

(1979) 04 BOM CK 0005

In the Bombay High Court

Case No : Civil Revision Application No. 117 of 1977

Chandrabhan Chunnilal Gour

APPELLANT

Vs

Shrawan Kumar Khunnolal Gour and Another

RESPONDENT

Date of Decision : 27-04-1979

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 20, 22, 22
Civil Procedure Code, 1908 (CPC) — Section 9

Citation : AIR 1980 Bom 48 : (1980) MhLj 690

Hon'ble Judges : Ginwala, J

Bench : Single Bench

Advocate : R.D. Choudhari, for the Appellant; S.H. Voditel, for the Respondent

Judgement

1. This Revision Application has been filed against the finding recorded by the trial Court on the issue regarding the validity of the transaction of sale between the plaintiff and defendant No. 2. The facts leading to the present Revision Application shortly stated are as follows:

Non-applicant No. 1 has instituted the suit in the Court below against the applicant and non-applicant No. 2 as defendants Nos. 1 and 2 respectively, for a decree for possession of the suit house from defendant No. 1 along with Rs. 210/- as damages for use and occupation from 26-9-1972 to 26-6-1973. The suit house originally belonged to defendant No. 2 which is admittedly a public trust registered under the Bombay Public Trusts Act, 1950 (hereinafter referred to as the Act). The plaintiff purports to have purchased it from defendant No. 2 under a registered sale-deed on 26-9-1972, Defendant No. 1 who is alleged to be in actual possession of the suit house is said to be a near relative of one Chuniyabai who is alleged to have bequeathed it to defendant No. 2. Thus according to the plaintiff, defendant No. 2 became owner of the suit house on the death of Chuniyabai on 29-7-1968. The plaintiff alleges that defendant No. 1 came to live in the suit house to perform the obsequies ceremonies on the death of Chuniyabai and unlawfully continues to occupy it. According to plaintiff the

occupation of the defendant No. 1 is that of a licensee and he continues to occupy it, though his licence was revoked. Thus the plaintiff claims possession of the suit house on the basis of his title.

2. Defendant resisted the suit by raising several contentions with which we are not concerned in this Revision Application, The defendant No. 1 however denies that Chuniyabai had bequeathed the suit house to defendant No. 2 and that the latter had become full owner on her death. He claims that he came to reside in the house in 1960, at the instance of Chhabile Bhagat, the husband of Chuniyabai, to look after both of them in their old age. He says that he has been residing in the suit house openly and continuously "as a heir apparent" of Chhabile Bhagat since 1960 under the direction and wishes of the latter in his own right, In short, defendant No. 1 has set up his own title to the suit house. Defendant No. 1 further contends that the sale of the suit house by defendant No. 2 in favour of plaintiff is not valid in law. In this connection, inter alia, he contended that defendant No. 2 could not have sold the suit house to plaintiff without permission of the competent authority under the Act and hence, the alleged title of defendant No. 2 in respect of the suit house was never legal and perfect. It appears that in view of the contention taken by the defendant No. 1, the plaintiff amended his plaint and submitted that the sale has been effected by the defendant No. 2 in his favour with the permission and approval of the Charity Commissioner, which was obtained on 25-4-1974. In his turn, defendant No. 1 further contended that the alleged ex post facto sanction granted by the Charity Commissioner was without jurisdiction and did not confer any right, title or interest in the plaintiff. In short, therefore, from these pleadings it would appear that when defendant No. 2 sold the suit house to plaintiff on 26-9-1972, it had not obtained any sanction as required u/s 36 of the Act, but obtained it on 25-4-1974 after the sale-deed had been registered,

3. On these pleadings several issues are framed by the trial Court and issues Nos. 9 and 10 are as follows:--

9. Whether the defendant No. 1 proves that the sale of suit property by defendant No. 2 in favour of plaintiff is illegal and void ab initio?

10. Whether the plaintiff proves that the pleas raised by defendant No. 1 regarding sanction of Charity Commissioner to suit transaction were finally and conclusively decided by Charity Commissioner under Bombay Public Trusts Act and hence this Court has no jurisdiction to decide the matter as averred in para 17 of the plaint?

