

(1961) 03 GUJ CK 0010
In the Gujarat High Court

Ambelal Makanji

APPELLANT

Vs

Manual Narharishanker and Another

RESPONDENT

Date of Decision : 02-03-1961

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 70A, 70A, 72, 72, 72(1)

Citation : (1961) 2 GLR 614

Hon'ble Judges : R.B. Mehta, J;N.M. Miabhoy, J

Bench : Division Bench

Judgement

R.B. Mehta, J.—This is an appeal against the decision of the learned Extra Assistant Judge Surat who dismissed an application filed by the appellant u/s 72 of the Bombay Public Trusts Act 1950 against the decision of the learned Charity Commissioner who reversed the order of the learned Deputy Charity Commissioner who had held that the estate in question was not a public trust on an application made by the first respondent Manilal Narharishanker.

2. The facts leading to this controversy are this way :The subject-matter of this controversy is Survey No. 547 comprising of 17 acres 32 Gunthas assessed at the annual revenue of Rs. 30 situated in the village of Achharan Taluka Olpad in the District of Surat. One Makanji Gopalji the deceased purchased this survey number on 13th April 1918 for Rs. 999/from one Khatu widow of Vajirkhan Kalekhan and other joint vendors. Thereafter by a document dated 27th May 1919 deceased Makanji made a disposition of this land to a public charitable trust. It is alleged by the appellant that by the said document no valid charitable trust was created. Makanji died on 12th November 1939. The present appellant Ambelal who is the daughters son of Makanji claims to be an adopted son of Makanji. The appellant intended to sell this property and for that purpose he got inserted an advertisement in connection with this proposed sale in favour of one Bavjibhai Bhavanbhai on 9th March 1953. As a result of this advertisement an application was made by the first respondent Manilal on 13th July 1953 being Application No. 102 of 1953 to the Deputy Charity Commissioner for registration

of this land as a public trust u/s 19 of the said Act. On 15th November 1954 the learned Deputy Charity Commissioner after an inquiry came to the conclusion that it was not a public trust. Over the decision of the learned Deputy Charity Commissioner Manilal filed an appeal to the learned Charity Commissioner. The learned Charity Commissioner reversed the decision of the Deputy Charity Commissioner and held that a valid public charitable trust was created under the said document of 27th May 1919. Being dissatisfied with this decision of the learned Charity Commissioner an application was filed by Ambelal the present appellant before the learned Extra Assistant Judge Surat who dismissed his application. It is over this decision that the present appeal has been filed.

3. It is contented before us by Mr. Thakore the Learned Counsel for the appellant in the first place that in this case the appeal which was filed by Manilal Narharishanker against the decision of the learned Deputy Charity Commissioner was on the date of its filing time-barred; that the learned Charity Commissioner before whom the appeal as filed had condoned the delay in filing the appeal; that this condonation of delay was wrong and the decision of the learned Charity Commissioner should not stand with the result that the decision of the learned Deputy Charity Commissioner should stand as a final decision in this matter. In this connection it was contended that Manilal had sent a memo of appeal on 6th January 1955 while the decision of the Deputy Charity Commissioner was given on 15th November 1954. The limitation period is 60 days for such an appeal. It was contended that the appeal which was preferred by Manilal on the 6th January 1955 was not according to Rule 37 of the Rules prescribed under the Bombay Public Trusts Act. Rule 37 prescribes the mode in which an appeal to the Charity Commissioner is to be filed from the decision of the Assistant or the Deputy Charity Commissioner. The requirements of the filing of such an appeal amongst others are that the appeal shall be sent either by registered post or by person or by pleader and shall be accompanied by a certified copy of the finding or order appealed from and by as many copies of the memo of appeal as are required for service upon the parties whose rights or interest would be affected by any order that may be passed in such an appeal and further the appellant has to pay into the office of the Charity Commissioner the costs of serving notice on all the respondents at the rates specified therein. In this case it was said that the memo of appeal was not as required under this Rule 37 but was only by a letter and the formalities which are prescribed in Rule 37 were not carried out. As such was the case after some correspondence between Manilal and the office of the Charity Commissioner the learned Charity Commissioner allowed Manilal to present a formal memo of appeal on 27th July 1955 and condoned the delay for the presentation of the appeal. By Section 72(1) of the Act it is provided that any person aggrieved by the decision of the Charity Commissioner under Sections 40 41 70 or 70A on the questions as to whether a trust exists and whether such trust is a public trust can file an appeal within sixty days from the date of the decision. The present appeal falls under the decision given u/s 70 of the said Act against the finding of the learned Deputy Charity Commissioner. By Section 75 of

