

(1987) 09 BOM CK 0069

In the Bombay High Court

Case No : Civil Revision Application No. 515 of 1987

Leelavati Pingle and Another

APPELLANT

Vs

Dattatraya Dhondiraji Kavishar and Others

RESPONDENT

Date of Decision : 22-09-1987

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 50

Citation : (1988) 2 BomCR 429

Hon'ble Judges : B.G. Deo, J

Bench : Single Bench

Advocate : A.V. Mohta, for the Appellant; A.V. Bhide, for non-applicant No. 2, for the Respondent

Judgement

B.G. Deo, J.—This revision is directed against the rejection of the preliminary objection made by order dated 13-4-1987 by the learned Civil Judge, Junior Division, Chikhli, in Regular Civil Suit No. 60 of 1987. The preliminary objection to the tenability of the suit made by application (Exhibit 19) by the applicants was on the ground that since it appears that the plaintiffs are trustees of a Registered Public Trust "Wakratund Maharaji Kavishwar Smarak" and have claimed possession of a portion of Survey No. 53/2 on the ground that the defendants have encroached upon the same, it is exclusively within the jurisdiction of the authorities contemplated under the Bombay Public Trusts Act, 1950 (hereinafter referred to as the Act) as to whether any property belongs to Public Trust or not u/s 79(1) of the Act and that, therefore, the suit should be dismissed.

2. It appears that while arguing before the learned Civil Judge, Junior Division, Chikhli, it was contended by the applicants that since no permission of the Charity Commissioner, as provided u/s 50 of the Act, was obtained for filing such a suit, the suit was not tenable. The learned Civil Judge came to the conclusion that as the instant suit is by the trustees of a Public Trust of a religious and charitable nature for possession of the property of the trust against a trespasser,

the subject matter of the suit is not governed either by section 92 of the CPC or section 50 of the Act and that, therefore, the consent of Charity Commissioner was not necessary.

3. The certified copy (Exhibit 28) of the registration of the Trust does not contain an entry relating to Survey No. 53/2. The learned trial Court observed that it cannot be considered that the suit land, forming part of Survey No. 53/2, is not property of a public trust, particularly when the gifts in respect of the property are in the name of the plaintiff-Trust by registered documents and as mutation has also been made in the revenue records in respect of the same.

4. The five non-applicant plaintiffs claimed that they are owners of the Survey No. 53/2 admeasuring 50 Acres, inclusive of the alleged encroached land of 1800 sq.ft. by virtue of two gift deeds dated 13-4-1978 and 26-8-1986, relating to two portions of Survey No. 53/2, executed by the original owner Natthulal. There is a temple of Lord Datta, a Dharamshala and other constructions on the said land. Obviously, the plaintiffs are trustees of the Public Trust". "Wakratund Maharaji Kavishwar Smarak" and are claiming possession of the encroached portion from the defendants on the basis of their title. The defendants have set up their own title to the property and are, therefore, claiming adversely to the non-applicant plaintiffs.

5. A suit by trustees for possession of a trust property against a trespasser, it was contended by the learned Counsel for the applicants, Shri Mohta, is governed by section 50 of the Act and that, therefore, such a suit was not tenable except with the permission of the Charity Commissioner and that too in the Court of the District Judge. There appears to be no doubt that such a suit would fall within the ambit of section 50 of the Act. The relevant portion of section 50 is as under:

"50. In any case,----

(i) x x x x x

(ii) Where a direction or decree is required to recover the possession of or to follow a property belonging or alleged to be belonging to a public trust..... from a trustee, ex-trustee, alienee, trespasser or and person including a person holding adversely to the public trust but not a tenant or licensee.

(iii) x x x x x

(iv) x x x x x

the Charity Commissioner after making such enquiry as he thinks necessary, or two or more persons having an interest in case the suit is under sub-clause (i) to (iii) or one or more such persons in case the suit is under sub-clause (iv) having obtained the consent in writing of the Charity Commissioner as provided in section 51 may institute a suit whether contentions or not in the Court within the

local limits of whose jurisdiction the whole or part of the subject-matter of the trust is situate, to obtain a decree for any of the following reliefs :---

(a) an order for the recovery of the possession of such property or proceeds thereof;

(b) x x x x x to

(q) x x x x x

The plaintiff have sued for a decree for possession of the trust property from the defendant-applicants trespasser claiming adversely to the public trust. The requirements of section 50(ii) are, therefore, satisfied in the instant case. In such a case, as provided by the section, the Charity Commissioner himself, after making an enquiry as he thinks necessary, or with the consent of the Charity Commissioner, two or more persons having an interest", as the suit is u/s 50(iii), may institute a suit in the Court i.e District Court, as defined in section 2(4) of the Act.

