

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
ORIGINAL SIDE**

Present:

The Hon'ble Justice Krishna Rao

IA No: GA 7 of 2022

In

CS 43 of 2016

Abhishek Agarwalla & Ors.

Versus

Kailash Nevatia & Ors.

WITH

GA 8 of 2023

In

CS 43 of 2016

Abhishek Agarwalla & Ors.

Versus

Kailash Nevatia & Ors.

Mr. Sakya Sen

Mr. Shiv Ratan Kakrania

Mr. Ovik Sengupta

Mr. Karanjeet Sharma

Mr. N. Das

... For the plaintiffs.

Mr. Swarnendu Ghosh
 Mr. Nirmalya Dasgupta
 Mr. Dibnath Dey
 Ms. Pallavi Pain

... For the defendant no. 4.

Mr. Siddhartha Banerjee
 Mr. Arnab Datta
 Ms. Labani Dey
 Mr. Sailendra Nath Chakraborty
 Mr. S.N. Ghosh
 Mr. Saptarshi Chakraborty
 Mr. Sabyasachi Hazra

... For the defendant no. 5.

Hearing Concluded On : 15.01.2024

Judgment on : 25.01.2024

Krishna Rao, J.:

1. The The defendant no. 5 has filed an application being G.A No. 7 of 2022 for rejection of plaint on the pretext that the mother of the plaintiff no.1 had initially filed an application for grant of probate of the alleged Will dated 15th December, 1999 being PLA No. 158 of 2000 which was subsequently converted to a Testamentary Suit No. 3 of 2017 and upon demise of the mother, the plaintiff no.1 is proceeding with the suit but the plaintiff no. 1 has not taken any proper steps for disposal of the said proceeding and now the plaintiffs have filed the present suit though the plaintiffs have no statutory right to file the suit.

- 2.** The defendant no. 5 says that Jagdish Prasad Tulshan was holding the post of Principle Trustee in respect of all the Trust properties namely Rai Surajmull Bahadur Charitable Trust, also known as Rai Surajmull Bahadur Charitable Fund and he died on 20th January, 2000 but he had not executed any Will dated 15th December, 1999 in favour of his sister Saroj Agrawalla.
- 3.** The defendant no. 5 says that the plaintiff no.1 is not having any right to interfere with the management or administration of the Trust Property. The plaintiff no.1 has filed the suit upon death of his mother along with other plaintiffs though he has not acquired any right over the property.
- 4.** The plaintiff nos. 2 and 3 are not the descendants of the family of the Settlor as per Trust Deed dated 3rd July, 1928 and both are outsiders. As per the Trust Deed, only the legal heirs of Rai Shewpersad Tulshan would become the Trustee of the Rai Surajmull Bahadur Charitable Trust. The plaintiff nos. 2 and 3 are the outsiders and have no statutory right to file the instant suit.
- 5.** The defendant no. 5 says that by a purported resolution taken by the concerned parties, the defendant no. 2 was appointed as a Trustee of the Trust by the surviving Trustees but as per the Trust Deed dated 3rd July, 1928, the defendant no. 2 is not a descendant of the Tulshan family and the defendant no. 2 is just a stranger and outsider. The genealogical table relied by the plaintiffs is not correct.

- 6.** The defendant no. 5 says that the defendant no. 3 has no statutory right to contest the present suit as previously he had filed a Civil Suit no. 202 of 2002 before this Court claiming himself as the last male lineal descendant of the Settlor and entitled to be the Principle Trustee but the said suit was dismissed and the order of dismissal was duly affirmed by the Appellate Court. After the dismissal of the suit, the defendant no. 3 had filed an application praying for an order allowing him to file written statement in the proceeding initiated under Section 7 of the Charitable and Religious Trusts Act, 1920 but the said application was also dismissed. After the said order, the defendant no. 3 was removed from the office of Interim Trusteeship.
- 7.** The defendant no. 5 also filed an application being G.A. No. 8 of 2023 praying for summarily dismissal of the suit on the pretext that the plaintiffs have not obtained leave under Section 92 of the Code of Civil Procedure, 1908 for institution of the suit.
- 8.** The plaintiffs say that prior to filing of the instant suit, the defendant no. 1, Rajendra Kumar Banka, since deceased, Ramwatar Banka, since deceased and the defendant no. 2, Kailash Nevatia have filed a proceeding being ACR No. 1 of 2002 under the Charitable and Religious Trust Act, 1920 relating to the operation of the bank account of the Trust and on account of stalemate which had arisen upon the death of Jagdish Prasad Tulshan, since deceased, the last Trustee of the Trust. This Court by an order dated 10th February, 2023 had dismissed the

said proceeding and now, the Trust is under the Supervision of Supervisory Trustee.

- 9.** The plaintiff no. 1 is the descendant of the family of the Settlor and the plaintiff nos. 2 and 3, since the last 10 years have been regular visitors of the Dharmashalas owned and maintained by the Trust at Haridwar, Chirawa and Gaya. The plaintiffs by virtue of their long association with the Trust, either as a descendant of the Settlor or as beneficiaries and are aware of the manner of reconstitution of the Trust from time to time. The plaintiffs say that Smt. Saroj Agarwalla, the mother of the plaintiff no. 1, who was the Executrix of the last Will and Testament of Jagdish Prasad Tulshan since deceased had already applied for grant of probate sometimes in the month of May, 2000 and the same is pending for adjudication. The mother of the plaintiff no. 1 being the only survivor of the last trustee, Jagdish Prasad Tulshan of the said Trust in terms of the stipulations contained in the indenture of Trust dated 25th August, 1887.
- 10.** The plaintiff no. 1 being the member of the family of the settlor through his late mother, Smt. Saroj Agarwalla has a direct and subsisting interest in the subject-matter of the Trust. The plaintiff nos. 2 and 3 are direct beneficiaries of the Trust and are regularly staying at the Dharmashalas maintained by the Trust situated at Haridwar and Chirawa since the last 10 years. The plaintiffs noticed that the Managers of the Dharmashalas are utilizing the Trust property to earn their income therefrom for their personal benefit and for the purposes

not connected with or related to the Trust and accordingly the plaintiffs prayed for leave under Section 92 of the Code of Civil Procedure, 1908.

