

(1978) 10 BOM CK 0005

In the Bombay High Court

Case No : First Appeal No's. 309 and 642 of 1976 (with Civil Applications No's. 779 of 1977 and 995 of 1978)

Krishna A. Khasgiwale

APPELLANT

Vs

Sitaram L. Rathi and Others

RESPONDENT

Date of Decision : 05-10-1978

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 56B(1)

Citation : (1978) 10 BOM CK 0005

Hon'ble Judges : M.N. Chandurkar, J

Bench : Single Bench

Advocate : M.B. Chitre and Prafulla Patankar, for the Appellant; R.M. Agarwal and M.D. Gengakhedkar, for the Respondent

Judgement

M.N. Chandurkar, J.—Both theses appeals arise out of an order passed on 20th March, 1976 by the Second Joint Civil Judge. Senior Division, Poona, directing sale warrant and proclamation for sale of House No. 1111, Budhwar Peth, Poona to be issued in execution proceedings started by the decree-holder. Certain facts are required to be stated in order appreciate the contention raised on behalf of the present appellants.

2. The property in dispute which was originally numbered as city Survey No. 20-A and now numbered as 1111 at Budhwar Peth. Poona, admittedly belonged to one Sardar Harihar Khasgiwale who died on 4th February, 1946. He is said to have executed a will on 21st December, 1945 whereby he is said to have created a trust which is described as "Shrimant" Sardar Hariharrao Kashinathrao Khasgiwale Kuldaivatarchan Kulsansmaram and Dharmapravartan Trust." Admittedly after the death of Harihar Khasgiwale, his son Anant mortgaged five items of property including the house in dispute on 3rd June, 1946 to Laxminarayan Rathi, the original mortgagee and the father of respondent No. 1. On the basis of this mortgage. A suit came to be filed by the mortgagee being Special Civil Suit Nos. 4 of the 1951 in which the liability of the mortgagor was

determined on 31st August, 1951, at Rs. 40,000/- and a preliminary decree for sale of the property was passed. The sons of mortgagor Anant who was original defendant in the suit filed, First Appeal No. 109 of 1952 in this Court. In that appeal the original mortgagor, his wife Indirabai and one son of his by name Kashinath were added as respondents. That appeal was partly allowed and the liability was determined at Rs. 23,488/- and the decree-holder was held entitled to interest at 4 per cent per annum from 31st August, 1951 on Rs. 11,744/-. A final decree for sale of the property was passed on 31st August, 1960. It is said that the public trust was registered on 3rd November, 1958. i.e. after the preliminary decree for sale was made by this Court in First Appeal No. 109 of 1952. Darkhast proceedings were taken by the decree-holder by filling a Darkhast on 31st January, 1969 and these appeals arise out of the orders passed in these Darkhast proceedings.

3. Three of the sons of the original mortgagor Anant along with one Nandkumar Krishnarao Navgire claiming to be representing the public trust filed a suit on 20th of August, 1971 in the Court of the Civil Judge, Junior Division, Poona, in which the relief sought was that the defendants, i.e. the heirs of the original creditor Laxminarayan, should be restrained from putting the house in dispute to sale in Special Darkhast No. 17 of 1969. Anant had by that time died and his heirs, the widow and four of his other sons were also joined as the defendants. It is to be noted that though the suit originally purported to be one for the declaration also, that part of the claim was amended and there is no prayer asking for a declaration that the house property in question is the property belonging to the public trust. In this suit an injunction was asked for in respect of the sale proceedings. A temporary injunction was granted on 19th February, 1973 till the interim application for stay of execution proceedings was decided on merits. Admittedly this injunction was vacated on 25th March, 1974 by the Court accepting the argument of the decree-holder that as a result of the temporary injunction, execution of the decree passed by the High Court had been stayed. The plaintiffs in that suit do not seem to have challenged this order by taking any further proceedings.

4. The executing Court thereafter proceeded with the proceedings in execution. However, in the execution proceedings an application came to be made on behalf of the trust purporting to be an application by a third party alleging that House No. 1111 was the property of the public trust. This application rejected by the executing Court. One more circumstance which has to be referred to is that a similar objection was taken by the judgment-debtors on which a considered order came to be passed by the executing Court on 9th February, 1973. One of the issues which the executing Court was called upon to decide by that order was : "Whether J.D. prove that the property mortgaged is a trust property and that it is not liable to be sold in execution of decree under execution?" "While dealing with this issues, the trial Court found that the judgment-debtors had not filed any documents to show that the property which was mortgaged is the trust property and they have not produced any sanad or trust-deed under which the

alleged trust was created to show that the property is owned by a private trust." In the absence of any such evidence, the Court held that the judgment-debtors had failed to prove the issue. It is now stated that the reference to private trust was erroneous and it was nobody's case that the property was private trust property.