It appears that these two issues were tried as preliminary issues. The learned trial Judge held that issue No. 10 would be required to be answered in the light of other issues and hence it would be premature to answer it, on the basis of the order passed by the Charity Commissioner, He, therefore, did not record any finding on this issue. However, with regard to issue No. 9 he held that the transaction was not void as the plaintiff had obtained ex post facto sanction from

the Charity Commissioner. The learned trial Judge appears to be of the view that the said sanction given by the Charity Commissioner could not be challenged in the suit as defendant No. 1 had not made a grievance about it, in appeal against it and since the Charity Commissioner, who was competent to grant sanction had done so after taking into account all the factors. In short, therefore, the learned trial Judge held the ex post facto sanction as valid sanction within the meaning of Section 36 of the Act. It is against this finding of the learned trial Judge that the present Revision Application has been filed.

4. Mr. R. D. Choudhari the learned counsel for the applicant submitted that the view taken by the learned trial Judge in this respect was not correct and was against the specific provision contained in Section 36 of the Act. He submitted that what was contemplated by the said sanction is a previous sanction and not an ex post facto sanction. According to Mr. Choudhari, on a true construction of Section 36 if the previous sanction from the Charity Commissioner is not obtained by a public Trust for sale of property belonging to it, the transaction would be invalid and void and of no legal effect and if that is so, the purchaser would not acquire any right, title or interest in it. Mr. Choudhary further submitted that in the Act itself there is no provision for any appeal or revision against the sanction granted by the Charity Commissioner and at any rate defendant No. 1 not being a party to the said transaction, he could not make any grievance of the alleged sanction. Mr. Choudhary further submitted that the power given to the Charity Commissioner u/s 36 of the Act was to grant "previous" sanction and not ex post facto sanction and if in this case the Charity Commr. had granted ex post facto sanction it was without jurisdiction and hence it could not be of any avail to the plaintiff in validating the transaction. As against this, Mr. Voditel the learned counsel of the non-applicant submitted that the Section 36 of the Act, if properly construed, does authorise the Charity Commissioner to grant ex post facto sanction. He submits that the sanction could be retrospective and that Section 36 was merely procedural and technical and it should not be construed in a way to take away the rights of the parties. According to Mr. Vodetal, the Charity Commissioner is empowered to sanction a sale, mortgage etc. under clause (g) of Section 69 of the Act and this clause does not state that such sanction has to be prior in time to the transaction in question.

5. Sub-section (1) of Section 36 which is relevant for the purpose of this Revision Application is in the following terms.

"(1) Notwithstanding anything contained in the instrument of trust.

(a) no sale, exchange or gift of any immovable property, and

(b) no lease for a period exceeding ten years in the case of agricultural land or for a period exceeding three years in the case of non-agricultural land or a building.

belonging to a public trust, shall be valid without the previous sanction of the

Charity Commissioner. Sanction may be accorded subject to such condition as the Charity Commissioner may think fit to impose, regard being had to the interest, benefit or protection of the trust;

(c) if the Charity Commissioner is satisfied that in the interest of any public trust any immovable property thereof should be disposed of, he may, on application, authorise any trustee to dispose of such property subject to such condition as he may think fit to impose, regard being had to the interest or benefit or protection of the trust."

It may be mentioned here that the words beginning with "sanction may be accorded" and ending with "benefit or protection of the trust" have been added in this sub-section by the Amending Act, 1971. Now a plain reading of this sub-section would indicate that sale, exchange or gift of any Immovable property belonging to a public trust would not be valid without the previous sanction of the Charity Commissioner. It has to be noted that the legislature has used the word "previous" before the word "sanction" which clearly means that the sanction contemplated by this Sub-section has to be obtained from the Charity Commissioner before the transaction is completed. Construing the sub-section in any other way would render the word "previous" superfluous. It is well settled that the legislature does not waste its words and every word in an enactment has to be given its due meaning. Now if the legislature says that the sale, exchange or gift of any Immovable property belonging to public trust shall not be valid without the previous sanction of the Charity Commissioner, it clearly intends that such a sanction has to be obtained and granted before such transaction is completed and not thereafter. Since the language of this sub-section is plain, clear, unambiguous and unequivocal there is hardly any room for construing it one way or the other. In such cases the question of interpretation or construction does not arise. Strictly speaking, there is no place for interpretation except where the words of a statute admit of two meanings, Rules of construction are laid down because of the obligation imposed upon the Courts to attach an intelligible meaning to confused and unintelligible sentences. It therefore, follows that if the language of the statute is clear and intelligible and does not admit of two meanings, effect must be given to the words used and thus the intention of the legislature must be carried out.

