

# IN THE HIGH COURT OF SINDH AT KARACHI

J.M. 05 of 2022 : Shahid Iqbal Dar & Others  
vs. Public at large

For the Petitioner/s : Ms. Nida Faisal Ghani, Advocate

For the Defendants/s : Ms. Sara Malkani, Advocate  
(Assistant Attorney General)

Mr. Sardar Ali Sher Khan, Advocate  
(Assistant Advocate General Sindh)

Date/s of hearing : 27.03.2024.

Date of announcement : 27.03.2024

## JUDGMENT

**Agha Faisal, J.** The National Bank of Pakistan (“NBP”) Staff Welfare Foundation Trust (“Trust”) is stated to have become dormant since 2018; on account of a debilitating vacuum in its board of trustees. Two beneficiaries of the Trust have preferred these proceedings, per Section 31 of the Specific Relief Act, 1877 (“SR Act”) read with section 92 of the Sindh Trust Act, 2020 (“Trust Act”), seeking rectification of two sub-clauses of the trust deed dated 24.09.1995 (“Deed”) dealing with appointment of trustees. It is their case that unless the Deed is rectified, in the manner sought, the requisite number of trustees could not be appointed / elected and the Trust would remain dormant; to the manifest irreparable detriment of the beneficiaries.

2. The Trust was settled in 1995 and clause 13 thereof regulates the number / appointment of trustees etc. Sub clause (a) therein states that there shall not be less than seven trustees of the Trust at any given time. It is the petitioners’ case that the number of trustees has fallen much below the said threshold and unless clauses 13(e) and clause 13(f) are amended, in the manner sought, the Trust will remain non-functional and dormant. The present form, the proposed amendments and the need thereof, as pleaded, is reproduced herein below in tabular form:

Clause	Previous Provision	Proposed Amendment	Need for Amendment
13(e)	Secretary General and President of Trade Union Federation will be the permanent trustees whereas the remaining 3 (three) members from the NBP Collective Bargaining Agents will be rotated and selected from different Provinces each year.	All Trustees hereunder shall be appointed on a yearly basis.  Three (3) Trustees will be selected yearly by the Executive Committee of the Bank	This provision clarifies that the appointment of each Trustee will be for one year only.  The requirement to appoint the Secretary General and

	Board of Trustees will decide their nominations in a meeting head by the Chairman and minimum 5 (Five) Trustees (2 (Two) Executives and 3 (Three) Union representatives.	from amongst 3 senior NBP executives, in its discretion which decision in this regard will be final and binding. In addition, 3 (three) members of the Board of Trustees will be selected from the NBP Collective Bargaining Agents and will be rotated and selected from different provinces each year.  The Executive Committee of the Bank will decide their nominations yearly and the Committee's decision in this regard will be final and binding. In the event 3 Provincial CBAs are not certified within the Bank in any given year, the vacancy/ vacancies so caused in that year may be filled by the Executive Committee of the Bank in its discretion which decision in this regard will be final and binding.	President of Trade Union Federation has been removed as no "Trade Union Federation" exists in NBP as defined in the IRA 2012. The provision for 3 CBA representatives on the Board of Trustees remains the same.  Drafting of the original provision is flawed as the Union representative Trustees from the previous year are to decide the nominations for the upcoming year. However, there are no validly appointed Union representative Trustees at the moment and no mechanism exists to approve future CBA nominees to the Board.
13(f)	President/Secretary General of NBP Officers Welfare Federation will be one of the Trustees and will be on rotated basis and will be selected for one year alternatively by the Board of Trustees	Two (2) Trustees shall be selected each year from amongst the Bank employees in the officer cadre by the Executive Committee, which decision shall be final and binding in this regard	No body named "NBP Officers Welfare Federation" exists within NBP

3. Notice of this petition was published in English and Urdu newspapers, namely, Dawn and Jang dated 26.08.2022, and no objection in such regard has been received from any quarters. Notices were also issued to the office of Attorney General for Pakistan and Advocate General Sindh and they have rendered able assistance to the Court.

