Applicability of the doctrine to resulting trusts law equity essay

Law

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DOCTRINE OF CY PRES

Introduction

Cy pres is a Latin word and it means for a purpose resembling " as nearly as possible" the purpose originally proposed. It means approximation. The doctrine of cy pres originated in English law in relation to charitable trusts, whereby if a gift is for charitable trusts only, it will not be allowed to fail because the precise object to be benefited, or the mode of application of the fund is uncertain. It must be evident that the transfer had a general charitable intent, but the precise purpose is impossible, or has never existed, or has ceased to exist before the testator’s death, or the purpose of institution has ceased to exist after the gift has taken effect, or in certain other cases where the question of general charitable intent is less material. If the conditions are satisfied, the court will settle a scheme for the application of the funds to another purpose as near as possible to that prescribed by the truster.[1]The word cy pres has several connotations. In connection with charities, the cy pres application of a fund means the application of that fund to objects or purposes which are not precisely those the donor provided for, but which as nearly as possible fit his intentions. It is obvious that such a power of altering the power of such a trust will only be used where it is impossible or impracticable to give literal effect to them as laid down in the trust.[2]At the same time there must be present in the gift the necessary, wider or paramount intention for this purpose.[3]Thus a gift may be saved from initial failure by the presence of a wider or paramount charitable intention to which it is possible to give effect. Once there is an effective devotion of funds to charity, those funds will remain devoted forever unless

there is in the gift an effective provision for devolution. Except in certain cases, the possibility of a lapse or a resulting trust is excluded. The doctrine of cy pres is available without there being width of charitable intent, the jurisdiction of which depends upon section 13 of the Charities Act, 1960. In such cases the court will frame a scheme, which will be carried out.[4]Where there is a surplus of funds after the specified charitable object has been carried out, the same will be applied cy pres, provided a paramount intention of charity appears.[5]A court has no authority to sanction any deviation from the donor’s expressed intention so far as it can be given effect. Similarly, because the court considers the application of the trust property or its income to another purpose, which would be more expedient or beneficial, it has no authority to do so. According to Hanbury[6]:" Such a power of altering purposes must be hedged round with safe guards, but in recent years, especially in connection with trusts with long outmoded purposes, it has been found necessary to relax them. Application of the cy pres doctrine is justified in varying circumstances." According to him, such case devolves into two parts:" First, where the problems arise at the commencement of a charitable trust, to which the width of a charitable intent provides the answer; secondly, problems that only arise subsequently, to which perpetual dedication to charity provides the answer."

The Indian position

The first and foremost task is to find out which trusts are charitable, in order to determine the application of the doctrine of cy pres. After browsing through the various Acts, it can be concluded that the meaning and scope of the words public or charitable is very much similar both in the Indian and

English context. In order to be charitable a trust must be either for the relief of poverty or for the advancement of education or religion, or for any purposes beneficial to the community as in England. Section 18 of the Transfer of Property Act, 1882 classifies charity into the following principle divisions: Advancement of religionAdvancement of knowledgeAdvancement of commerce, health and safety of the public; andAdvancement of any other object beneficial to mankind. The Bombay Public Trust Act 1950 also provides the meaning of charitable purpose. Under section 9 of the said Act, charitable trust includes: Relief of poverty or distressEducationMedical relief and the advancement of any other object of general public utility, but does not include a purpose which relates: To sports, orExclusively to religious teaching or worship. For example, the following have been held to be charitable pr religious purposes: Gift of property t o temple or to idol[7]. Gift for the maintenance of priests[8]Gift to dignitary of church[9]Gift for building wells, troughs[10], hospitals, schools and universities, for feeding the poor etc. Gift for keeping a choultry in repair.[11]Section 10 and 11 of the Bombay Public Trusts act is worth mentioning in this context. Section 10 of the said Act provides:" Notwithstanding any law, custom or usage, a public trust shall not be void only on the ground that the persons or objects for the benefit of whom or which it is created are unascertained or unascertainable." Hence, a charity created for such purposes as " dharma, punyadan" etc. is not void only on the ground that the objects for which it is created are unascertained or unascertainable. Section 11 of the same Act runs as under:" A public trust created for the purposes some of which are charitable or religious and some of which are not, shall not be deemed to be void in

respect to the charitable or religious purposes only on the ground that it is void with respect to the non-charitable or non-religious purpose." The test to determine whether an object is of general public utility or beneficial to the community is not whether the testator believed it to be so, but whether the court considers it to be beneficial to the public having regard to the nature and character of the trust and at the same time in so deciding the court would be guided by the Indian ideas and particularly the common opinion amongst the community to which the interested parties belong.[12]