6. Mr. Voditel relying on the words which have been added to the subsection by the Amending Act, 1971, submits that the word "sanction" used therein is not qualified or preceded by the word "previous" and hence what is contemplated by this sub-section is that the sanction could be obtained even after the transaction is contemplated, Mr. Voditel does not appear to be on firm ground in advancing this argument. The first sentence in this sub-section which provides for the sanction clearly states that it has to be prior to the transaction. The second sentence merely authorises the Charity Commissioner to impose such condition as he may think fit while granting the sanction. Now the legislature once having said that the sanction has to be previous, it was not necessary for it to repeat

the same language again while it empowered the Charity Commissioner to impose condition at the time of according the sanction. This would have been mere repetition which the legislature generally avoids. Hence merely because the word "sanction" in the second sentence of this sub-section is not preceded by the word "previous" it cannot be said that the Legislature had empowered the Charity Commissioner to accord the sanction even after the sale, exchange or gift as the case may be.

7. Mr. Voditel further contended that it is Clause (g) of Section 69 of the Act which in fact empowers the Charity Commissioner to accord sanction to a sale, mortgage, exchange, gift or lease of Immovable property belonging to a public trust u/s 36. Mr. Voditel submits that this clause does not lay down that the sanction has to be prior in time to the transaction. It is true that this clause merely gives power to the Charity Commissioner to sanction sale, mortgage, exchange, gift or lease of Immovable property belonging to a public trust u/s 36, but at the same time it should be noted that this clause refers to sanction u/s 36 and if as seen above, this section itself requires the sanction to be previous, Clause (g) of Section 69 cannot be taken to enlarge the scope of Section 36. This clause merely gives power to the Charity Commissioner to accord sanction to these transactions and the mechanism for the exercise of this power is provided in Sub-section (1) of Section 36. In other words, if the Charity Commissioner has to exercise the power given to him u/s 69, he can exercise it only in the manner provided for in Sub-section (1) of Section 36. Hence it Section 36 requires that the sanction should be previous, there is no power in the Charity Commissioner to accord sanction after the transaction is completed and validate it by the so-called ex post facto sanction. Giving such a sanction would be against the express requirement of Sub-section (1) of Section 36. Obviously in enacting the provision that the Charity Commissioner must give the sanction before the transaction is completed, the legislature intended that he should have full control over the transaction and should be in a position to prevent it and not allow the transaction to be completed in case he finds that it is not in the interest of the public trust concerned. This purpose would not be effectively achieved by sanction accorded after the transaction is completed.

8. Mr. Voditel next submitted that if legislation can be given retrospective operation, there is no reason why sanction could not be retrospective. He has referred me to the decision of Supreme Court in *Rattan Lal Vs. State of Punjab*, . It is difficult to see how the observation of the Supreme Court in this case could help him. In that case the question before the Supreme Court was whether Section 11 of the Probation of Offenders Act 1958 was retrospective in its operation. While dealing with this question, the Supreme Court observed that every law that takes away or impairs the vested right is retrospective and that every ex post facto law is necessarily retrospective. There cannot be any dispute that in certain circumstances a legislature can enact a law with retroactive operation. But it is difficult to see how this analogy can be applied to the power of Charity Commissioner in according sanction u/s 36 of the Act. As seen above,

Sub-section (1) of Section 36 expressly provides that the sanction has to be previous to the transaction and if the law itself provides so, it would not be open for the Charity Commissioner to exercise his power to accord an ex post facto sanction and thus validate a transaction which was otherwise invalid.

9. Mr. Voditel then contended that after all what Section 36 of the Act lays down is the procedure for alienation of the trust property by the trusts. He submits that the provision of this section and particularly of Subsection (1) thereof are technical. According to him, if in such circumstances the Charity Commissioner accords the sanction not previously, but after the transaction, it could at the most be termed as an irregularity, but not an illegality. In this connection, he seeks to rely on the observations of the Supreme Court in *The State of Punjab and Another Vs. Shamlal Murari and Another*, Now in the case before the Supreme Court the question was whether Rule 3 of the Punjab and Haryana High Court Rules which prescribes the number of copies of memorandum of appeal, judgment and paper book to be filed along with the appeal under Letters Patent, is mandatory. This question arose in the context of the fact that the required number of copies were not furnished by the appellant. In dealing with this question the Supreme Court held that the copies of all the documents prescribed had been furnished, but three copies of each were not furnished and this omission or default was only a breach which could be characterised as an irregularity to be corrected by condonation on an application by the party fulfilling the condition within a time allowed by the Court. The Supreme Court then made the following observations.