5. It was stated at the Bar by Mr. Chitre that certain proceedings for probate were taken by one of the trustees in Probate Application No. 130 of 1944 which was opposed by Anant and though earlier the probate was rejected, an appeal filed against the order of rejection of probate was allowed on 26th March, 1953. There is nothing, however, on the record of the execution proceedings from which this could be verified. The objections to execution having now been rejected and the property having been directed to be sold. Appeal No. 309 of 1976 has been filed by Shrikrishna Anant Khasgiwale in his capacity as a trustee of the trust. The other Appeal No. 642 of 1976 has been filed by the other heirs of Anant Khasgiwale and the common question which is argued in both these appeals is that the property, being public trust property, it was not liable to be sold in execution of the decree for sale. In this Court along with the appeals an application has been made praying that a notice u/s 56-B of the Bombay Public Trusts Act be given to the Charity Commissioner. Another application has been filed under Order 41, Rule 27 of the CPC seeking permission to produce certain documents in order to prove that the property is public trust property. No documents, are however, filed along with the application.

6. Mr. Chitre appearing on behalf of the appellants in both these appeals initially wanted to contend that the executing Court should have first directed sale of the other property and only if the decree-holder's amount due was not recovered from the sale of the other property, the house in dispute could have been sold. I have declined to entertain this contention at this stage, because such a contention does not arise out of the orders which are impugned in both these appeals.

7. The other contention which is raised is that unless the Charity Commissioner is made a party to these proceedings, these appeals should not be decided and in any case the property sought to be put to sale should be adjudicated as the property belonging to a public trust. On hearing Mr. Chitre and Mr. Agrawal, I find that there are several hurdles in the way of Mr. Chitre and it is not possible to grant any relief to the appellants in any one of these two appeals. The question as to whether the suit property is the property of a public trust or not, is already being agitated by the public trust in Civil Suit No. 974 of 1972. Notwithstanding that no prayer for declaration has been made, before the plaintiffs in that suit can claim an injunction, they are bound to prove that the property in question is trust property. Since the question is directly before a Civil Court at the instance of the plaintiffs, it will not be proper to decide this question at this stage in an appeal for the first time without any material at all being available on record. The second hurdle is that a similar objection has already been taken before the

executing Court and that objection has come to be decided as far back as on 9th February, 1973. The objectors had failed to establish that the suit property was a public trust property. If that question was already decided by the executing Court, the executing Court could not go into the matter for the second time and no error can, therefore, be found in the order of the executing Court when it decided to proceed further with the execution proceedings.

8. The contention based on section 56-B of the Bombay Public Trust Act, is also without substance. Section 56-B(1) of the said Act reads as follows :

"In any suit or legal proceedings in which any question affecting a public religious or charitable purpose is involved, the Court shall not proceed to determine such question until after notice has been given to the Charity Commissioner."

These provisions, therefore, indicate that notice to the Charity Commissioner is necessary only when the question raised affects a public religious or charitable purpose. When a property which is claimed to be a property belonging to a public trust is being sold in execution proceedings by a competent Court the question cannot be said to affect a charitable purpose.

9. In *Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel*, , it was observed in paragraph 3 of the judgment :

"A suit to enforce a mortgage or a proceeding to enforce a mortgage decree against property belonging to a public trust is not a suit or proceeding in which a question affecting a public, religious or charitable purpose is involved."

In view of these observations, section 56-B of the Bombay Public Trust Act was clearly not attracted. In the view which I have taken, there is no substance in these appeals and both the appeals are dismissed with costs.

10. So far as the application for issue of notice to the Charity Commissioner is concerned, this Court had positively directed by an order of 7th April, 1977 that the application will be considered at the time of hearing of the appeal. A notice has come to be issued by the office in view of certain observations made by Mr. Justice Vaidya referring to a reported decision in the *Charity Commissioner, Bombay v. The Municipality of Taloda* 65 Bom.L.R. 27. It is necessary to point out to the office that where a positive order was passed by this Court that the application itself will be considered at the time of hearing that order could not be overridden by any observations in any other decision. The office should, not, therefore, have issued a notice on its own in complete disregard of the order dated 7th April, 1977. The Charity Commissioner is discharged from these proceedings.

11. So far as the application for producing additional evidence is concerned, even the documents which are sought to be produced are not available for perusal and in any case in the view which I have taken, I do not consider that their production is called for to enable to decide the two appeals. That application is also dismissed.

12. However, there will be no order as to costs in these applications.