Cypres and severability

The doctrine of cy pres is subject to the doctrine of severability. In this context, the decision of the Allahabad High Court may be mentioned in the case of Abdul Rauf vs. Shamshul Haq[13], wherein the Court held that it is not correct to that when some of the dispositions made in a waqf are found to be invalid, the court can uphold and give effect to the remaining dispositions only by invoking the doctrine of cy pres. the efficacy of a settlement of property cannot be destroyed in entirety on account of the existence therein of some provisions which are not sanctioned by law, and there is no reason why the valid provisions thereof should not have effect when they are clearly severable from and independent of the invalid provisions and particularly when they do not come into play simultaneously with the invalid provisions according to the provisions of the deed. It has been held in a plethora of cases[14]that the doctrine of cy pres is applicable to wills and not to charitable gifts by deed inter vivos. A general charitable intent is essential condition for the application of this doctrine and the charitable intention has to be construed in a broad sense having regard to

the context in which the question of applicability of this doctrine arises, since the doctrine of cy pres is a doctrine of equity this doctrine arises, since the doctrine of cy pres is a doctrine of equity and its course has not been confined to any rigidly fixed groove but has covered diverse situations and the courts have applied it liberally for preventing the failure of charities. [15]The doctrine of cy pres applies if the nature of charitable object is general and not specific.[16]

Applicability of the Doctrine to Resulting Trusts

Resulting Trust

The question of a resulting trust arises in cases where a fund is constituted for a particular purpose and that purpose fails or had been fulfilled with a surplus left over. Thus, where a company executed a trust providing for payment of pension to its managing director on his retiring from service, and the money was paid to the trustees to take out a Deferred Annuity Policy on the life of the managing director in the names of trustees, and the trust being incapable of being executed and the trust property remaining unexhausted, it was held that the trustees would hold the money for the benefit of the company.[17]

Applicability of the doctrine

As has already been explained, cy pres means " as near as possible". Questions as to the destination of fund have arisen where subscriptions had been raised from identifiable as well as anonymous subscribers for a particular charitable purpose such as the funding of a hospital and there has been failure of the purpose. If the appeal for funds was for general charitable

purpose though it was to take the shape of a particular institution, there would be no resulting trusts, but an application of the funds cy pres. [18]Where, however, the appeal for funds was for a particular institution, and there was an ab initio failure of the object on account of lack of adequate funds or other causes, such as, for example, the State itself providing for the contemplated object, there would be a resulting trust in favor of the identifiable subscribers who would be entitled to return of their proportionate of the subscriptions after the payment of costs and expenses.[19]in some instances where he court is able for the circumstances of the case to gather that there is a general paramount intention for the benefit of charity although there was also a particular intention, the court would execute the trust cy pres.[20]The principle on which the doctrine of cy pres rests is that in such cases the court considers charity on the abstract as the substance of the gift and particular disposition as the mode and the mode failing, the court executes the general charitable intention by a search for objects as to the mode.[21]Where however there is no general charitable intent but only a disposition for well-defined specific purpose there is no room for the application of the doctrine of cy pres but here is a resulting trust in favor of the donor in favor of his legal representatives.[22]If a gift is made for a specific charitable purpose, it cannot be said that the donor has a general intention. Where a land is given to a charitable body for a specific purpose only, then such gift becomes a nullity if the performance of that purpose is rendered impossible. In other words, such a gift is a conditional one. The doctrine of cy pres is applicable to trusts created by wills and not to those created by deeds or words of mouth intra vivos.[23]Where a land on which a

Dharamshala stood was acquired along with the Dharamshala, the original purpose fails. In such a case compensation money has to be applied to another object of charity by applying the doctrine of cy pres.[24]

Application of the Cy pres doctrine in Muslim Law

There can be wakfs whose income cannot be applied to the desired objects because of a change of circumstances, or lapse of time, or for any other reason. In such cases the courts may apply their income to similar objects, as nearly as possible to the original one. This is known as the Cypres doctrine. Indeed the English doctrine of Cypres is narrower than the doctrine as known in Muslim law. But the doctrines in both these systems have one common feature: there must be a valid trust or wakf in existence before this doctrine is attracted; where there is no valid wakf or trust, there is nothing upon which the doctrine of Cypres can fix itself. The purposes of a wakf are also not always indicated with reasonable certainty. On the validity of such wakfs, there is a divergence of views between the modern authorities and ancient doctors. The modern view is that the purposes of a trust must be indicated with reasonable certainty, and if they are not, the trust fails. The view of ancient jurists, however, was different. According to them, once a man made a wakf even without designating clearly the purpose for which the income was to be applied. It was a lawful dedication. Regarding the modern view, Fyzee observes that the Indian text writers and Judges are not unanimous on the points In Morrice v. Bishop of Durhan, a leading case on charities in England; it was held that a bequest for uncertain and vague objects was invalid. This ruling was followed by the Privy Council in Runchordas v. Parvatibai, and following this decision there developed a