4. Ms. Nida Faisal Ghani, advocating the case for the petitioners, submitted that the case set forth qualified per requirements of section 31 of SR Act. She sought to demonstrate that a trust deed is a document rectifiable under the said provision; a beneficiary is empowered to invoke the jurisdiction of this Court; the amendment sought is in pursuance of and in conformity with the intention for which the Deed was settled; and finally that the amendment is precipitated due to a manifest mistake at the onset. Learned counsel

concluded that the relief sought is non-adversarial in nature and in the interest of beneficiaries, in line with the purpose of settlors.

5. Ms. Sara Malkani, Assistant Attorney General, articulated that instruments that may be rectified per section 31 of the SR Act include a trust deed; proceedings seeking such rectification may be brought by a party or representative-in-interest thereof and a beneficiary fell within the purview thereof; a correction per section 31 of the SR Act is merited to bring an instrument in consonance with the discernible intention of the parties and that such rectification ought to be predicated on the allegation of fraud or mutual mistake, when executing / settling the original instrument. She relied upon the authority of *CIT vs. Kamla Town Trust* reported as AIR 1996 SC 620 and *Jagdamba Charity Trust vs. CIT Delhi* reported as 128 ITR 377 Delhi to illustrate her submissions.

Mr. Sardar Ali Sher Khan, Assistant Advocate General Sindh, concurred with the submissions made and supplemented the same with interpretation of Sections 92 of the Trust Act as well as Section 92 of the CPC to demonstrate that amendment of a deed is a remedy independent of appointment of trustees and ought to be evaluated on its own merit upon being subjected to the anvil discussed supra.

6. Heard and perused. *Admittedly*, the Trust was settled for the welfare of the beneficiaries and funds are accumulating therein, including accretions thereto, for such intent. The Trust is to be administered by its board and the constitution thereof has fallen below the critical quorum threshold. There is no cavil to the assertion that with the Deed being in its present form the board cannot be replenished, hence, would remain non-functional resulting in the Trust becoming dormant.

7. Section 31<sup>1</sup> of the SR Act provides for rectification of an instrument and the respective learned counsel concurred that the phrase included a trust deed. Reliance in such regard was placed upon paragraph 4 of *Jagdamba Charity Trust vs. CIT Delhi* reported as 128 ITR 377 Delhi and paragraph 15 of *CIT vs. Kamla Town Trust* reported as AIR 1996 SC 620.

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<sup>1</sup>31. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value...

8. The counsel also remained in accord to demonstrate that the phrase “either party or is representative-in-interest” extended in *pari materia* circumstances to include a beneficiary of a trust, hence, a beneficiary would be empowered to prefer such proceedings. Reliance was placed upon paragraphs 16 and 18 of *CIT vs. Kamla Town Trust* reported as AIR 1996 SC 620:

16. So far as this contention is concerned it was vehemently contended by learned senior counsel for the Revenue that Civil Court will get jurisdiction to entertain rectification proceedings provided any of the two conditions precedent are satisfied, namely, (i) through fraud; or (ii) by mutual mistake of parties the instrument in writing does not express real intention of parties. So far as fraud is concerned it is not the case of anyone that either party to the instrument had committed any fraud. In fact the learned senior counsel went to the extent of submitting that there are no two parties in an instrument of trust. It is difficult to agree. Settlor is one party to the trust who settles his property in trust for the benefit of others who become beneficiaries and the legal ownership of the property is transferred to the trustees. Thus not only there are more than one party to the instrument of trust but in fact there would at least be two main parties, namely, the settlor on the one hand and the trustees on the other and also there will be the beneficiaries who would be indirectly third parties to the instrument though not being direct parties thereto. Thus it would be almost a tripartite transaction. Dr. Gauri Shankar than submitted that even if it is so, no mutual mistake was alleged in the rectification proceedings. Even this contention cannot be accepted. The Settlor Company had clearly indicated in the rectification proceedings that the real intention of the settlor to create a public charitable trust was not clearly brought out on the wordings of the original Trust Deed and, therefore, the need to rectify the instrument, as neither the Settlor Company nor the trustees who assumed the legal ownership of the property settled in trust would have agreed to the transaction in question if it had purported not to create a public charitable trust. It was this mutual mistake on the part of both the parties that required rectification of the instrument to make, what was latent intention a patent one. Even that apart it is strictly not open to the Revenue which is not a party to the

