APPELLATE CIVIL.

Before Mukerji and S. K. Ghose JJ.

AJITKUMAR MITRA

v.

TARUBALA DASEE.*

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Mar. 12, 13, 29.

Hindu Law—Perpetuities, Rule against—Trusts—Gifts.

A private trust (and not a public charitable trust) is amenable to the rule against perpetuities.

Perpetuity may arise in two ways:—

First, by taking away from the owner the power to alienate property, and

Secondly, by the creation of future remote interests.

The former gives rise to the rule forbidding restraints on alienation; and the latter gives rise to the rule against remoteness.

There is nothing inherently wrong in a contract between persons tying up properties for a limited time for a definite purpose or for the sake of convenience. But it is against public policy that properties shall be settled on special trust for an indefinite period so as to prevent it being freely dealt with.

A trust, settling properties for the maintenance of the members of the family of the settlors, born or to be born, creating a perpetuity regarding the properties constituting the family fund under the trust, and limiting for an indefinite period the enjoyment of the profits thereof, is not valid.

What cannot be done directly by gift cannot be done indirectly by the intervention of a trust.

Tagore v. *Tagore* (1); *Krishnaramani Dasi* v. *Ananda Krishna Bose* (2); *Rajender Dutt* v. *Sham Chund Mitter* (3) and *Shookmoy Chandra Das* v. *Manoharri Dassi* (4) referred to.

A deed executed by four brothers establishing a family fund for the maintenance of the members of their families out of certain properties and Government promissory notes in accordance with certain fixed rules thereunder, which, *inter alia*, prohibited transfer of the said properties and Government promissory notes by gift or sale, and further provided for the residence of the executants and their heirs in succession in one of the properties, for the maintenance of the families of the executants out of the income of the other family fund properties, for the appointment of a manager declaring his powers, duties and liabilities and empowering him to invest any surplus income in purchasing immovable properties or Government promissory notes to be included in the said family fund property, was not binding on the heirs of the executants and persons who were not parties to it.

*Appeal from Original Decree, No. 220 of 1930, against the decree of Upendrachandra Ghosh, Second Subordinate Judge of 24-*Parganás*, dated Aug. 4, 1930.

(1) (1872) 9 B. L. R. 377; L. R. Sup. Vol. 47.
(2) (1869) 4 B.L.R. (O. C. J.) 231.
(3) (1880) I. L. R. 6 Cal. 106.
(4) (1885) I. L. R. 11 Cal. 684; L. R. 12 I. A. 103.

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APPEAL FROM ORIGINAL DECREE by some of the defendants.

The material facts of the case and the argument in the appeal appear in the judgment.

Saratchandra Basak, Senior Government Pleader, *Seetaram Banerji* and *Nandagopal Banerji* for the appellants.

S. N. Banerjee (sr.), *Charuchandra Biswas*, *Hemendrachandra Sen* and *Surendranath Basu* (sr.) for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows:—

The plaintiff's husband Charuchandra Mitra and all the defendants in the suit, out of which this appeal has arisen, are lineal descendants of one Gurucharan Mitra. A pedigree setting out their relationship is given in the plaint (Paper-book, page 54). The suit was instituted on the 7th March, 1928, with regard to certain items of properties specified in three schedules to the plaint—Schedules *ka*, *kha* and *ga*. It was alleged in the plaint that, in 1880, the four sons of Gurucharan Mitra, *viz.*, Ishan, Gireesh, Harish and Mahendra, each of whom had acquired various properties, executed a deed whereby they purported to make certain arrangements for the enjoyment and management of the properties. It was averred that the dispositions of the properties and of their income as provided for in the deed were void and of no effect. It was prayed that the deed be construed and so declared and that the properties in the schedule as also other properties that may be discovered be partitioned, the plaintiff's shares therein being declared. There were also a prayer for accounts. In the alternative and in the event of the deed being found to be valid, it was prayed that the defendant No. 1 be removed from his office as manager under the deed on the ground of misfeasance and malfeasance, and a scheme of management be framed.

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The Subordinate Judge has made a preliminary decree for partition and has overruled the claim for accounts. Some of the defendants, namely, the representatives of the branches of Gireesh, Harish and Mahendra, have then preferred this appeal. The plaintiff and the other members of Ishan's branch are the respondents therein.

