

MOHAMMED SADDIQ KHAN

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v.

MOHAMMED SHAFIQ KHAN AND OTHERS

[SUPREME COURT, 1965 (Hammett P.J.), 18th November, 9th
December]

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Civil Jurisdiction

Trusts and trustees—variation of trust—provision of capital to develop properties otherwise a liability—Trustee Ordinance (Cap. 46) ss.45A,45A(1).

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The testator left the residue of his property in trust to accumulate the income for twenty-one years (expiring on the 21st July 1970) and then for distribution between such of his six sons as should then be living, the male issue of any son dying before the date for distribution to take in equal shares *per stirpes* the share which their deceased father would have taken had he survived. The sons were all living at the date of the present application.

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The assets consisted of leasehold properties, and on five of them the buildings were condemned as unfit for human habitation and have been demolished. Rental continues to be payable and on one lease there is a building covenant. There were no available liquid assets, owing to the trustee, in breach of trust, having advanced money from the trust to certain of the testator's sons.

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Held: Approval would be given (without relieving the trustee of responsibility for any breach of trust) to a variation of the trust to permit the sale of one leasehold property for £12,000 to enable any urgent and necessary development of the trust's undeveloped properties to be financed.

Application for variation of trust under section 45A of the Trustee Ordinance.

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K. C. Ramrakha for the applicant.

M. J. C. Saunders for the respondents.

The facts appear sufficiently from the judgment.

HAMMETT P.J. : [9th December, 1965]—

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The applicant is the sole surviving executor and trustee of the estate of his deceased father, Mohammed Tawahir Khan who died on 21st July 1949. Under the terms of the will dated 21st October 1946 of which probate was granted on 17th August 1949, the testator, after a number of specific legacies, gave the remainder of his property to his trustees upon trust to stand possessed of the balance of the capital and income of his estate for 21 years after his death (i.e. until 21st

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July 1970) and then to divide the said balance of capital together with all accumulations of income in equal shares between such of his six sons as should then be living.

A In the event of the death of any of his sons before the date of distribution, the male issue of such deceased son alive at the date of distribution were to take, in equal shares *per stirpes*, the share their deceased father would have taken had he not died.

B The will contained express provisions forbidding the sale of any property before the date of distribution save for the purpose of meeting the specific legacies and paying the deceased's debts, funeral and testamentary expenses.

From the accounts filed it appears that the value of the estate at the date of death was £14,434. 5.4 and that it had risen to the value of £84,208. 14. 11 by 31st December 1964.

C The assets consist almost entirely of twenty blocks of land in Lautoka township all of which are Crown Leasehold titles, save one which is a Native Lease.

D The estate has little or no liquid assets and the income from rents is falling whilst the outgoings by way of rentals and rates on the Leaseholds are rising. Five of the buildings on the land held by the trust have been condemned by the Lautoka Town Council as unfit for human habitation and have been demolished. This has resulted in loss of income from the former tenants of these buildings, but the estate is still liable for the payment of the rents on the Crown Leases concerned, which have been increased, and the rates due to the Lautoka Town Council. The total rates paid on the trust properties have exceeded £1,500 in each of the last two years. The Native Leasehold contains a building covenant and unless the trustee builds thereon the lease may be cancelled.

E In these circumstances the trustee wishes to raise money to finance new buildings from which more income may be derived to meet the estate's increasing outgoings.

F The trustee has express power to raise money on mortgage but Counsel assure me that the bank will not provide accommodation. This is because the trust has only five years to run and the property will then be distributed and the identity of the person who will then be entitled to these leases, which is a material factor to a lender on the security of a lease, is not know.

The trustee has therefore applied to the Court for an order varying the terms of the trust in the following respects:

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- (a) to permit the trustee to distribute the trust funds now instead of in 1970; or
 - (b) to permit the trustee to sell Lease No. 44848 Lot 14 Section 18 for £12,000.

The respondents to the application are the five other sons of the deceased and all support the application.

H As I understand it, all parties consider that if the properties were held by them individually they could individually raise sufficient funds to develop each of the properties separately, whereas this has been

found to be impracticable by the trustee to do on behalf of the whole estate whilst it is held as a trust property. In the alternative, if one of the properties were sold now, the proceeds of sale could be used by the trustee to develop those sections of land which do not bring in any income but on which outgoings by way of Crown rents and rates have to be paid every year.

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In the exercise of the powers given the Court by the provisions of section 45A of the Trustee Ordinance, to approve on behalf of persons who are not at present entitled by may become entitled to an interest under the trust at a later date, and this may include persons not yet born, I am restricted by the proviso to section 45A(1) from approving any arrangement on behalf of any person if the arrangement is to his detriment.

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It cannot be assumed that all the present six sons of the deceased will be alive at the date of distribution appointed by the testator, i.e. 21st July 1970. None of them have a vested interest and all of them merely hold an interest contingent upon them surviving until 21st July 1970.