6. At one time, there was a controversy whether trustees are included in the expression "person having interest" as defined in section 2(10) of the Act. The controversy has now been settled by the Supreme Court in the case reported in 1986 Mh.L.J. 809 Shree Gollaleshwar Dev and others v. Gangawwa Kom Shantavva Math and others. The expression "person having interest", as defined in section 2(10) of the Act as per the aforesaid decision, includes "trustees" and that, therefore, a suit by two or more trustees in the name of idol to recover possession of property against person holding adversely is not excluded from section 50(ii) of the Act. Their Lordships have further set at rest the controversy as regards the scope of section 50 of the Act. In paragraph 14 Their Lordship observed :

"It is clear from these provision that section 50 of the Act created and regulated a right to institute a suit by the Charity Commissioner or by two or more persons interested in the trust, in the form of supplementary statutory provisions without defeasance of right of the manager or a trustees or a shebait of an idol to bring a suit in the name of idol to recover the property of the trust in the usual way. There is therefore no reason why the two or more persons interested in the trust should be deprived of the right to bring a suit as contemplated by section 50(ii) (a) of the Act."

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There is, therefore, no doubt that the present suit, having satisfied all the conditions, would therefore, be competent in the Court of a District Judge u/s 50 of the Act. It is a suit by five plaintiffs who are trustees of a registered public trust. They claimed that the suit land Survey No. 53/2 admeasuring 50 Acres is owned by the Public Trust. They contend that a portion of the same has been encroached upon by the defendants. The defendants have set up their own title and are claiming adversely to the public trust. The plaintiffs being trustees, have

no doubt interest in the public trust and they are, therefore, entitled to file a suit u/s 50 of the Act but only after obtaining permission of the Charity Commissioner.

7. The present suit, however, has not been filed u/s 50 of the Act. It is a suit, in the regular jurisdiction of the Civil Judge, Junior Division, Chikhli, by the owner i.e. plaintiffs who are trustees of a public trust for possession of an encroached portion of the suit land against the trespasser i.e. defendant-applicants. The question, therefore, is whether in view of the provisions of the Act, such a suit is barred. In this connection, two provisions of the Act may be noticed. Section 3(i) of the Act is as under :

"31. (i) No suit to enforce a right on behalf of a public trust which has not been registered under this Act shall be heard or decided in any Court."

The words "in any Court" were substituted for the words "in any Court" by section 16 of the Maharashtra Act 20 of 1971. The difference brought about by the amendment is worth notice. Formerly, no suit to enforce a right on behalf of a public trust which was not been registered could be heard or decided "in any Court" i.e. in the District Court. Now such a suit cannot be heard and decided "in any Court" meaning any Court having jurisdiction.

8. There is no doubt that the public trust is a registered one and the plaintiffs are trustees thereof. Section 31(i), therefore, does not bar a suit of such a nature from being filed in the Court having jurisdiction to decide the same.

9. The second provision, which needs to be considered, is contained in section 80 of the Act. Section 80 runs as under :

"80. 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 this Act, and in respect of which the decision or order of such officer or authority has been made final and conclusive."

A plain reading of the section would show that what is barred is the jurisdiction to "decide or deal with any question" which, under this Act, has to be decided or dealt with by any officer or authority, whose decision has been made final and conclusive. Section 79(i) of the Act provides as under:

"79. (i) Any question, whether or not a trust exists and such trust is a public trust or particular property is the property of such trust, shall be decided by the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal as provided by this Act."

What is therefore barred is a question as to whether a trust exists, whether such a trust is a public trust or whether particular property is the property of such trust. These are questions which any Court has no jurisdiction to decide. These questions have to be decided by the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal as provided by the Act. What is significant to be considered is that a suit is not barred, but only the questions of the

aforesaid type involved in a suit are barred from the jurisdiction of the Court. When in a suit such question do arise, they have first to be referred and decided by the authority contemplated u/s 79(i) of the Act and not by the Court. Having obtained such a decision from the competent authority u/s 79(i), the suit can proceed. The bar u/s 80 of the Act provides only for this much and nothing more.

10. Having considered the provisions of the Act and the bar contained therein, it is well high clear that when trustees of a public trust, as owners of the public trust, as the property of the trust vests in them, want to use a trespasser, two courses are left open to the trustees, as they are undoubtedly, as has been held by the Supreme Court in the case reported in 1986 Mh.L.J. 809 (supra), included in the expression "person having interest" as defined in section 2(10) of the Act. In the first place, they can move the Charity Commissioner who can himself file such a suit before the Court, as defined in section 2(4) i.e. a Court which, u/s 2(4), means in the Greater Bombay, the City Civil Court and elsewhere, the District Court. The Charity Commissioner can also give a consent in writing to the persons having interest i.e. the trustees or two or more any other persons who are having an interest to file such a suit in the Court i.e. before the District Judge having jurisdiction to decide the subject-matter of the suit.

