

(2000) 04 BOM CK 0046

In the Bombay High Court

Case No : First Appeal No. 735 with First appeal No's. 948, 949 and 950 of 1990

Eruch Merwan Irani and another

APPELLANT

Vs

Sardar Sorabji Ruttonji Patel and others

RESPONDENT

Date of Decision : 10-04-2000

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 19, 22A, 41E, 70A, 72(4)

Civil Procedure Code, 1908 (CPC) — Section 100

Evidence Act, 1872 — Section 101, 110

Citation : (2000) 3 ALLMR 1 : (2000) 3 BomCR 438

Hon'ble Judges : S.S. Parkar, J

Bench : Single Bench

Advocate : Mrs. Uma K. Shah and K.D. Shah, for the Appellant; D.R. Zaiwala, A.S. Bilawala, instructed by Bilawala and Co. and K.P. Presswalla, instructed by L.C. Tolat and Co., for the Respondent

Judgement

S.S. Parkar, J.—These appeals are filed by the original applicants against the common judgment and order delivered by the District Judge, Pune in Misc. Civil Appeal No. 200 of 1989 and Misc. Application Nos. 3.82, 383 and 384, all of 1989 preferred by these appellants before him whereby the said appeals were dismissed confirming the common judgment and order dated 16-5-1989 delivered by the Joint Charity Commissioner, Pune Region, Pune in Revision Application Nos. 12 of 1987, 21 of 1987 and 18 of 1988 and Application No. 11 of 1987.

2. The brief background leading to the present appeals is as follows:

One Sorabjee Ratanjee Patel, a resident of Pune, constructed a firm temple and community hall for the Parsees called as Patel Hall in his property situated at Nana Peth in Pune in the year 1824. He also constructed a tower of silence in his property away from the above property at Gultekadi. One Dastur Jamshedji Edulji of Bombay was appointed as high Priest for the performance of religious rites in the said Fire Temple and Tower of Silence as per the Zoroastrian tenets.

In the year 1843 sacred fire called Atesh Adaran was installed in the Fire Temple. The said Fire Temple was continued in the charge of and absolute dominion of Dastur Jamshedji Edulji for superintendence, management and performance of religious rites. On 29th August, 1843 the founder of the Trust executed a Gift Deed in Gujarati called Bakshispatra transferring two properties in the name of Dastur Nausherwanji Jamshedji i.e. the son of aforesaid Jamshedji Edulji Dastur. The income of the said properties was to be applied for the management of the fire temple, Patel hall and tower of silence. It appears that on 19-4-1846 Jamshedji Edulji Dastur died. On 23rd August 1852 the original founder Shri S.R. Patel executed a Will in favour of Nausherwanji Jamshedji Dastur and thereafter he died on 3rd September 1852. The Gift Deed of 1843 and the copy of the Will are not produced on record. It appears that under the said Will Nausherwanji Dastur was entrusted with the responsibility not only of performing religious rites and managing the properties gifted hi the year 1843 but also was given power to appoint his successors and heirs to look after the affairs of the Fire Temple, Tower of Silence, Hall and the properties gifted by the Donor.

3. On 2nd July, 1884, Nausherwanji Dastur executed a document called Trust Deed a copy whereof is annexed at page 303 of the Appeal paper-book. In the said deed reference is made to the construction of the Fire Temple, Hall and the Tower of silence by founder S.R. Patel in the year 1824, Gift Deed of 1843 and Will dated 23rd August 1852. This last document of 2nd July 1884 is the registered document registered in the Adalat (Court) of Poona. It appears that survey numbers to the lands were given for the first time in Poona in the year 1889. Prior to that lands in Pune were given Perde or Bakkal numbers. In the year 1889 survey numbers to the properties in question with which we are concerned were given as 177 and 178. In the year 1930, for the first time, Record of Rights of the properties were introduced in the City of Pune in the form of Registers of village Form Nos. 6 and 7/12. In the year 1936 City Survey (C.T.S.) numbers were introduced and accordingly Survey No. 177 was given C.T.S. No. 613 and Survey No. 178 was given C.T.S. No. 612. In the mean time the Trust property as well as the Fire Temple and the Patel hall were being managed by the successors of Nausherwanji Dastur who is said to have died in the year 1884 itself after the execution of Trust deed dated 2-7-1884. As per the Deed of 1884 two properties were gifted in 1843 by S.R. Patel to the then Trustee Nausherwanji Dastur whose income was to be applied for the affairs of the trust. From the recital in the said Deed of 1884 it appears that Nausherwanji and his brothers had contributed to the expenses of the Trust out of the income of their personal properties and had rebuilt the Community Hall in the year 1865, and the Fire Temple in the year 1877. Both these newly constructed structures were bigger and larger in size than the original structures which were constructed by the said founder S.R. Patel.