"We must always remember that processual law is not to be tyrant, but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the hand-maid and not the mistress, lubricant, not a resistant in the administration of justice. Where the non-compliance the procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominate desideratum. After all, Courts are to do justice and not to wreck this end product on technicalities. Viewed in this perspective even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in extended time."

Now these observations of the Supreme Court may apply in so far as the provision which is to be construed, is connected with procedure. However, in my view Sub-section (1) of Section 36 is not merely procedural or technical as contended by Mr, Voditel. As stated above, this provision has been enacted to enable the Charity Commissioner to exercise control over the alienations to be made by the trustees of the trust properties. Granting or refusal of sanction would, therefore, affect the substantive rights of the party concerned. It is therefore not possible to say that the said provision is purely technical or procedural.

10. Mr. Voditel lastly submitted that in any case Section 41-E of the Act empowers the Charity Commr. to grant temporary injunction or make such other order for the purpose of staying and preventing the wasting, damaging, alienations, sale, removal or disposition of a trust property, if it is brought to his notice that any such property is in danger of being wasted, damaged, or improperly alienated by any trustee or any other person. Mr. Voditel contends that in case any trustee or trustees are about to alienate trust property in contravention of the provisions contained in Sub-section (1) of Section 36 of the Act, the Charity Commissioner can intervene by virtue of the power given by Sub-section (1) of the Section 41-E and prevent such an alienation. Mr. Voditel submits that if instead of taking such an action u/s 41-E the Charity Commissioner grants ex post facto sanction, it must be held that he holds the alienation proper and legal. It would appear that Sub-section (1) of Section 41-E of the Act empowers the Charity Commissioner to grant a temporary injunction or to make any other order for the purpose of staying and preventing the alienation. It appears that the Charity Commissioner can exercise this power for protection of the trust property only for staying or preventing alienation. This, therefore, postulates that the power would be exercised before the alienation. This section does not make any provision for the contingency where the trustee or trustees have already alienated the property without the previous sanction of the Charity Commissioner and have parted with it. In that case the only thing which could be said is that the alienation itself is invalid because of the requirements laid down in Sub-section (1) of Section 36. Apart from this what has to be considered in this case is as to whether the Charity Commissioner had power to accord ex post facto sanction and if as pointed out above, the Act does not make any provision in this direction, but on the contrary makes an express and specific provision that the sanction has to be prior to the transaction, it is difficult to see how Section 41-E could be said to empower the Charity Commissioner to grant an ex post facto sanction. In my view, therefore, no assistance can be drawn from Section 41-E in support of the proposition that the Charity Commissioner can accord ex post facto sanction.

11. In my view therefore the sanction which has been obtained in the present case after the transaction of sale had been completed on 26-9-1972, was not a sanction at all in the eye of law and if that was so, the said transaction would not be valid as provided for in Sub-section (1) of Section 36. It is needless to say that there is no real difference between a transfer being void or not being valid. (See Mohammad Ibrahim v. Sugrabi, 1955 Nag LJ 344. Even if Sub-section (1) of Section 36 says that such transfer shall not be valid, the effect would be that it is void, if the previous sanction of the Charity Commissioner is not accorded.

12. The next question which arises for consideration is whether it was open to the Civil Court to hold that the ex post facto sanction granted by the Charity Commissioner is not legal and is without jurisdiction. Section 80 of the Act states that save as expressly provided in the Act, no Civil Court shall have jurisdiction to decide or deal with any question which is by or under this Act to be decided or

dealt with by any officer or authority under the Act and in respect of which the decision or order of such officer or authority has been final and conclusive.

