**(2014) 10 BOM CK 0143**

**In the Bombay High Court**

**Case No :** Misc. Civil Application [Review] No. 661 of 2014 (Arising out of Civil Revision Application No. 1242 of 1998)

Marwadi Samshan Hanuman Mandir APPELLANT

Vs

Lakhanlal and Others RESPONDENT

**Date of Decision :** 14-10-2014

**Acts Referred:**

Bombay Public Trusts Act, 1950 — Section 2(10), 2(10)(e), 50, 51, 72
Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 41, 42, 43, 44, 45
Civil Procedure Code, 1908 (CPC) — Order 10 Rule 10, Order 7 Rule 11, 9 (A), 92

**Citation :** (2014) 10 BOM CK 0143

**Hon'ble Judges :** A.B. Chaudhari, J

**Bench :** Single Bench

**Advocate :** R.L. Khapre and S.R. Deshpande, Advocates for the Appellant; M.D. Zoting, Advocates for the Respondent

## Judgement

A.B. Chaudhari, J.—This is an application for review of Judgment and Order dated 8th February, 2006 passed by learned Single Judge of this Court in Civil Revision Application No. 1242 of 1998, by which the Civil Revision Application No. 1242 of 1998 was allowed and the application under Section 9A, Civil Procedure Code, for dismissal of Regular Civil No. 5 of 1998 filed by the Review Applicant, was allowed and consequently the said Civil Suit was dismissed.

FACTS :

2. Review Applicant, Marwadi Smashan Hanuman Mandir [hereinafter referred to as Plaintiff] filed a suit, namely Regular Civil Suit No. 5 of 1998 in the Court of Civil Judge [Junior Division], Akot, against the Non-applicants [hereafter referred as defendants], for declaration and permanent injunction. Plaintiff averred in the suit that the suit land Survey No. 19/1 of Kasbe Akot, Tq. Akot, Distt. Akola, total 3 hectares 4 R is owned by the plaintiff-Trust. In Enquiry Case No. 323 of 1993, Asstt. Charity Commissioner, Akola, had by order framed a Scheme upon

 

registration of the Plaintiff as a Public Trust, which order was confirmed in appeal by the Joint Charity Commissioner, Nagpur. The suit land finds place in the Record of Right, 7/12 extracts and the map filed with the plaint and also the public record and in the Scheme that was framed. Smt. Rukhminibai, the widow of Narayan Khandole, the son of Dhanaji, was shown as a tenant in the 7/12 Extracts. Claiming to be the tenant, Smt. Rukhminibai applied for fixation of purchase price under Section 49-A of the Bombay Tenancy & Agricultural Lands [Vidarbha Region] Act, 1958. Tenancy Tahsildar held in her favour. But the Sub-Divisional Officer in appeal decided on 28th September, 1990 held that Rukhminibai could not purchase the land and the reason was that it fell within the Municipal limits of Akot Municipal Council where the Tenancy Act did not have any application. In Revision, Maharashtra Revenue Tribunal confirmed the appellate order of Sub-Divisional Officer on 29th January, 1996. Writ Petition No. 2130 of 1994 filed by Rukhminibai was pending in the High Court. It was ultimately dismissed on 16th September, 2000 confirming the appellate order of Sub-Divisional Officer].

Plaintiff further averred that on 30th April, 1990, Rukhminibai on her own sold 2.41 hectares of land by sale-deed to the defendants. She had no title and was also found to be not a tenant. Even assuming she is treated as a tenant, permission of the Collector under Section 57 of the Tenancy Act was required for any such sale, which was not obtained. Finally, therefore, the plaintiff claimed relief of declaration that none of the respondents have any right to transfer and execute sale-deed or create any interest in the suit property and permanent injunction restraining the non-applicants-defendants from further transferring, alienating or creating any rights.

3. Defendants filed Written Statement and raised a plea in para 8 thereof that permission under Section 51 of the Bombay Public Trusts Act was not obtained by the plaintiff for filing the suit and in the absence thereof, the suit could not have been filed before Civil Court and such a suit, as per the provisions of Sections 50 and 51 of the Bombay Public Trusts Act, was not maintainable and at any rate, the suit was barred under Section 80 of the Bombay Public Trusts Act.

4. A separate application [Exh. 14] was filed by the defendants on 22nd January, 1990, purported to be under Section 9A, Civil Procedure Code, stating therein that the suit was filed for declaration and permanent injunction which falls under Section 50 of the Bombay Public Trusts Act and is not tenable without previous permission of the Charity Commissioner. It was also stated that Section 80 creates a bar on jurisdiction of Civil Court and, therefore, suit should be dismissed. The said application [Exh. 14], which was as vague as it could be, was replied accordingly. The Trial Judge then made an order which reads:-

Here plaintiff is suing for its right a to certain property and the present suit is having no concern with the said plaintiff-Trust. Section 50, Bombay Public Trusts Act, has no application to such dispute. Hence this application is rejected.