4. The present controversy arose when the Respondent Nos. 2 to 9 wanted to sell about 12,674.25 sq.ft. land out of City Survey No. 612-B/2 and City Survey No. 612-A/1 to the respondent Nos. 10 and 11 Respondent Nos. 2 to 8 are the

present Trustees of respondent No. 1 - Trust by name Sardar Sorabjee Ruttonji Patel Charitable Trust, Pune, while respondent No. 9 is a daughter of Respondent No. 2, one of the Trustees. Before effecting the sale or entering into an agreement to sell the aforesaid property, public notice was given on 10th June 1986 in the newspaper of the intended sale. Thereafter an agreement to sell was entered into with respondent Nos. 10 and 11 on 31/3/1987 by respondent Nos. 2 to 9. The applicants filed an application being Application No. 11 of 1987 u/s 41-E of the Bombay Public Trust Act, 1950 before the Charity Commissioner, Pune and asked for an injunction injuncting the vendors from selling the property to respondent Nos. 10 and 11. The said application was made on 15th July 1987 on which date ex-parte order of injunction was granted against selling the aforesaid properties to respondent Nos. 10 and 11. The ex-parte order obtained on 15th July 1987 was confirmed by the Joint Charity Commissioner on 20th August 1987. Thereafter in the course of hearing of the said application, documentary as well as oral evidence was led before the Joint Charity Commissioner who, after appreciating the evidence on record and considering the record of the office of the Charity Commissioner, dismissed the application by his judgment and order dated 16th May 1989. The said application u/s 41-E of the Bombay Public Trust Act was heard along with the Revision Application No. 12 of 1987 made u/s 70-A of the Bombay Public Trust Act by these appellants and also Revision Application Nos. 21 of 1987 and 18 of 1988 filed by Respondent No. 9, as the application as well as revisions pertained to the same subject matter and raised the common question.

5. As the appellants lost in all the aforesaid four applications before the Joint Charity Commissioner, they filed Civil Appeal No. 200 of 1989 and three Misc. Civil Application Nos. 382, 383 and 384 of 1989 in the District Court of Pune against the common judgment and order of the Joint Charity Commissioner dated 16th May 1989. The said appeal and applications were heard by the Vth Addl. District Judge, Pune who dismissed the Appeal as well as the Misc. Applications by his common Judgment and order date 13/8/1990.

6. Aggrieved by the aforesaid concurrent findings and decisions by the Joint Charity Commissioner and the Addl. District Judge, Pune the appellants have preferred above four Appeals. Since the said Appeals raise common questions of facts and law, all the above Appeals were heard together and are being disposed of by this common judgment.

7. I heard Mrs. Shah, the learned Counsel appearing on behalf of the appellants, Mr. Zaiwala on behalf of respondent Nos. 1 to 9, the vendors and Mr. Presswalla on behalf of respondent Nos. 10 and 11, the purchasers, at length.

8. Mr. Presswalla at the outset raised the preliminary objection that although the above Appeals are shown as First Appeals they are, in fact, in the nature of second Appeals contemplated u/s 100 of C.P.C. and, therefore, this Court can only interfere if a substantial question of law is involved. According to him the question involved in these appeals is a question of fact to be decided after

appreciation of evidence on which there are concurrent findings given by the two authorities below and, therefore, these appeals are not maintainable and are liable to be dismissed on that ground alone.