13. In this connection it may be noted that Section 36 of the Act in its application to this State does not make the decision of the Charity Commissioner to grant or refuse sanction either final or conclusive. In this connection, it would be worthwhile to note Sub-sections (3) and (4) of the said section in its application to the State of Gujarat, Sub-section (3) provides for an appeal to the Revenue Tribunal from the decision of the Charity Commissioner and Sub-section (4) makes such decisions final subject to the appeal, No corresponding provisions have been made in Section 36 in its application to the State of Maharashtra, It would, therefore, appear that the decision of the Charity Commissioner to grant the sanction or to refuse it, has not been made final and conclusive by any provision of the Act, In this situation, therefore, it could be said that Section 80 of the Act would not be applicable to the validity or otherwise of the sanction granted by the Charity Commissioner since his decision to grant the sanction has not been made final and conclusive, However, even if it is assumed that it is final and conclusive the jurisdiction of the Civil Court to determine its validity would not be taken away, if the sanction has been granted without jurisdiction or power. In this connection, it would be apt to refer to the dicta of the Supreme Court in *Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and Others Vs. The Administrator, Municipal Committee, Ludhiana*, which are to the following effect,

"Under Section 9 of the Civil P. C. the Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of Civil Courts in respect of a particular matter. The mere conferment of special jurisdiction on a Tribunal in respect of the said matter does not in itself exclude the jurisdiction of Civil Courts, The statute may specifically provide for ousting the jurisdiction of Civil Courts, even if there was no such specific exclusion if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the Civil Court's jurisdiction is not completely ousted. A suit in a Civil Court will always lie to question the order of a Tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said Tribunal abuses its power or does not act under the Act, but in violation of its provisions."

The view taken by the Supreme Court as above, has been followed by it in *K.S. Venkataraman and Co. Vs. State of Madras*, wherein it has been reiterated in the majority judgment that suit in a Civil Court would always lie to question the order of a Tribunal created by a statute even if its order is expressly or by necessary implication made final, if the said Tribunal abuses its power or does not act under the Act, but in violation of its provisions. In this case It has been

further observed that it is also equally well established that the Civil Courts have power to entertain a suit in which the question is whether the executive authority has acted ultra vires its power. The dictum which has been laid down by the Supreme Courts in the case of Firm Radhakisan has again been followed by it in The Pabbojan Tea Co. Ltd., etc. Vs. The Deputy Commissioner, Lakhimpur, etc., . It would therefore, appear that it would be always open to the Civil Court to determine if the act of an authority constituted under an enactment is ultra vires its power. As already pointed out above, the Charity Commissioner had no power under the Act to grant an ex post facto sanction as has been done in the present case. If that is so, obviously the Charity Commissioner has acted in violation of the provisions of the Act and cannot be said to have acted under the Act. In my view, therefore, the Civil Court is not debarred from determining if the ex post facto sanction, which has been granted by the Charity Commissioner, was in accordance with law and saved the transaction between the plaintiff and defendant No. 2.

14. The learned trial Judge has observed that defendant No. 1 should have made a grievance about the validity of the sanction "in Appellate Court." Probably the learned trial Judge meant to say that the defendant No. 1 should have preferred an appeal against the decision of the Charity Commissioner granting the ex post facto sanction. However, the learned trial Judge failed to notice that there is no provision in the Act under which such an appeal could be preferred by an aggrieved person. As already seen above, Section 36 itself has not provided for an appeal. Section 70 makes provision for appeal against the finding or order of Deputy or Assistant Charity Commissioner rendered under Sections 20, 22, 22-A, 28, 54 and 79-AA. However, no appeal has been provided for against the sanction granted u/s 36. Sub-section (2) of Section 51 gives a right of appeal against the decision of the Charity Commissioner refusing his consent to the institution of a suit Under Sub-section (1) of that section and such appeal lies to Maharashtra Revenue Tribunal. However, no such appeal has been provided against the decision granting or refusing sanction u/s 36. The learned trial Judge, was therefore, not right in saying that defendant No. 1 should have agitated this question before the Appellate Court. The learned trial Judge has further held that the sanction has been granted "by the Court having competent jurisdiction." This view is again not correct in the light of what has been said by me above. The learned trial Judge has not gone into the various provisions of the Act and particularly Sub-section (1) of Section 36 before holding that the sanction has been granted by the competent authority. It would, therefore, appear that the finding given by the learned trial Judge on Issue No. 9 is entirely incorrect and has to be set aside.

15. Since, however, the learned trial Judge had tried this issue as a preliminary issue, he will have to see the effect of the affirmative finding on it, on the maintainability of the suit, as contended by defendant No. 1.

16. In the result, the revision application is allowed and the finding recorded by

the trial Court on Issue No. 9 is hereby reversed and it is held that the issue should be answered in the affirmative. The trial Court will proceed with the suit in the light of the finding now recorded on Issue No. 9. The costs of this Revision Application shall be costs in the suit.

17. Application allowed.