The genealogy, at the date of the trial of the suit in the court below, had undergone drastic changes; defendant No. 1 had died leaving heirs who are now some of the respondents in the appeal; and defendant No. 4, Khokalal, had also died leaving an infant Maniklal. Since then there have been other deaths, namely, of defendants Nos. 2, 3 and 7.

The decree for partition has been made on the finding that the deed could only bind the contracting parties, and it was voidable at the instance of the plaintiff. This finding has been challenged on behalf of the appellants.

The deed is in three parts; the first part consists of two paragraphs, the second part contains eleven clauses; and the third part consists of two schedules *ka* and *kha*, included in the latter of which are certain Government promissory notes which are separately described in the body of the document as constituting schedule *ga*. In the first paragraph of the first part it is set out that the object of the deed is to establish a family fund for the maintenance of all the members of the family of the four brothers, and that Ishan was making over his self-acquired properties in schedule *ka* and all the four brothers were making over their ancestral properties in schedule *kha* and the Government promissory notes standing in their names in schedule *ga* for the maintenance of all the members of the family of the four brothers. In this part it is also stated that to other properties which belonged or would belong in future to any of the brothers as his separate property none of the other brothers or their heirs will be able to lay any claim on the ground that he or they

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was or were joint in mess. In paragraph 2 it is stated that certain rules were being framed for the properties constituting the family fund, and it was declared that the brothers and their heirs would observe those rules; and it was further declared that there were no debts due from them and so the object of establishing the family fund was not to defeat any debt. A significant sentence then follows—

> In consequence, we expect that any other person or we brothers or any one of our family shall not at any time do anything contrary to the terms of the deed.

Of the eleven rules which follow it would be sufficient to note the following: Rule 1, which provides for residence in some of the properties, lays down that out of the income of the other properties the family should be maintained, and prohibits transfer by way of gift or sale. Rules 2 to 10 contemplate the appointment of a manager and lay down detailed instructions for his guidance, and also his powers, duties and liabilities. Of rule 11 the following extract may be reproduced:—

> If any surplus remains after defraying the said expenses (meaning family expenses which have to be made out of the income of the family fund) the same will be kept in deposit in the family fund in the hands of the manager, and with that money the manager will be competent to purchase any immovable property or Government promissory note or any profitable permanent property and the same shall be purchased in the name of the then manager of the family fund on mentioning him as such and the property thus purchased shall be included in the family fund property.

It is clear to us from the terms of the deed that no trust was intended in the sense that the brothers, by divesting themselves of their ownership in the properties, created a legal title in the manager or any body else, constituting him a trustee either expressly or by implication. What has been created is undoubtedly a trust in the sense that the properties which constitute the family fund have been declared to be available for the use of persons other than the owners thereof and in a prescribed manner. But then such trust not being a public charitable trust but only a private trust is amenable to the rule against perpetuities. And it is well settled that what cannot be done directly cannot

also be done indirectly by the intervention of a trust. It is well known that perpetuity may arise in two ways: *first*, by taking away from the owner the power to alienate property; and *secondly*, the creation of future remote interests. The former gives rise to the rule forbidding restraints on alienation, which strictly speaking is the rule against perpetuities; and the latter gives rise to the rule against remoteness, which is also mis-called rule against perpetuities. Of course, as observed by Phear J. in the case of *Radhanath Mukerjee* v. *Tarrucknath Mukerjee* (1), any one member of a Hindu joint family and therefore all might, for sufficient consideration, bind themselves to forego their rights for a specified time and for a definite purpose by a contract which could be enforced against them personally. But as also observed by the learned Judge in the same case,—

> I need hardly say that it is not competent for the owners of property in this country by any arrangement made in their own discretion to alter the ordinary incidents of the property which they possess, for instance, in this particular case, to say that the joint property shall remain the joint property of the joint family in perpetuity but shall not possess the incident which the law of the country attaches to property in such condition, namely, that every independent parcener is entitled at any time to have his share divided off from the rest.

There is nothing inherently wrong or objectionable in a contract between persons tying up properties for a limited time for a definite purpose or for the sake of convenience. But it is against public policy that property shall be settled on special trust for an indefinite period so as to prevent it being freely dealt with. And it is plain that the disposition of the corpus of the properties that has been made by the deed offends the first branch of the rule against perpetuities to which reference has been made above. Again, the creation of an interest in the surplus in the members of the family is the creation of a future remote interest and the direction to purchase properties to be thrown into the family fund and to partake of the character of the properties originally constituting it also offends against

(1) (1876) 3 C. W. N. 126.