9. Mrs. Shah on the other hand submits that the main question involved in these appeals is on whom the burden to prove the ownership of the disputed properties lies. According to her the courts below have wrongly cast the burden on the appellants when in fact the documents like the original Deed of the Trust, Gift Deed and the Will are supposed to be in possession of the respondents-trustees and, therefore, the burden, is on respondents-trustees to produce the aforesaid documents and to prove that the property in question was not the subject matter of the Trust. Secondly, she contended that if the respondents-trustees claim the property to be of their private ownership, then also the burden is on the respondents-trustees to prove their ownership of the disputed property.

10. In order to appreciate the aforesaid contentions raised by the two sides, it was necessary for me to go through the pleadings and the evidence on record as it is not possible to decide the preliminary question without going into the merits of the controversy itself. Accordingly I heard the Counsel on the merits of the case. There is no doubt that the only document on record pertaining to the Trust is the Deed of 1884 executed by Nausherwanji Jamshedji Dastur which is a duly registered document. No other deed is produced on record by either side about Trust Property. The Deed of 1884 makes reference to the earlier two documents only of 1843 and 1852 i.e. the Gift Deed and Will of S.R. Patel. There is no mention of the alleged document of 1824 creating trust by S.R. Patel. I see no reason to hold that the omission of reference to the alleged Trust Deed of 1824 in the Deed of 1884 was deliberate. The Bombay Public Trust Act, 1950 came into force on 21st April, 1952 and thereafter the present Trust came to be registered under the Bombay Public Trust Act, some time in the year 1952-53, when a Trust is registered under the aforesaid Act, all enquiry is supposed to be held for the purpose of registration of a Trust, u/s 19 of the above Act. For the purpose of registration of a Trust, the information is furnished as per form given in Schedule I vide Rule 5 of the Rules and an enquiry is held u/s 19. Before the registration of a trust, the authorities have to find out whether the trust, owns any property and accordingly it is mentioned in the register. At the time of the registration of this Trust, the then trustees had mentioned property bearing City Survey No. 612 corresponding to old Survey No. 178 instead of City Survey No. 613 as trust property.

11. The trustees subsequently realised that mistake in the year 1973 and, therefore, applied for correcting the records of the Trust. The said application for correction was granted after enquiry and City Survey No. 613 was entered in the records of the Charity Commissioner as being the property belonging to the above trust instead of City Survey No. 612 wrongly shown earlier. It is not in dispute that the present appeals, though shown as first appeals, are to be considered as second appeals as held by the Apex Court in the case of

Ramchandra Goverdhan Pandit Vs. Charity Commissioner of State of Gujarat, . Mr. Zaiwala and Mr. Presswalla relied on the decision of the Division Bench of this Court in the case of Shivprasad Shankarlal Pardeshi, since deceased by his heirs Vs. Leelabai Badrinarayan Kalwar since deceased by her heirs and others, in which this Court, after considering the earlier decisions, held that the appeal filed u/s 72(4) of the Bombay Public Trust Act, like the present one, is in the nature of a second appeal and, therefore, the same would be maintainable in this Court only in case it involves a substantial question of law. In the above case it was held that since there were concurrent findings of facts by the two courts below, the second appeal filed u/s 72(4) of the Act was not maintainable.

12. Mrs. Shah has not joined issue on the proposition that the present Appeals should be treated as second appeals u/s 100 of C.P.C. Her submission is that the lower courts have wrongly cast the burden on the appellants to prove the ownership of the property in question. She placed reliance on section 101 of the Indian Evidence Act and contended that the respondents-trustees should prove that it is they who are the owners of the property which they are seeking to sell. Section 101 of the Indian Evidence Act is as follows:

"101. Burden of proof.---Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Where a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