tendency among the Indian High Courts to hold that a wakf for good objects in general was void. This opinion was supported by Wilson and Mulla. Justice Ameer Ali, on the other hand, was of the opinion that the principle of Morice v. Bishop of Durham was not applicable to the law of wakfs." Mere vagueness or uncertainty will not lead to the failure of a wakf," writes Ameer Ali, " for in such a case, the law itself would supply the defect by declaring that the trust should be in favour of such objects [that] approach nearest in character to the intended object of the wakf; or, even when that is not expressed, it may be applied to the support of the poor and needy. In the absence of explicit directions on the part of the wakf, the Judge has the power of framing a scheme by himself or in consultation with the beneficiaries, for the administration of the wakf. The principle therefore laid down in Morice v. The Bishop of Durham, which has been occasionally endeavored to be applied to a wakf, is not applicable to trusts or consecrations under the Mohammedan Law. For the Cypres doctrine is carried to the utmost limit in the Moslem system, and the failure of the original purpose does not in any case cause the failure of the wakf.'The poor form, by necessary implication of the law, has the ultimate beneficiaries of every wakf created in favour of individuals or the descendants of the wakf. Where, therefore, the primary object fails, such failure, instead of voiding the wakf only accelerates' the ultimate application." Again, where the dedication is to a religious or charitable institution, which, in the course of time, ceases to exist, the property so dedicated, instead of reverting to the grantor or his heirs, would be applied ... to some other religious or pious institution, similar in character to the one which has failed, or to any other object by which

benefit may accrue to human beings. Under these circumstances, a conflict of decisions was inevitable and some curious results of juristic interpretation may be found in the Indian Law Reports. Despite the conflict of opinion on the subject, the latest trend appears to be to agree with the views of Ameer Ali and Tyabji and to hold that once it is clear that there is a bonafide intention on the part of wakf to create a wakf and to divest himself completely of the property, a good wakf has been created which will not be allowed to fail. A valid wakf may thus be constituted in cases:

Where the objects are not satisfied at all.

Where the objects fail as impracticable; and

Where the objects are partly valid and partly not valid.

In cases (a) and (b) the Cypres doctrine will be applied, and in case (c) the valid objects may be accepted by the court and the others rejected. The Cypres doctrine aims at a judicial determination of a particular purpose to which the trust fund shall be applied and which is as near to the settlor's s intention as possible. Under Islamic Law there is no provision or machinery for such [a] determination. It is assumed as a basic principle that the ultimate purpose of a wakf is charitable and, therefore, the appropriation of the benefit of the wakf to the poor is a fulfilment of this purpose. Since the benefit of the poor is considered to be a residuary charitable object of a wakf, there is no necessity for a close scrutiny of the settlor's intention and careful construction of the trust instrument, as is required under the Cypres doctrines. The discretion given to the Courts, to apply the Cypres doctrine, does not mean that where the doctor's intention can be given effect to, the Courts should exercise the power of applying the wakf property or its income

to other purposes simply because they considered them to be more expedient or more beneficial than that the settlor had directed. Section 42 of the Civil Procedure Code does not expressly empower the court to apply the Cypres doctrine in the settling of schemes. The court may rarely apply the doctrine but has no jurisdiction to apply the doctrine extra territorium. The Shia law extends this doctrine much further than under the Hanafi Law. Where a wakf of some general charitable nature fails, the usufruct of such a wakf may be utilized for " good purposes generally" and preference is to be given to an object as near as possible to the object of the original wakf. Another view is that when a specific charitable wakf fails, the wakf property may be applied for the benefit of the poor and for all pious acts and objects which may be the means of approaching God.(a) Failure or non-existence of primary or intermediate objects: The failure or non-existence of the initial or primary object of a wakf does not, under the Hanafi Law, effect the operative character or validity of wakf. The failure or extinction of the intermediate objects only accelerates the ultimate reversion but does not cancel or void the wakf. Consequently, when a wakf is made in favour of unborn children, or any nonexisting object, it is valid." The object of a wakf may be non-existent," says Radd-ul-Mukhtar, " in two ways: Firstly, the beneficiary may be non-existent when the wakf is made, when it is called " wakf munkata-ul-aswwal" (cutoff initially); and secondly, the persons for whom the wakf is made may cease to exist after the creation of the wakf, when it is called *wakf" munkata-ul-wasaty (cut off in the middle). Examples of both classes of cases are given by Kazi Khan. For example, a man makes a wakf for the children born of his loins, if he has no children at the time, it is a 'wakf