11. In the month of May, 2000, the mother of the plaintiff no. 1, Smt. Saroj Agarwalla had filed an application for grant of probate before this Court being PLA No. 158 of 2000 and subsequently one Shri Yasheel Jain being the son of the pre-deceased sister of the deceased Jagdish Prasad Tulshan had filed an affidavit in support of his caveat. Smt. Malati Tulshan claiming herself to be wife of the said deceased had also filed caveat and affidavit in support of the caveat. The mother of the plaintiffs have filed two applications being GA No. 4640 of 2000 and GA No. 3977 of 2000 in PLA No. 158 of 2000 for discharge of caveat filed by the defendant no. 5 and the defendant no. 2. Both the applications filed by the mother of the plaintiff no. 1, were dismissed by this Court. Being aggrieved with both the orders, the mother of the plaintiff no. 1 had filed an appeal but the same was also dismissed. Being aggrieved by the order of the Appellate Court, a Special Leave Petition was preferred but the same was also dismissed.

12. In the meantime, the mother of the plaintiff no. 1 had passed away on 17th November, 2014, leaving behind her two sons and a daughter as her legal heirs. After the death of the mother, the plaintiff no. 1 had preferred an application being GA No. 647 of 2015, praying for substitution in place of the deceased mother to continue with the proceeding for grant of Letter of Administration of the last Will and Testament of the deceased, Jagdish Prasad Tulshan. By an order dated

26th March, 2015, this Court has allowed the substitution but has kept the matter open with regard to conversion of the case at the later stage and the said suit being TS No. 3 of 2017 is pending for adjudication.

- 13.** The defendant no. 5 had filed an application before this Court praying for addition of party to the instant suit as well as in the proceeding under Section 7 of the Charitable and Religious Trusts Act, 1920 as he is a necessary party but the applications filed by the defendant no. 5 was dismissed by orders dated 12th June, 2017 and 13th November, 2017. Being aggrieved with the said orders, the defendant no. 5 had preferred an appeal being APO No. 160 of 2018 and 161 of 2018 and the Hon'ble Appellate Court by an order dated 23rd August, 2018 directed the defendant no. 5 to be added as a party in the instant suit.
- 14.** Mr. Sakya Sen, Learned Advocate representing the plaintiffs submitted that while disposing of the appeal by the Hon'ble Division Bench dated 23rd August, 2018, it was made clear that the defendant no. 5 will not be entitled to challenge the locus of the plaintiffs in the suit or the locus of the petitioners in the petition under the Act of 1920 but the defendant no. 5 will be given a voice if the defendant no. 5 has something constructive to say regarding the scheme or the terms and conditions of the administration of the estate.
- 15.** Mr. Sen submitted that in view of the order passed by the Hon'ble Appellate Court dated 23rd August, 2018, the application filed by the defendant no. 5 is not maintainable and is liable to be dismissed.

16. Heard the Learned Counsels for the respective parties, perused the materials on record.
17. The defendant no. 5 has filed two applications for dismissal of the suits, one on the ground that the plaintiffs are the strangers and are not connected with the Trust and the another application on the ground that the plaintiffs have not obtained leave under Section 92 of the Code of Civil Procedure, 1908.
18. The plaintiffs have filed the suit for framing of scheme for management and administration of the Trust, removal of the defendants as trustees and allied prayers. Though the plaintiffs have filed the suit for framing of scheme of the management and administration of the trust but have not prayed for leave under Section 92 of the CPC, 1908. Subsequently, the plaintiffs have filed an application being GA No. 799 of 2017 praying for amendment in the prayer portion by incorporating the prayer for leave under Section 92 of the Code of Civil Procedure, 1908. The application filed by the plaintiff was disposed of by this Court by an order dated 25th April, 2017, by allowing the amendment by incorporating the prayer for leave under Section 92 of the Code of Civil Procedure, 1908. In the said order, this Hon'ble Court has further made it clear that *"all issues relating to the applicability of Section 92 and locus of the applicant is left open and to be decided at the trial"*.
19. In the order dated 23rd August, 2018, the Hon'ble Appellate Court while disposing of APO No. 160 of 2018 and APO No. 161 of 2018 had

categorically held that *“it is also made clear that the appellant will not be entitled to challenge the locus of the plaintiffs in the suit or the locus of the petitioners in the petition under the Act of 1920, but the appellant will be given a voice if the appellant has something constructive to say regarding the scheme or the terms and conditions of the administrations of the estate. It is also observed that the appellant’s right in the estate of the Tulshan may be completely irrelevant in the context of the suit and the petition”*.

- 20.** The grounds on which the defendant no. 5 filed applications for dismissal of the suit cannot be decided in the instant applications as the Appellate Court by an order dated 23rd August, 2018 held that the defendant no. 5 is not entitled to challenge the locus of the plaintiffs in the suit and in the order dated 25th April, 2017, this Court had made clear that all issues relating to the applicability of Section 92 is left open and to be decided at the trial.
- 21.** In view of the above, this Court finds that the applications filed by the defendant no. 5 are not maintainable and accordingly the same are dismissed.
- 22. GA No. 7 of 2022 and GA No. 8 of 2023 are accordingly dismissed.**

(Krishna Rao, J.)