13. It cannot be disputed that it is the appellants who had filed the proceedings before the Charity Commissioner asserting that the property sought to be sold is the Trust property and not private property of the respondents. Mrs. Shah, however, submitted that the trustees are supposed to be in possession of the earlier documents like the Trust Deed of 1824. Gift Deed of 1843 and Will of 1852 executed by late S.R. Patel, the founder of the Trust. It is not in dispute that the appellants in their application made before the Charity Commissioner u/s 41-E of the Act relied upon the Trust Deed of 1884 executed by Nausherwanji Dastur to whom two landed properties were transferred and who was, as per the Will of the founder, looking after the properties as well as the affairs of the Trust. From the Deed of 1884 it is clear that Nausherwanji Dastur had reconstructed and put up larger structures, both of Fire Temple as well as community hall, in the years 1865 and 1877. The Trust was registered after the Bombay Public Trust Act, 1950 came into force in the year 1952. The Charity Commissioner had registered the Trust on the basis of the Deed of 1884 executed by Nausherwanji Dastur. That Deed of Trust makes no mention of the property known as Dastur Hall which was admittedly the residence of Nausherwanji Dastur. The Deed of 1884 makes reference only to the Fire Temple and the community hall and two more properties which were transferred to the said Nausherwanji Dastur under gift deed of 1843 for the purpose of getting income, out of which the Fire Temple and the community hall were to be maintained. The said Nausherwanji Dastur, who was also the high priest of the community and performing religious rites in

the fire temple, has mentioned in the Trust Deed of 1884 that he reconstructed the fire temple and the community hall at his own expenses borne by himself and his brothers and that he did not want to spend more amount from his private property for the maintenance of the fire temple and the community hall. In fact the boundary mentioned in the Deed of 1884 with regard to the Trust property i.e. the Fire Temple and Patel hall were bounded on the North by a Public Road and on the South by the lands and premises of Khan Bahadur Dastur Nausherwanji Jamshedji and his brothers known as Dastur hall and the residences and buildings appertaining thereto, on East by the public Road known as Dastur Road or Nivdungia Vithoba's Road and on West partly by a Public Road called the Dastur Back Road and partly by a Mohammedan Burial ground, which appears in Part I of the First Schedule annexed to the said Deed of 1884 at page 330 of the paper-book. Secondly the other two properties which were donated by the founder S.R. Patel for the purpose of support of the religious institutions are mentioned in Part III of the First Schedule annexed to the Deed giving area of 5943 sq. yards and four ninths of a square yard. These properties are called a "Old Goonte Gidangy" and are situated far away from the fire temple, Part I in the Schedule referring to fire temple and Patel hall gives the measurements of the said property as 5332 sq. yards and two thirds of a sq. yard which corresponds approximately to the area of 5150.4 sq. mtrs. of the said property mentioned in 7/12 extract at page 38.

14. As regards the earlier documents of 1824, 1841 and 1852 are concerned it is the case of the respondents- trustees that they are not in possession of these documents. The contention of Mrs. Shah is that it is the trustees who are supposed to be in possession of these documents and if they are not produced, adverse inference should be drawn against the trustees unless they produce documentary evidence to substantiate the case of their ownership in respect of the property which is being sold by the respondents as their private property.

15. First of all, as mentioned earlier, the Trust was registered on the basis of the document of 1884. In the said document there is no reference to any deed of 1824 executed by the founder S.R. Patel creating trust. In the deed of 1884 there is mention of the property on which Fire Temple and Patel hall are situated which, as per Schedule I Part I, admeasures 5332 sq. yards and 2/3rd of a sq. yard. The other properties which are referred to in Part 3 of Schedule I, are the immovable properties donated for the purpose of support of the religious institutions which are not in the vicinity of the fire temple or CTS Nos. 612 and 613, but are situated far away from them. The appellants are all the time assuming that there was deed of Trust executed by S.R. Patel in the year 1824 and that Dastur Hall which is named after the executor of the Deed of 1884 Nausherwanji Dastur or his forefathers was given to the family of Jamshedji Dastur, father of Nausherwanji Dastur for his residence to enable him to look after the affairs of the Trust and, therefore, could not be sold at any point of time as being part of the Trust property. This case is put up by the appellants on their belief that Dastur hall, which is the residence of family of the priest, must have