mankata-ul-awwal' and the rents and profits will be applied to the benefit of the poor. If children are born to him afterwards, then the rents and profits will be paid to them." An example of the second or 'wakf munkata-ul-wasat' arises in this way: a wakf is made in favour of two sons and " after them" in favour of their children and children's children. And subsequent thereto one of the sons dies. It is a 'wakf munkata-ul-wasat.' In this case, half of the rents and profits will go to the surviving son and the remainder to the poor and indigent, and when the surviving son dies the entire rents and profits will be given to his children, for the wakif has reserved the interest of the wakf for the grandchildren only after the demise of both the sons. But should it appear that the intention of the wakif was that the surviving son should take the entire benefit, or the interest of the deceased son should descend to his issues, effect would be given to such an intention.(b) Objects partly valid and partly invalid: In cases of wakf where the object is partly valid and partly invalid, it is valid insofar as the valid object is concerned and invalid as to the rest. The portion of the property relating to invalid objects will revert back to the wakif. In Abdul Sattar Ismail v. Abdul Humid, the Madras Court observed that the whole income of such a wakf can be applied to the valid objects. The fact, that a certain portion of the deed cannot be given effect to, does not make the whole deed invalid.

6. Doctrine of Cy pres under Hindu Law

Cy pres doctrine not displaced even if . the residuary bequest is to charity.

Almost all these principles of English law have been adopted by our courts in India. One of the earliest pronouncements on the subject is that of the

Judicial Committee in Mayor of Lyons v A. G. of Bengal[25]. This case arose out of the will of General Claude Martin who was a Major General in the service of the East India Co. and a native of Lyons in France. With the sanction of the British Government he afterwards took service under the ruler of Oudh and resided at Lucknow where he died in 1800. He left behind him a will by which he bequeathed his properties valued at over 30 lakhs of rupees partly to individual legatees but mainly to charities. The will contained, besides others the following dispositions: A gift of Rs. 5, 000 per annum for the release of prisoners for debts in Calcutta, and a gift of Rs. 1, 000 per annum for the relief of such prisoners; a similar gift of Rs. 4, 000 per annum for the liberation of poor prisoners in Lyons; a like sum of Rs. 4, 000 per annum to liberate prisoners of debts in Lucknow; three bequests to found charities in Calcutta, at Lyons and at Lucknow respectively, and a gift of the residue equally between the said three charities. With reference to the gift in favour of the Lucknow prisoners the will directed that if it should fail the fund should remain to the estate. No similar direction was given in respect of the gift on behalf of the Calcutta or Lyons prisoners. The question arose with regard to the trust for the release and relief of prisoners in Calcutta. On August 3, 1865, the Advocate General of Bengal presented a petition to the Calcutta High Court in which it was stated that the bequest to prisoners in Calcutta had become obsolete by reason of change in the law relating to imprisonment for debts and that a fund of Rs. 3, 50, 000 had accumulated, and a scheme was proposed for application of the accumulated funds. The scheme was adopted by the Court; thereupon the Mayor of Lyons put forward objections to the acceptance of the scheme and contended inter alia

that the bequest having failed, the money fell into the residuary estate. These objections were overruled, and the scheme was affirmed. The Mayor of Lyons thereupon took an appeal, against this decision, to the Privy Council. On behalf of appellant it was contended inter alia before the Judicial Committee that the Cy pres doctrine could not possibly apply when the residue of the testator's estate was given to charity, and that at any event the fund that was allotted to the object that failed should be applied to the other charitable objects specified by the testator in his will and which were capable of taking effect. Their Lordships held that it could not be laid down as a general proposition of law that the Cy pres doctrine is displaced where the residuary bequest is to charity, or that there is anything analogous to the benefit of survivorship, since cases may easily be supposed where the charitable object of the residuary clause is so limited in its scope or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it. As soon as a specific charitable bequest fails, the court gets jurisdiction to act on the Cy pres principle, no matter whether the residue is given to charity or not, unless upon a construction of the will a direction can be implied that the bequest, if it fails, should go to the residue. It was further held that in applying the Cy pres doctrine, search should be made for objects akin to that which has failed, though the court may have regard to the other objects of the testator's bounty as mentioned in the will. In an early Calcutta case[26]a testator directed his executors to set apart a sum of Rs. 7, 000 to provide a fund for or towards the education of two or more boys at St. Paul's School, Calcutta, and such boys to be natives of Calcutta, of poor and indigent