the Act it is provided that in computing the period of appeal the provisions of Sections 4 5 12 and 14 of the Indian Limitation Act shall apply to the filing of such appeals and it is u/s 5 of the Indian Limitation Act that the learned Charity Commissioner has condoned the delay holding that there was sufficient cause in this case for delay in presentation of the appeal. It is contended by Mr. Thakore that it was the erroneous exercise of judicial discretion on the part of the learned Charity Commissioner in condoning this delay. It was said that Rule 37 quoted above had made specific provision for the mode in which the appeal was to be presented and that ignorance of law was the excuse of the party and in these circumstances if the party in ignorance of the provisions of Rule 37 did not present a proper appeal then the discretion should not have been exercised in its favour to condone the delay. We do not think that the contention which has been advanced by Mr. Thakore can be accepted by us. In this case the first respondent had presented an appeal but in the form of a letter in Gujarati. It is found that this document was lost and was not traceable in the office of the Charity Commissioner and there was correspondence on this account between the first respondent and the Charity Commissioners office. If the document was not lost in the Charity Commissioners office it is probable that the Charity Commissioners office would have brought to the notice of the first respondent in time that the memo of appeal which he had presented was not in proper form and if this was done the first respondent would have taken steps to file his appeal according to the rules in time. We do not think that in these circumstances if the learned Charity Commissioner condoned the delay for good and sufficient cause he exercised the judicial discretion vested in him improperly such that we should interfere with his discretion. This is one answer to Mr. Thakore's argument. But there is a second answer to Mr. Thakore's argument for in this case the learned Charity Commissioner has said that even if the case did not warrant condonation of delay this was a fit case where interests of justice demanded that he should exercise his revisional jurisdiction and his interference can also be deemed to be an interference in revision which he was perfectly entitled to do under the provisions of Section 70A of the Bombay Public Trusts Act 1950 There is therefore no substance in this objection of Mr. Thakore.

4. Before leaving this point we may mention that it was contended by Mr. Thakore that the story of sending an application in Gujarati to the Charity Commissioners office was not true; but the simple answer to this point is that this point was not put in issue before the learned Charity Commissioner and not being put in issue no evidence was led on this point and it is too late for Mr. Thakore to take up this point before us. Coming to the merits of the case it is next contended that in this case there was no dedication to charity and that there was no divesting of the ownership by the deceased Makanji. It was further stated that he never parted with the possession of the lands in favour of the trustees and further that he himself retained possession and enjoyed the benefits of the property. It was contended that no valid trust was in these circumstances created by the deceased Makanji. It is necessary in this connection to refer to

the document itself which is dated 27th May 1919. The recital in the document is as follows:

A writing of Dharmada about a land in Kasbe Olpad.

That I Patel Makanji Gopalji aged about 62 by caste Kadva Patidar occupation agriculture residing at Moje Accharan Taluka Olpad make this writing giving in Dharmadan. That I have got of my ownership and possession and enjoyment the land mentioned below.

That I donate the land for the welfare of the public and for the object of propagation of education. That I give the same with the intention for establishing a public (Prajakiya) school in Moje village Achharan. That I had called a meeting of fifteen gentlemen in my own residential house on 23-5-1919. That one Mr. Desai Khandubhai Rambhai Morthanwalla was made the President at that meeting. That in that meeting it was unanimously resolved that the name of the association should be given as Kelavani Pracharak Mandal and the following gentlemen and members were given authority to take the writing. And hence on behalf of the said Kelavani Pracharak Mandal the writing is made in favour of the following gentlemen and possession is given:

Age. Caste. Occupation Residence. Khandubhai Rambhai Desai. 45 Anavil Brahmin. Agriculture. Parbhubhai Dayalji Desai. 45 " "Morthan Dahyabhai Nathubhai Patel. 50 Kadva Patidar. "Achharan. Ambelal Makanji Patel. 19 " Study.

That as per the resolution of the committee the above mentioned persons have been given as a charitable donation (Dharmadan) till the Moon and Sun. endure and it is given in their possession. That hence hereafter the right to manage this land as per their desire is vested in the Kelavani Pracharak Mandal. That henceforward I or my heirs or legal representatives have no right or claim of any sort. That we have no right or claim of any sort. That we have no right of suit And that if me file any suit claiming any right the same is now not tenable. That there is no obstruction by any mortgagee or by any sharer. And that if anybody files a suit then the are responsible for the same. That the assessment from the Fasal of 1976 is to be paid by the said Mandal.