instrument to take up such a contention about non-fulfilment of condition precedent as it would be a fact in issue before the competent Court which was called upon to rectify the instrument by either of the parties to the instrument. Absence of such a condition would at the most make the order erroneous and which can be challenged by either of the parties to the proceedings but it will have no impact on the Jurisdiction of the Civil Court to pass such an order however erroneous it may appear to be to the Revenue. At the highest such an error would remain in the realm of error in the exercise of jurisdiction and not an error depriving jurisdiction to the competent court to entertain such rectification proceedings. In this connection it is profitable to have a look at the decision of Delhi Court in the case of Jagdamba Charity Trust v. Commissioner of Income-Tax, Delhi (Central) MANU/DE/0097/1980 [1981]128ITR377(Delhi). In that case Deed of Trust was got rectified by the parties from the Civil Court. These proceedings had to be initiated in the light of the judgment of the High Court which had held that due to provisions in certain clauses of the Trust Deed the trust was non-charitable and the trust was not entitled to exemption under Income-Tax Act and that since the decision had created some doubts regarding the validity of some clauses of the deed it was necessary that the deed should be rectified. The Civil Court granted a decree and directed that the Trust Deed be rectified. The question was whether such rectification order of the Civil Court was binding on the Income Tax Department when the assessee-trust armed with such rectification order claimed exemption from income tax under Section 11 of the 1961 Act. S. Ranganathan, J, as he then was, speaking for the Delhi High Court took the view that the word instrument used in Section 26 of the Specific Relief Act has a very wide meaning and includes every document by which any right or liability is, or is purported to be created, transferred, limited, extended, extinguished or recorded. There is no reason to exclude a Trust Deed from its purview. A Trust Deed is a document which sets out the terms of an understanding between the author of the trust and the trustees. Though in form, the trustees are not signatories to the instrument as drawn up, they are parties to the instrument in a real sense for it is on the terms of the instrument that they

accept office and proceed to administer the trust. The law obliges them to act upon the terms of the Trust Deed and they cannot commit a breach thereof. If a gift deed, sale deed or promissory note could be within the terms of the section, there is no reason why a Trust Deed cannot be rectified under Section 26. It was further held that since there was an order of Civil Court binding on the author and the trustee, they could administer the trust only in terms of the amendment directed by the Court. The trustees were and must be deemed, from the beginning, to have been under a legal obligation to hold the properties only for the object and with the powers set out in the Trust Deed as amended. Therefore, whatever might be the correctness or otherwise of the order passed by the Civil Court under Section 26 of the Specific Relief Act, 1963, it was not open to the income-tax Officer to say that the trustees could administer the trust in accordance with the original deed and that the claim for exemption had to be dealt with on the basis of the original deed. Nor was it open to the Income-tax Officer to say that in the relevant accounting year, the trustees held the property subject to the terms of the original and not the amended deed. In our view the aforesaid decision of the Delhi High Court lays down the correct legal position in connection with proceedings for rectification of instruments like trust deeds, initiated before competent Civil Courts under the relevant provisions of the Specific Relief Act.

18. So far as this contention is concerned Dr. Gauri Shankar, learned senior counsel for the Revenue was right when he contended that order of rectification by a Civil Court is not a judgment in rem. It would be a judgment in personam binding on the parties to the rectified instrument, namely, the settlor on the one hand and the trustees on the other as well as on the ultimate beneficiaries. It is also true that Section 41 of the Indian Evidence Act cannot apply to such rectification order as under the Said provision only judgments and orders passed in exercise of probate, matrimonial admiralty or insolvency jurisdiction would have the character of Judgments in rem. Similarly Section 42 of the Indian Evidence Act also could not make them relevant in any