parents or fatherless children of American or other Christian religion. The testator died in 1867. Three years before his death, the St. Paul's School at Calcutta was removed to Darjeeling. The Darjeeling School was a boarding school and the cost of each pupil was much higher than that of the day school in Calcutta. The plaintiff who was a son of the testator alleged that by reason of the closing of the St. Paul's School at Calcutta, the trust failed and the money became part of the residuary estate. Pigot, J. overruled this contention. It was held that the gift was not really to the school, but there was a trust created for the education of boys of a particular description, and there being a general charitable intention, the Cy pres doctrine applied and a reference was made to the Registrar to report on the question in what manner the wishes of the testator could be best carried out. This order was affirmed on appeal[27]and Wilson J. in the course of his judgment pointed out that as the gift was not to the St. Paul's School, the question whether the institution at Darjeeling was a continuation of the Calcutta School was not required to be decided in the case. In Advocate-General of Bengal v Belchambers[28], a testator directed his: executors inter alia to set apart a sum of Rs. 16, 000 for a charitable dispensary and a sum of Rs. 50, 000 for its upkeep and the dispensary was to be erected on a part of the garden house of the testator at Ramkrishtopore. The executors were all dead and the garden house at Ramkrishtopore had ceased to be the property of the deceased. Fletcher, J. held that these circumstances did not affect the charitable trust and as there was a. general charitable intention the trust was to be executed Cy pres. The application of the Cy pres principle to the surplus income of a trust fund is illustrated by the decision of the Calcutta

High Court in the Advocate-General of Bengal v Capt. S. Webb Johnson[29]. This related to a trust known as Silver Wedding Trust Fund, which was started on the occasion of the anniversary of the Silver Wedding of the King Emperor and the Queen Empress of India in 1918. Under the direction of the Queen Empress the fund was held by the treasurer for charitable endowments and the income was applied for the higher education of the children of Indian soldiers who had fallen or become permanently disabled during the `last Great War'. For some years past the entire income could not be spent on those objects, it having been found impracticable to do so, and the result was an accumulation of a considerable sum of money as surplus income. In these circumstances, with the consent of Her Majesty, the court applied' the Cy pres principle and extended the scope of the trust by including under it the education and assistance of children and dependants of the Indian officers and soldiers who rendered military service under the Crown during that Great War or who had taken part or may hereafter take part in subsequent warlike operations. The decision of Mr. Justice Davar in the Advocate-General of Bombay v Fardoonji Ardeshir[30]is a leading Indian authority on the point that in the case of charitable bequests the court has no right to set aside the wishes of the testator and substitute another charity in place of the one directed to be established by him simply because it might not be so useful as some other that the court might substitute. In this case a testator had made a bequest of Rs. 7, 500 for distribution of trandus (brass pots) to the members of his caste and saraswat Brahmans in Bombay and there was another bequest for distribution of copper pots and sugar candy to members of his caste in 1, 440 villages in Cutch. The Advocate-General, at

the instance of the plaintiff, moved the court to have it declared that it was not practicable to carry out the bequest and asked the court to apply them Cy pres to some other and more useful charities. Davar, J. negatived this contention and held that the trusts were valid public trusts and were capable of being carried out. In order to carry out the Cy pres Doctrine, it should be physically impossible to carry out the original object of the donor under all conceivable circumstances. It is enough if it is impracticable or has become valueless owing to altered circumstances and the object cannot be carried out in the manner and form intended by the donor[31].

7. Conclusion

The English doctrine of Cy pres applies to Wakf. It literally means " as near as possible". The doctrine lays down that where a clear charitable intention is expressed in the instrument of Wakf, it will not be permitted to fail because the objects if specified happen to fail then the income will be for the benefit of poor or to objects as near as possible to the objects which failed. This doctrine is not applicable unless the original wakf is valid. A wakf that is void for uncertainty cannot be validated by the application of the doctrine[32]. Moreover the doctrine cannot justify the diversion of wakf property to different purposes. The question whether wakf property can be supplied to other religious or charitable purpose is to be determined with reference to the intentions of the wakif which must always be taken into consideration and must govern the application of the income. Thus, if the wakf did not express a general charitable intent in favour f the poor or the other charitable objects for the benefit of the public generally so long as the

descendants were alive, it would be violating the intention of the wakif to turn the wakf from a wakf-alal-aulad into a public wakf[33].