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both the branches of the rule. The object was to settle the properties in trust for the maintenance of the members of the family born and to be born; to create a perpetuity as regards the properties constituting the family fund and to limit for an indefinite period the enjoyment of the profits thereof. This could not be done by gift: and what could not be done by gift could not be done by the intervention of a trust. *Tagore* v. *Tagore* (1); *Krishnaramani Dasi* v. *Ananda Krishna Bose* (2); *Rajender Dutt* v. *Sham Chund Mitter* (3); *Shookmoy Chundra Das* v. *Monoharri Dassi* (4).

So long as the executants of the deed, who were the contracting parties, chose to remain bound by its terms, the deed remained in force. But the deed is certainly inoperative as against persons who were not parties to it, and the plaintiff therefore can challenge its validity and ask for partition of the shares which she has in the properties.

Another point has been taken on behalf of the appellants, namely, the point as to limitation; it being urged on the authority of the decision of the Judicial Committee in the case of *Vasudeva Padhi Khadanga Garu* v. *Maguni Devan Bakshi Mahapatrulu Guru* (5), that the properties having been treated for a sufficient length of time as joint-family properties, whatever rights the parties individually had in them had been extinguished, the possession of the joint family having been adverse to the separate estate. The distinction between that case and the present one is this that in that case the character of the possession of the joint family was such that it was adverse to that of the individual sharers, whereas in the present case the manager who was to keep the corpus intact and spend the income in a particular way as laid down by them could not be regarded as holding the properties in any way adversely to the individual sharers.

(1) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.
(2) (1869) 4 B. L. R. (O. C. J.) 231.
(3) (1880) I. L. R. 6 Cal. 106.
(4) (1885) I. L. R. 11 Cal. 684; L. R. 12 I. A. 103.
(5) (1901) I. L. R. 24 Mad. 387; L. R. 28 I. A. 81.

Nextly, a question has been raised on behalf of the appellants as regards the share which the plaintiff claims in properties *ka*, it being said that as Ishan allowed the said properties to be thrown into the common stock he intended that they should be blended with and partake of the character of joint family properties. In our opinion, no such position has been made out. Here the joint-family lost its character of a Hindu joint-family as understood in Hindu law, by reason of the terms of the deed itself; and the properties were in no sense allowed to be blended with any joint-family properties but were formed into a joint stock,—the creature of the contract between the parties. And when that contract ceases to be in force, the properties regain their original character even though in the meantime they did not have that character by reason of the use they were put to under the contract. The learned judge, in our opinion, was right in holding that the plaintiff is entitled to a one-third share in the *ka* properties and not a one-twelfth share.

Lastly, it has been pointed out to us that the learned judge has made an order in the decree as regards properties not in the schedule, no trace of which nor any discussion relating to which is to be found in his judgment. The order runs in these words:—

> It is further ordered that plaintiff is entitled to have the properties specified in the said documents as also the accretions and additions and rents, issues and profits and income therein or thereout arising partitioned and allotted to her in severalty.

The complaint is perfectly well-founded. One cannot make out what the word "said" in this passage means; nor is anything stated there as to what the plaintiff's share in these properties or in any of them should be. There is not a word to be found about them in the judgment of the learned judge. From time to time petitions were put in giving lists of such properties, but there is no incorporation of the properties into any of the schedules to the plaint. There were counter applications filed on behalf of some of the defendants, some objecting to the inclusion of the properties in this suit at the stage at which the case had

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arrived, others setting out facts which would bear on the question of the propriety of partition as well as the extent of the shares. No issues appear to have been framed as regards the properties and yet the order aforesaid has been made in the decree, without even specifying what the properties are and what share should be given. It is quite true that at no time during the proceedings in the court below did the plaintiff claim any specific share in these properties, and all that she did was to remain content by asserting that these properties should be brought into the suit and partitioned. The explanation for not specifying any share in the claim may be this that until the properties are known and a proper enquiry held it was not possible for her to state definitely what share she was entitled to.

In these circumstances, all we can do is to hold that the case as regards these properties has not been tried at all. While, therefore, we affirm the rest of the decree, we set aside the portion of the decree referred to above and send back the case to the court below so that this part of the case may be re-opened and a proper decision arrived as regards the number and nature of the properties, as also on the question of the plaintiff's share therein. The question involved, in our opinion, is not a mere question of law which we can decide here.

The appeal is allowed to the extent indicated above. Each party will bear his or their own costs in the appeal.

Appeal allowed in part.

A. K. D.