enquiry or proceedings unless they relate to matters of a public nature relevant to the enquiry. However it is Section 43 of the Evidence Act which would squarely get attracted in such cases. Said section lays down that judgments, orders or decrees other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of this Act. Section 40 deals with 'previous judgments relevant to bar a second suit or trial'. That obviously cannot have any application. But a rectified Trust deed pursuant to the order of the Court would certainly make the rectification order relevant under the provisions of Section 11 of the Indian Evidence Act, as the fact in issue in an enquiry before the Income-tax Officer would be whether on the basis of the rectified trust instrument the assessee trust is entitled to get its income exempted from tax under the relevant provisions of the Income-tax Act. In such proceedings, therefore, the order granting rectification of such instrument of trust would certainly remain relevant. Consequently it cannot be said that such rectification orders passed by Civil Courts permitting rectifications of trust deeds under the relevant provisions of the Specific Relief Act could not be relied upon by the assessee-trust in assessment proceedings before the Income-tax Officer even though the Revenue or the Income-tax officer was not a party to such rectification proceedings. It will be for the Income-tax Officer to consider the real scope and ambit of the Trust Deed as presented to him in rectified form with a view to finding out whether on the basis of such a rectified instrument the assessee trust had earned exemption from payment of income tax under the relevant provisions holding the field in the concerned assessment years. The third contention is, therefore, decided by answering that though the rectification orders of the Civil Court are not judgments in rem they are relevant in assessment proceedings before the Income-tax Officer and will have to be given effect to for whatever they are worth”

9. The express intention of an instrument is also imperative to discern while considering whether the rectification sought is merited. Petitioners' counsel drew the attention to recital 2 and clause 37 of the Deed to demonstrate that the trust was settled for the welfare of its beneficiaries and notwithstanding the accumulation of funds therein for the said purpose, such intent is impossible to execute unless the rectification is granted.

10. The final aspect to consider is the existence of a mutual mistake, present from the onset and meriting remedy per section 31 of the SR Act. Learned Assistant Attorney General articulated that the question is not what a party would have done had they been able to anticipate subsequent developments but to discern what mistake had been committed at the time that an instrument was executed. Petitioners' counsel submitted that the implication of any subsequent development could not be ignored outright and in such regard placed reliance upon illustration (b)<sup>2</sup> of Section 31 of the SR Act itself.

11. Clause 13 (f) of the Deed states that the President / Secretary General of the National Bank of Pakistan Officers Welfare Federation will be one of the trustees on a rotation basis and shall serve on the board. It is seen in the present context that while an association would be a collective of its members, however, a federation would be a collective of such associations. Perusal of the memorandum of petition and the comparison of table of amendment corroborates the assertion regarding the existence of a mistake in view of the uncontroverted statement that there was never any legal entity by the name of NBP Officers Welfare Federation within the NBP or otherwise. There appears to be no cavil to the proposition that since no such federation was ever in existence, therefore, the reference thereto in the verbiage of clause 13(f) in the Deed was a manifest mistake; right from the onset.

12. Clause 13(e) of the Deed contemplates representation from the trade union federation, stated to be envisaged per the Industrial Relation Act, 2012. It is submitted before the Court that save for a *period* in 2001 and 2015, the said body has not existed. This statement is seen in juxtaposition with the date upon which the trust deed was settled, being 24.09.1995, and it appears that

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<sup>2</sup> (b) By a marriage settlement, A, the father of B, the intended wife, covenants with C, the intended husband, to pay to C, his executors, administrators and assigns, during A's life, an annuity of taka 5,000. C dies insolvent and the official assignee claims the annuity from A. The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.



even at the material time the said body was not constituted. Once again this lends credence to the assertion of a mistake perpetuating right from the onset.

13. It was articulated that determination of a mutual mistake debilitating an instrument ought to be appraised in conjunction with evaluating the intention for executing the instrument; as they were two sides of the same coin. Reliance was placed upon the following authority of the New York Supreme Court:

*Gulf Ins. Co. v Transatlantic Reins. Co. reported as 2009 NY Slip Op 06788 [69 AD 3d 71]*

*As Supreme Court correctly recognized, to support a claim for reformation a "mutual mistake must exist at the time the agreement is signed" (Shults v Geary, 241 AD2d 850, 852 [1997]). Supreme Court erred, however, in concluding that this course-of-performance evidence is not probative of a belief by Gerling, when the 1999 and 2000 I&L contracts were signed, that its percentage participation was a percentage of Gulf's entire exposure for its RVI business. How the parties perform a contract necessarily is manifested after execution of the contract, but their performance is highly probative of their state of mind at the time the contract was signed. As Justice Sullivan stated in Federal Ins. Co. v Americas Ins. Co. (258 AD2d 39, 44 [1999]):*