11. The other course is that the trustees, without moving the Charity Commissioner, as owners of the property, can, like an ordinary owner, file a suit against a trespasser in the ordinary Court having original civil jurisdiction over the subject-matter of the suit. The present suit is of such a type filed before the Civil Judge, Junior Division, Chikhli. In the case reported in 1986 Mh.L.J.773 Vidarbha Kashtriya Mali Shikshan Sanstha v. Mahatma Fulley Shikshan Samiti, Amravati, Justice Dhabe of this Court, having considered up-to-date case law on this point and also having referred to the case reported in AIR 1986 Sc 221 Shri Golaleshwar Dev v. Gangawwa Kom, has held as follows :

"Section 50 of the Bombay Public Trusts Act does not contemplate a suit which is to be filed by a person for enforcing his own right. In such a case the suit by a public Trust for enforcing its civil rights is not barred by section 50 of the Bombay Public Trust Act. Such a suit has to be filed in the ordinary from under the CPC and is not required to be instituted in the Court as defined in section 2(4) of the Bombay Public Trusts Act. The expression "Court" as defined in section 2(4) only deals with suits which are filed under the provisions of the Bombay Public Trusts Act and has no applicability to suits other than those prescribed thereunder. Suit is not barred by the first proviso to section 50 of the Act because in its contextual interpretation and read in the light of the substantive provision can only bar a suit which is contemplated by the substantive provision."

Justice Dhabe further held :

"However the question to be considered is whether it is necessary for a person who is enforcing his civil rights to obtain permission of the Charity Commissioner before filing the suit. Examining section 50 of the Act, it would be clear that in

regard to any of the matters provided in the said section, the Charity Commissioner or any two or more person having interest, with the permission of the Charity Commissioner, can file a suit whether contentions or not in the Court within the local limits of whose jurisdiction the whole or part of the subject matter of the trust is situate. The expression "Court" is defined in section 2(4) of the Act, according to which it means in the Greater Bombay, the City Civil Court and elsewhere, the District Court. The expression "person having interest" is also defined in section 2(10) of the Act. It is worthwhile to notice that the application of section 92 of the CPC (for short the Code) to suits relating to the public trusts is barred to section 52(i) of the Act."

12. That a suit against a trespasser by trustees, as owners of the trust property, can be filed in the ordinary form under the CPC and it is not necessary to take recourse to section 50 of the Act and obtain permission of the Charity Commissioner for instituting the same, has already been decided by this Court. The only difference that is made by the decision of the Supreme Court in the case reported in 1986 Mh.L.J. 809. *Shri Gollaleshwar Dev and other v. Gangawwa Kom Shantavva Math and others*, is that a suit by two or more trustees of a public trust in the name of the idol to recover possession of its property against the person holding it adversely to the trust is not excluded from the purview of section 50 (ii) of the Act. Reading the two decision together it is well nigh clear that a suit by two or more trustees to recover possession of the property of the trust against persons holding adversely i.e. against trespassers being not excluded by section 50 (ii) of the Act, such a suit can be filed u/s 50 of the Act before the District Judge having jurisdiction and also such a suit can be filed by the trustees in their rights as owners of the same for enforcement of that right in the ordinary civil jurisdiction under the CPC for the latter suit, permission of the Charity Commissioner is not required.

13. A division Bench of the Court, consisting of Hon''ble Mr. S.P. Kotwal, the then Chief Justice and Mr. Justice Bal, in the case reported in *Rajgopal Raghunathdas Somani Vs. Ramchandra Hajarimal Jhavar*, , has held that section 50 of the Bombay Public Trusts Act, 1950, is not restrictive but cumulative in its effect. It only enables persons having an interest to sue and does not prohibit any suits being filed by trustees or public trusts. The trustee who is in the position of a legal owner of property can sue to recover the property from persons who are without any right, title or interest in themselves, without obtaining any previous sanction of the Charity Commissioner. Thus, section 50 of the Act provides for a further protection for preserving the property of the public trust. This provision is of a protective nature and is not derogatory to the civil rights of and recourse to a Civil Court of ordinary jurisdiction. This can be gathered from the observations of the Supreme Court in *Shri Gollaleshwar Dev's* case (supra). The statutory provisions of section 50 of the Act, as has been held by the Supreme Court in *Shri Gollaleshwar Dev's* case, are without defeasance of the right of the manager or a trustee or a shabait of an idol to bring a suit in the name of idol to recover the property of the trust in the usual way.

14. This position which therefore emerges is that a suit by trustees for possession of the trust property against a trespasser can be filed in the usual way in the Court of ordinary civil jurisdiction or can be also be filed with permission of the Charity Commissioner u/s 50 of the Act in the Court of the District Judge. Which course, out of the aforesaid courses, is to be taken depends on the facts and circumstances of each case. In no case, can section 50 be considered as a bar to the tenability of such a suit.

15. As has already been observed, if questions which require decision u/s 79(1) of the Act as to whether a particular property belongs to the public trust or whether a public trust exists or not in a suit and particularly in the instant suit, after the written statement has been filed, the same can be referred and decided by the competent authority under the Public Trusts Act and till then the suit can be stayed and thereafter decided having regard to the said decision. Such a provision cannot bar institution or decision of the suit as a whole.

16. The order of rejection passed by the learned Civil Judge, Junior Division, Chikhli, rejecting the preliminary objection as regards tenability of the suit u/s 50 of the Act and in view of the provision of section 79(ii) of the Act does not, therefore, call for any interference.

17. In the result, the revision application, therefore, is hereby dismissed. In the circumstances of the case, there shall be no order as to costs.