been given by the original founder i.e. S.R. Patel to the Trustee, without there being any foundation for it. No documentary or even oral evidence has been led by the appellants to show that the property in occupation of Nausherwanji Dastur and his descendants i.e. the present Trustees stood in the record of rights in the name of the Trust or the original founder S.R. Patel. We have on record the revenue records like 7/12 extracts which show the name of Surdar Khan Bahadur Dastur Nausherwanji who is the high priest of Parsee agiyari i.e. fire temple as owner. The property was not shown in the name of the Trust. Both the two authorities below have made reference to the revenue records which show the disputed property i.e. Dastur hall in the name of the ancestors of the respondents and not in the name of the Trust. The lower courts also have placed reliance on the Index Record (Exh. 36) which shows that the respondent No. 2 had sold out various properties from City Survey Nos. 612 and 613 to various persons since the year 1949. Except the bare word of the appellants there is no iota of evidence on record to show or to infer that the property in occupation of the family of Nausherwanji Dastur was given to him or gifted to him by S.R. Patel, the original founder of the Fire Temple for the purpose of residence to enable him and his successors to perform the religious rites and manage the affairs and the property of the trust as alleged. In my view if the original founder S.R. Patel had executed any deed in the year 1824 the deed of 1884 would have surely made a reference to it and in all probability mentioned about the Dastur hall i.e. the disputed property if the same had been gifted to Nausherwanji Dastur by the original founder S.R. Patel, when the reference is made to the gift deed of 1843 and Will of 1852 extracts are quoted therefrom.

16. As far as the burden of proof is concerned Mr. Presswalla relied on the decision of the Supreme Court in the case of the The Bihar State Board Religious Trust, Patna Vs. Mahant Sri Biseshwar Das, . In that case the question was whether the temple and the property in suit were the personal properties of the plaintiff or the Trust properties. It was found that the Mahants had been in possession and management of the asthal and the properties all through out and that the Mahants had acquired properties from time to time in their own names as proprietors and never in the name of Deities or asthal without any objection from any one and sold some of the properties. In that context the Supreme Court observed in para 10 of the Judgment as follows:

"Properties of the temple being thus admittedly in the possession of the Mahants ever since the time of Gaibi Ramdasji the onus of proof that the respondent-Mahant held them on trust for public purposes was clearly on the appellant-Board who alleged that it was so. The trial Judge was, therefore, clearly in error in holding that the respondent-Mahant ought to have produced the sanads and that on his failure to do so an adverse inference could be drawn, namely, that had they been produced they would have shown that the grants to Gaibi Ramdasji were for public purposes of a religious or charitable character see AIR 1938 195 (Privy Council) ."

17. In the present case it is not disputed that the portions of lands from the above city survey numbers were sold by the respondents' family previously right from the year 1949 and that those properties were in possession of the respondents all through out and were never shown as Trust properties either in the record of rights or in the record of the Charity Commissioner. Reliance was also placed by Mr. Presswalla on the decision of the Nagpur High Court in the case of Ganeshgir v. Fatehchand, reported in AIR 1935 Nag 114. There the question was whether a certain property found to be in possession of the person who occupied the office of Mahant of a Math could be presumed to belong to Math. Repelling the said contention and placing reliance on section 110 of the Evidence Act, it was held that when any person is shown to be in possession of any property the burden of proving that he is not owner is on the person who affirms that he is not the owner. The counsel for the respondents, therefore, rightly placed reliance on section 110 of the Evidence Act which is as follows:

"110. Burden of proof as to ownership.---When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

Under the said provision when the question is whether any person is owner of anything of which he is shown to be in possession the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

18. The Counsel for the respondents then contended that the question whether the property in dispute belongs to the respondents or the Trust is a question of fact which having been decided by the two forums below giving concurrent findings, cannot be disturbed or reopened in the present appeals which are construed to be second appeals to which the provisions of section 100 of C.P.C. are applicable under which this Court can entertain second appeal only in case a substantial question of law is involved. Counsel rightly contend that the Courts below had given concurrent finding on a question of fact. In this regard they placed reliance on the decision of the Supreme Court in the case of Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others, of the judgment the Supreme Court held that when the two courts below had concurred in holding that the deity was not a mere family deity in which the public had no interest and that the properties given to the deity constituted religious and charitable endowment of public nature, such finding was a finding of fact and not open to further scrutiny by the Supreme Court. The arguments that the legal inference drawn from the proved facts was erroneous and, therefore, a point of law arose was repelled by the Supreme Court observing that a mistaken inference from documents is no lesser a finding of fact if there is no misconstruction of the documents. Mrs. Shah relied on the observations of the Supreme Court in para 43 of the said judgment where it was observed that the trustee himself must not mix private property with the trust property and if he does so he undertakes a heavy burden of proving that any particular property is