*"[T]he parties' course of performance under the contract is considered to be the 'most persuasive evidence of the agreed intention of the parties.*

*Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.*

*As Restatement (Second) of Contracts § 202, comment g has expressed it, 'The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.'*

*contends, and we agree, that from all the evidence it submitted, a factfinder reasonably could conclude that a multibillion dollar reinsurance company does not collect the premium and pay losses for more than three years without any internal controls whatsoever to ensure that the substantial amounts it receives and pays are consistent with the terms of the underlying contracts.*

*In sum, Gulf was not required to come forward with incontrovertible proof of mutual mistake. It met the heavy burden it was required to shoulder of coming forward with "unequivocal evidence of mutual mistake" "in evidentiary form"*

*Warberg Opportunistic Trading Fund L.P v. GeoResources, Inc. reported as 2017 NY Slip Op 04537 [151 AD 3d 465]*

*"A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake," and to succeed, the party seeking relief "must establish by 'clear, positive and convincing evidence' that the agreement does not accurately express the parties' intentions"*

*The parties' course of performance under the contract, or their practical interpretation of a contract for any considerable period of time, is the most persuasive evidence of the agreed intention of the parties (Gulf Ins. Co. v Transatlantic Reins. Co., 69 AD3d 71, 85 [1st Dept 2009]).*

Learned counsel also relied upon the Indian Supreme Court judgment in the case of *Babu Lal vs. Hazari Lal Kishori Lal & Others* reported as *AIR Supreme Court 818* and Madras High Court in the case of *J*, to bulwark her arguments that.

14. It was also demonstrated before the Court that when the intention of the instrument is demonstrably impeded by a constituent thereof, said to have

been predicated upon a mutual mistake, then it would behoove the Court to consider that since the rectification sought would not because any prejudice to anybody, therefore, same ought not to be withheld. Reliance was placed upon *Babu Lal vs. Hazari Lal Klshori Lal & Others* reported as *AIR Supreme Court 818* and *J. Kumar vs. T. Selvaraj*, being a judgment (dated 08.12.2023 in CRP (MD) 2266 of 2023) of the Madras High Court.

15. It is observed that per clause 15(h) of the Deed that a person ceases to be a trustee upon determination of employment with NBP. The statement dated 26.03.2024 is on record demonstrating, vide Annexure 1 thereof, the progression in appointment and retirement of respective trustees. It is demonstrated that the number of trustees on the board has fallen below the critical threshold of seven, hence, the Trust is effectively dormant.

16. The learned counsel have demonstrated that a trust deed is capable of rectification by the Court upon being approached by beneficiaries. The presumption as to intent<sup>3</sup> of the parties to the instrument is *prima facie* discernible from the Deed, being welfare of the beneficiaries, and such intent has also been demonstrated to override any constraints in the language of the instrument<sup>4</sup>. It is also been shown that grant of the rectification sought would prejudice none.

17. There appears to be consensus that unless this petition is granted, the situation cannot be remedied and the beneficiaries shall remain deprived of the benefit accruing on their account in the Trust. Therefore, clauses 13(e) and 13(f) of the Trust Deed National Bank of Pakistan Staff Welfare Foundation Trust dated 24.09.1995 are hereby rectified and replaced to read as follows:

13(e) All Trustees hereunder shall be appointed on a yearly basis. Three (3) Trustees will be selected yearly by the Executive Committee of the Bank from amongst 3 senior NBP executives, in its discretion which decision in this regard will be final and binding. In addition, 3 (three) members of the Board of Trustees will be selected from the NBP Collective Bargaining Agents and will be rotated and selected from different provinces each year. The Executive Committee of the Bank will decide their nominations yearly and the Committee's decision in this regard will be final and binding. In the event 3 Provincial CBAs

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<sup>3</sup> 32. For the purpose of rectifying a contract in writing, the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

<sup>4</sup> 33. In rectifying a written instrument, the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

are not certified within the Bank in any given year, the vacancy/ vacancies so caused in that year may be filled by the Executive Committee of the Bank in its discretion which decision in this regard will be final and binding.

13 (f) Two (2) Trustees shall be selected each year from amongst the Bank employees in the officer cadre by the Executive Committee, which decision shall be final and binding in this regard.

This application is allowed in terms herein.

Judge