X X X X X

That this writing of Dharmadan is written by me willingly and in my full senses and when I am not intoxicated. That the same is binding on me and is accepted by me and my heirs and legal representatives.

5. The document is signed by the executant Makanji Gopalji in the presence of two witnesses and the document has been registered before the Sub-Registrar before whom Makanji appeared and acknowledged the execution of this document. It is common ground that thereafter the land records were mutated and the said survey number was transferred in the names of the four trustees including the present appellant. It is contended by Mr. Thakore that in this case there has been no divesting of the estate by Makanji and that therefore a valid

charitable trust has not come into existence. It may be mentioned that for the creation of a public charitable trust by a Hindu execution of a trust-deed is not necessary. All that is necessary is that the charitable purpose should be clearly specified and the property intended for the endowment should be set apart for or dedicated for the purpose. In this connection reference may be made to Mulla's Hindu Law 12 Ed page 575 Section 407. It is quite clear if one reads the language of the document that the executant has shown a clear intention to dedicate the land in question to charity for he has said in this document that he was giving the land in question for the benefit of the public for the purpose of education and he has further stated that the object was to establish a school for this purpose. He has further stated that four days prior to the execution of the document i.e. on 23rd May he had called a meeting of 15 persons at his place and at that time a Kelavani Mandal was formed and that Kelavani Mandal was authorised to accept this donation from him and further that it was in pursuance of that resolution that he was passing this document in question. The executant has further stated that it was in pursuance of that resolution by the Kelavani Mandal that he was executing this document. Thus he names four persons as trustees as stated above. He further states that he has handed over possession to these four trustees and that handing over was to last till the Sun and the Moon endure and that the Kelavani Mandal was fully entitled to manage the said property and that he and his successors had no right of any kind whatever in the said land. These statements from the executant of the deed are quite clear to indicate that the author of this document intended to dedicate the property in question to the purpose mentioned in the document itself and that he has in fact dedicated it to the public. Further it is also clear from the statements which the executant has made in this document that he and his successors were not to have any right whatsoever and that the title of the Kelavani Mandal was to last till the Sun and the Moon endure and it is admitted that after the execution of this document the executant admitted the execution of this document before the Sub-Registrar and further there was changing over from his name to the names of the four trustees in regard to this land in the record of rights. It is therefore clear that so far as the dedication is concerned it is complete and total and so far as even the divesting of ownership is concerned there was nothing left in him both by his declaration and his conduct viz. change over of the ownership in the record of rights from the name of Makanji to the names of the four trustees. In these circumstances therefore it is impossible for us to accept the contention of Mr. Thakore that in this case the dedication was wanting or that there was no divesting of the estate such that there was no valid execution of a charitable trust. We do not find any substance in this contention of Mr. Thakore.

Next it was contended by Mr. Thakore that the objects of the trust are vague and indefinite and therefore the trust is void for uncertainty. The objects of the trust as described by the donor are as follows.

6. This shows that the object was to spread education for the benefit of the public and for that purpose to establish a school. We do not think that it can be

said in regard to this declaration of the object that it is either vague or uncertain. The object appears to us to be reasonably defined and that is the spread of education for the benefit of the public. It is therefore not possible for us to accept Mr. Thakore's contention that the trust is void for uncertainty of the object.

7. Next it was contended by Mr. Thakore that it was not mentioned in the document as to for which public the benefit was to be given. This argument was also advanced by Mr. Thakore in support of his contention that the object of the trust was uncertain. It is not necessary in our view to mention as to which particular public was to be benefited by the trust where the trust is indicated to be for the benefit of the public at large. A trust is a public trust when it is either for the benefit of the public at large or for a section or a class of the public which is an uncertain and fluctuating body of persons. If the trust is for the public at large as in this case ex hypothesi no question of ascertaining which section of the public is to benefit can possibly arise. It was contended that there was nothing to prevent the trustees from spending the trust's monies for the public in England for starting a school. To this extravagant illustration if we may use that expression the obvious answer seems to be that a Court will rarely allow the removal of the trust funds outside its jurisdiction unless expressly permitted by the trust itself. We do not think it is necessary to deal with this argument any further. Suffice it to say that there is no vagueness or uncertainty in regard to the beneficiaries on the ground that the trust is for the benefit of the general public. This objection of Mr. Thakore therefore cannot survive.