his as distinguished from the trust. There cannot be dispute with regard to the aforesaid principle laid down by the Supreme Court. As observed earlier, the appellants have not been able to establish that the property sought to be sold by the respondents could be said to be part of the trust property. When the trust property was sold by Nausherwanji Dastur to Western India Club for a sum of Rs. 20,000/- to which reference is made in the Deed of 1884, 4% Government Promissory Notes for the said amount were purchased and kept separately as trust property. Neither the Deed of 1884 nor the record of the Charity Commissioner or the revenue records show that the Dastur hall in possession and occupation of the family of Nausherwanji Dastur for over a period of more than 150 years was any time treated, construed or dealt with or shown as the property of the Trust. The argument of Mrs. Shah, that Dastur hall was given for the residence of high priest to enable him to perform the rites in the Fire Temple and look after the trust property is based on belief and conjecture which has no foundation and, therefore, the argument that the said Dastur hall was gifted with a condition that it should be used for the residence of the priest of the Fire Temple is devoid of substance. Perusal of both the judgments of the Charity Commissioner and the District Court shows that lower authorities had tried to appreciate the evidence on the basis of the available record and thus the finding given by them is finding of facts and, therefore, does not call for interference in these Appeals as no substantial question of law is involved.

19. Mrs. Shah contended that the appellants have made one more application in the office of the Charity Commissioner u/s 22-A of the Act which is pending and, therefore, unless it is decided this appeal should be kept pending.

20. The said plea is made very belatedly and deserves to be rejected. The said plea should have been raised before the Charity Commissioner himself and not after the two Courts have given their findings. Moreover, the application made u/s 22-A before the Charity Commissioner also involves same question which was raised by the appellants in application u/s 41-E and in revision u/s 70-A of the Act. In fact the present proceeding was decided by the Joint Charity Commissioner, while the application u/s 22-A, even if it is held to be maintainable, requires an enquiry to be made by either the Deputy or Asst. Charity Commissioner who are subordinate to the Joint Charity Commissioner and whose order can be challenged before the Joint Charity Commissioner. When the present proceeding was decided by the higher authority i.e. Joint Charity Commissioner there is no question of keeping this matter pending till the decision of the Deputy Charity Commissioner is given on the application made u/s 22-A of the Act as in both the applications same grievance is made.

21. As stated earlier, though the preliminary objection was raised by Mr. Presswalla that unless and until substantial question of law is shown to have been raised in these appeals, they are liable to be dismissed at the outset. I had heard both the sides at length on the merits of the case. I do not find the findings of facts given by the two authorities below are perverse in any way. In

my opinion, the revenue records, the record of the Charity Commissioner, the Deed of 1884 relied on by the appellants themselves and the previous transactions of sale of lands from the said city survey Numbers having been made by the respondents and their ancestors right from the year 1949 without any opposition from any quarter, would not warrant any other finding.

22. Mr. Presswalla lastly stated that the present application is not made bona fide and the appellants had made this application mala fide with a view to harass the respondents. He relies on the admission of the appellant No. 2 in his cross-examination where he admitted that he had applied to Dastur School run and managed by the respondents which is undisputedly not a trust property, on 25-1-87 and 26-4-87 seeking permission for holding funfair in the premises of the school between 29th to 31st May 1987 but the same was refused on 27th April, 1987 by the respondents-trustees. According to the Counsel the present proceeding was instituted by the appellant u/s 41-E before the Charity Commissioner in May 1987 mala fide because of refusal of his above application by the respondents. Any way, in my view, that would not necessarily brand the present application as having been made mala fide though the refusal of that permission might have motivated the appellants to file the present proceedings. Whether the application was made bona fide or mala fide, after perusal of the evidence on record, it is clear that the appellants could not substantiate the allegations made in the applications filed before the Charity Commissioner and pursued right through, up to this Court.

23. For the aforesaid reasons I find the above appeals devoid of substance and, therefore, the same are dismissed. In the circumstances of the case, there shall be no order as to costs.

24. On the application of Mrs. Shah the injunction granted by this Court earlier shall continue upto 12th May, 2000.

25. Appeal dismissed.