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If the estate is distributed now it is possible that some of the persons who would take now would not survive until 21st July 1970 and the persons who would in that event then be entitled to an interest in the trust fund would receive nothing at all.

Distribution now would clearly be detrimental to the interests of those persons, on behalf of whom my consent is sought. I cannot therefore approve an earlier distribution of the trust funds than that stipulated by the deceased in his will.

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I now turn to the question of whether the terms of the trust forbidding the sale of any real property should be varied so as to permit the sale of one property.

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It is clearly to the advantage of the beneficiaries generally, whoever they may prove to be in 1970, that a valuable lease should not be lost by reason of the failure of the trustee to comply with a building covenant in the lease through lack of funds. I was, however, naturally very interested to learn why it was that the trust did not have sufficient cash resources out of accumulated income to use for this purpose. I had every right to assume that income had been accumulated, as had been directed by the terms of the trust, and that it had been invested in further real property as directed and thus was not available for development purposes. If this had been the case I would certainly have approved the sale for development purposes of any real property purchased out of accumulations of income.

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From my study of the trust accounts and from replies to questions I have put, however, it is clear that the trustee has been guilty of persistent and flagrant breaches of trust by not accumulating income but by advancing it, in one form or another, to his brothers who hold contingent interests under the trust. The trustee has now disclosed that since the trust began in 1949 these brothers have become debtors to the trust by reason of unauthorised advances, unpaid rents and the like to the following extent:

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	Mohammed Rafiq Khan	£1,435. 13. 2
	Mohammed Safiq Khan	£2,017. 14. 0
A	Mohammed Atiq Khan	£3,346. 6. 4
	Mohammed Tamiq' Khan	£3,408. 17. 8
	Total	£10,208. 11. 2

B It seems clear that the reasons why no income has been accumulated as was required by the terms of the trust, is because it has been advanced to the contingent beneficiaries. I note with approval that the trustee, although himself a contingent beneficiary does not appear to have advanced any money to himself.

C If these unauthorised advances had not been made then the trust would have had ample reserves of cash to meet the demands which it now finds it does not have the liquid resources to meet. I accept Counsel's assurances that these contingent beneficiaries do not have the means to repay these advances in full at once.

D It may well be that the persons who do eventually prove to be the beneficiaries of the trust are in fact the present contingent beneficiaries. In that event the advances made to them can of course be charged against them upon distribution of the corpus of the trust funds. In that event no real harm will result from these breaches of trust. If, however, any of the present contingent beneficiaries should die before 21st July 1970 and the sums advanced to him are not recoverable and in certain other circumstances as well, the actual persons who then prove to be beneficiaries will undoubtedly have a right of action in damages against the present trustee or his estate for any loss occasioned by such breaches of trust. I wish this to be clearly understood by the applicant so that he may be under no misapprehension of the seriousness of his breaches of trust.

E He has explained to me and I accept his explanation how when his mother was alive and was his co-trustee, she actively approved the giving of financial assistance by the trust to his brothers as the need arose. By allowing his brothers to have rent on "credit" as it were, he says he was merely carrying out the practice of their father when he was alive, who did in fact allow them to use the premises free of rent. I appreciate how domestic pressures and the influence of his mother and other members of the family may well have led the applicant into a line of conduct which, although it amounts to a series of breaches of trust, was not motivated by any idea of personal gain or any lack of integrity.

G In these circumstances I feel justified in dealing with the situation as it is and not as it ought to be, but in doing so I wish to make it abundantly clear that I do not condone, or excuse these breaches of trust or consider the applicant should be relieved of any responsibility for them.

H It appears to me to be in the interests of all the beneficiaries and to the detriment of none if the terms of the trust be varied, with proper safeguards, to the extent necessary to permit the sale of one property in order that the proceeds of sale may be used to finance

any urgent and necessary development of the trust's undeveloped properties. I am therefore prepared to approve such a variation of the terms of the trust on behalf of any beneficiaries who are not at present entitled, but may become entitled to an interest under the trust at a later date, but only subject to certain restrictions and conditions. A

The basis of the conditions I feel must be imposed is this. In the past the applicant, as trustee, has applied trust monies that should have been accumulated and could have been used for the development of trust properties, to make advances to his relatives contrary to the terms of the trust. In view of this I must insist that some safeguards be provided that the proceeds of sale of any trust property authorised to be sold are not similarly misapplied. This might well be done by the appointment of a co-trustee approved by the Court or by the proceeds of sale of any trust property being paid into Court, or otherwise. I will leave it to the parties to discuss and decide how best they can meet the situation. Until then I shall stand this application over with liberty to apply reserved to all parties, to put up a scheme on the lines I have indicated for the approval of the Court. B C

I do not consider this is a proper case in which costs should be borne by the trust and I shall therefore make no order as to costs.

*Application stood over the settlement of conditions with leave to apply.** D

* No further application was made.