8. Next it was contended by Mr. Thakore that in this case the gift is to the Kelavani Mandal which is referred to in the document itself. It was said that such a Kelavani Mandal did not come into existence and that therefore this gift was bad. It was also contended that the gift was conditional on the coming into existence of the Kelavani Mandal. A correct reading of the declaration of the donor in the document itself cannot lead us to the inference that the creation or the continued existence of the Kelavani Mandal was a condition precedent to the coming into effect of this charitable gift. It seems to us that the words of the gift-deed are quite clear viz. that the object is to spread education for the benefit of the public and it is only for the purpose of carrying out this object that the Kelavani Mandal is referred to. In other words the Kelavani Mandal has been brought in to carry out the purpose of the trust. That is to say the trust is for the benefit of the public and not for the benefit of the Kelavani Mandal; neither can we say that the gift is made on condition of the coming into existence of the Kelavani Mandal the object being the spread of education for the benefit of the public which is quite certain; and the Kelavani Mandal assumes therefore in this context the character of a trustee. This being our view the gift to charity cannot fail for want of a trustee in this case the Kelavani Mandal. We are assuming that the Kelavani Mandal has not come into existence for the purpose of this argument but even on this assumption we do not think that we can accept the contention of Mr. Thakore that the gift was conditional either on the creation of

the Kelavani Mandal or on the continued existence of the Kelavani Mandal. This argument therefore also fails.

9. It was next contended by Mr. Thakore that in this case there has been adverse possession by the donor himself and thereafter by the appellant and that the adverse possession has been such that it has completed their title adversely to the trust if any. In this regard reliance is placed on certain documents which are rent-notes passed by tenants who are cultivating the land in question in favour of Makanji. There are three rent-notes in number being Exs. Nos. 27, 29 and 30. Ex. 27 dated 15th June 1926 is a rent-note passed by four tenants in favour of deceased Makanji. Mr. Thakore drew our attention to a recital in this rent-note in which it is stated that the land is of your ownership and possession. In other words it was said that these tenants have admitted that the land was of the ownership and possession of Makanji. It is therefore said that Makanji has exercised a right of ownership in regard to this land. It may be mentioned that this is a registered document and Makanji has also signed it before the Registrar, but Makanji has signed it as

10. In other words it is signed by Makanji as Niranjanswami. It is probable that Makanji might have taken to the order of Sadhu's for this describes him as Niranjanswami who was formerly Makanji Gopalji. Any way the identity is there that this document was in favour of Makanji Gopalji. Mr. Thakore as stated above says that by this document Makanji has exercised a right of ownership and possession adverse to the trust. Ex. 29 is also a rent-note by two tenants who were cultivating the land in question. This rent-note is dated 5th August 1927. It is on a printed form of Ganotpatta No. 6 in which the printed words say that the land is of the ownership and possession and enjoyment of Makanji in whose favour the rent-note was executed. The third document is Ex. 30 which is dated 22nd March 1929 and which is passed in favour of Makanji whose alias as Niranjanswami has also been described. In this document also it is stated that the land is of the ownership possession and enjoyment of Makanji. From these three documents it is sought to be argued by Mr. Thakore that deceased Makanji has exercised a right of ownership adversely to the trust if any; and that Makanji having died in 1931 had completed his title by adverse possession and on his death the appellant as his son and heir succeeded to the estate which he had acquired by adverse possession. In this connection it is worth remembering that after the trust-deed was executed the property in question was transferred in the record of rights to the names of the four trustees. This is not challenged. In the Pani-Patrak Ex. 31 which is from 1917-18 to 1921-22 it is found that the names of the four trustees including the name of the present appellant are shown as the Kabjedars of the land in question. That means that Makanji's name was substituted for the names of these four trustees. Thereafter in Ex. 33 which is the record of rights as well as record under Form No. 7A as well as Form No. 12 it is found that the tenants who have been cultivating the land from 1928 onwards till 1937 are all mentioned as the persons who have the Khed-Hak and along with this fact it is also mentioned in the same register that the occupants

are Khandubhai Rambhai and others that is the trustees under this trust. We have therefore to appreciate the effect of the rent-notes in context with these revenue documents which make it clear that all throughout this period prior to the death of deceased Makanji the Kabjedars were the trustees of this trust and along with the mention of the Kabjedars the mention of the actual cultivators the persons who have the Khed-Hak is made. In this context therefore it is clear that Makanji was not exercising any right which was adverse to the rights of the trustees. On the contrary Makanji was exercising a right accepting the existence of the trustees as being the Kabjedars of the land and the words which are used in the rent notes viz. of ownership possession and enjoyment have to be read in this context and we can only say that these words are used in a loose sense meaning that the persons who were giving the land for cultivation had the right and authority to give the land for cultivation to the tenants. We do not think therefore that the use of the words that the land was of the ownership possession and enjoyment of Makanji in these rent-notes in this context was in any way indicative of any adverse enjoyment of this land by Makanji to that of the trust. Further it is not shown on behalf of the appellant that the monies which were received by Makanji as rent from the tenants were used by Makanji for his private purpose. On the contrary when Makanji has himself accepted the continued description of the trustees as Kebjedars would show that he was holding this land very probably for and on behalf of the trust itself. In our view therefore we cannot accept the argument of Mr. Thakore that in this case Makanji had at any time adversely possessed the land in question to the trust.

11. There is one further point which we may mention that in one of the rent-notes i.e. Ex. 27 Makanji has been described as stated above as Niranjanswami. It indicates that Makanji might have perhaps renounced the world. In that case Makanji's adverse possession assuming that there was one could not endure to the benefit of the present appellant who if Makanji had renounced the world could not inherit his estate as a son and heir, but as this point was not canvassed in the Court below we only refer to it and do not base our conclusions on these facts.

12. Next it was pointed out by Mr. Thakore that the present appellant himself has completed adverse possession by himself of the land in question against the trust and in support of this case Mr. Thakore relies on Ex. 34 which is a mutation register. The entry in question is dated 29 January 1940. The entry says that on 27th May 1919 this land was entered in the name of Khandubhai Rambhai and others (the four trustees of the trust) for the object of the Kelavani Pracharak Mandal management. But that the said object was not achieved and that Makanji had not given possession and management to anyone and that Makanji managed the land in question till his death on 12th November 1939 and that therefore the land was entered into the name of the present appellant as the direct heir of Makanji with the consent and approval of the other heirs of Makanji. The present application by the first respondent was made to the Deputy Charity Commissioner on 13th July 53. It was contended that the appellant has Himself

completed his title by adverse possession from the time that his name was brought by mutation in the revenue register till the time that the first respondent made his application to the Charity Commissioner. It may be stated in this connection that the first respondents himself one of the four trustees and his name was entered as one of the trustees and Kabjedars amongst the four trustees in whose name his land was entered in the record of rights after the date of the execution of the trust-deed in question. In other words when Makanji died and thereafter till this mutation entry was made the lands stood in the record of rights in the names of the four trustees one or whom was the present appellant. It therefore cannot be denied that till the mutation entry which is shown to us was made he was one of the Kabjedars as a trustee. In the mutation entry itself also what is stated is not that there was no trust nor that there was an invalid trust; but that the land was entered in the names of the four trustees but that the object was not carried out and that the possession was not given by Makanji to the trustees that, therefore Makanji having died the appellant became the heir as Makanji's successor and that therefore the land was to be entered and was in fact entered in his name. In other words before this land was mutated in his name he was a trustee and his character of a trustee remained with him till it legally came to an end which is can only be after he had obtained a formal discharge from proper authorities, which in this case he has not done. If his character as a trustee has not come legally to an end then his character as a trustee remains with him and if the land was mutated in his name then it cannot be said that after the said mutation he held the land adversely to the trust and only in the character of a son and heir to Makanji for his character of a trustee still was with him and it has not left him. In these circumstances the mutation entry of 1940 cannot help the appellant and cannot be accepted as the exercise of any title adverse to the trust. In these circumstances it is not possible for us to accept Mr. Thakore's contention that the appellant acquired the title by adverse possession in this case to that of the trustees.

13. Before leaving this question of adverse possession we may refer to the oral evidence of the appellant wherein he has stated that he was one of the trustees in the trust deed. In other words he had himself accepted his position as a trustee in the trust deed. He then stated that he was living with Makanji and then after Makanji's death he was in possession of the estate. He has further stated that Makanji had kept the land under his management even after the trust deed and used to take its income himself. What is stated is that Makanji has kept this land under his management that means that Makanji was managing the land and looking to the change over to the trustees names in the record of rights the conclusion that we have arrived at in this connection that Makanji very probably managed this land on behalf of the trustees seems to be correct. That disposes of all the contentions taken by Mr. Thakore on behalf of the appellant.

14. Under the circumstances the appeal must be dismissed with costs. The appellant to pay the costs of the Charity Commissioner as also the costs of the first respondent in separate sets. In case the Charity Commissioner cannot

recover the costs from the appellant the Charity Commissioners costs to come out of the estate. Same order for the costs of respondent No. 1.