 

The said order of rejection was put to challenge in Civil Revision Application No. 1242 of 1998 that was filed on 2nd December, 1998 through Adv. Mr. C.S. Kaptan in this Court. This Court had issued notice before admission on 14th December, 1998 and thereafter on 12th January, 1999, Rule was issued asking the parties to maintain status quo in respect of suit property during pendency of said Civil Revision Application. Civil Revision Application was finally heard and was allowed as stated earlier. The present Review Application was filed in this Court by the plaintiff on various grounds and objections taken in the Review Application.

5. In support of the Review Application, learned counsel for the plaintiff, assailing the Judgment and Order under review, made the following submissions:-

[a] That, the judgment under review made by this Court shows mistakes and mistakes, errors and errors, which are apparent on the face of record, if carefully perused with record of the case.

[b] Apart from the above errors which have occurred, there are serious errors also in the matter of legal position about permission contemplated by Sections 50 and 51, bar of Section 80 of Bombay Public Trusts Act, consistently laid down by this Court in various earlier judgments of Division Benches as well as learned Single Judges of this Court, that no such permission is at all necessary.

[c] There is a reference to the Judgment in the Case of Church of North India alone in the judgment under review which is wholly irrelevant in the matter, while the consistent law laid down by this Court in the matter which is the only relevant law and ought to have been followed by obeying the doctrine of stare decisis has not been followed in the judgment under review. That is a clear error apparent on the face of record.

[d] Learned Adv. Mr. Khapre, appearing for the applicant, who is appellant in Second Appeal No. 407 of 2009, referred to several decisions of this Court delivered by Single Judges and Division Benches, and submitted that the consistent view taken by this Court for the last several years has not been applied in the instant case by the learned Single Judge while delivering the judgment under review. On the contrary, the Judgment in the case of Church of North India has wrongly been applied, which was of no relevance at all.

[e] Mr. Khapre then took me through the entire record and the plaint averments and submitted that as per the settled law, it is only the plaint which was required to be read carefully in entirety. But, that was not done and it was read superficially, resulting into several errors in the impugned judgment.

[f] Learned counsel then contended that this Court is under a duty to exercise the power of review, since the judgment under review is without any factual and legal foundation, resulting into miscarriage of justice to the Applicant-Trust.

[g] He invited my attention to the averments in the plaint that the Public Trust was registered, suit property was also reflected in the record of Rights and 7/12

 

Extracts and that a scheme was framed by the Charity Commissioner. The property was clearly shown in the revenue record as a Trust property upon the scheme being framed by the Charity Commissioner and, therefore, the suggestion in the judgment under review that the declaration of ownership of the suit property was essential is wholly misplaced. He submitted that the history about tenancy litigation between Rukhminibai and the plaintiff-Trust was narrated in the plaint which clearly indicated that even according to Rukhminibai, plaintiff was the owner of the suit property and that is why she had instituted the proceedings for fixation of purchase price under Section 49-A of the Tenancy Act. These were material averments which were ignored.

[h] He then submitted that Rukhminibai, claiming to be the tenant, unauthorizedly and illegally and without any right or saleable interest in her, effected sale-deed in favour of the defendants and all that was clearly mentioned in the plaint, but was not read. The defendants, who had purchased the suit property from Rukhminibai, were rank trespassers and no permission from Charity Commissioner as such was required for filing the suit. He then submitted that Section 79 of the Bombay Public Trusts Act has, even remotely, no application, but was pressed into service in the judgment under review. There was no question anywhere as to whether the suit property was a Trust property or not, since in the year 1993 itself, the property was declared as a Trust property along with the scheme that was framed. Mr. Khapre relied on the following decisions and submitted that the Trust could not recover the possession from the trespassers and suffered for all these years:-

[1] Shri Samarth Seva Mandal and Others Vs. Shri Ramdas Swami Sansthan and Others, ,

[2] C. Natrajan Vs. Ashim Bai and Another, ,

[3] Surayya Afzal Khan Vs. Raza Shah Fakir Takiya and Masjid Trust and Others, ,

[4] Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others, ,

[5] Gafoor Ali Hussain through legal heirs Vs. Ram Mahadik and others, ,

[6] Amirchand Tulsiram Gupta and Others Vs. Vasant Dhanaji Patil and Others, , and

[7] Bishwanath and Another Vs. Shri Thakur Radhaballabhji and Others, .

6. None appeared for the respondents.

7. In view of the old nature of litigation, the present Review Application was taken up for final disposal in the presence of Mr. M.D. Zoting, learned Adv., for the respondents, who waived service on 8th May, 2014. Accordingly, the matter was listed for admission on 5th August, 2014, but none remained present for the respondents and, therefore, the matter was posted for final disposal on 6th August, 2014. On 6th August, 2014, the matter was called out, but none

 

appeared for the respondents, though counsel for the review applicant was heard and the counsel for the review applicant was asked to inform Mr. M.D. Zoting to attend the court for hearing on the next date. On the next date, i.e., 8th August, 2014, counsel for the Review Applicant again appeared and argued, but counsel for the non-applicant did not appear. Thus, after finally hearing the counsel for the applicant, this Court completed the hearing on 8th August, 2014.

CONSIDERATION :

8. It would be very much necessary to examine the correctness of the submissions made by Mr. Khapre to find out whether there are mistakes and mistakes and errors and errors apparent on the face of record as contended by him. The principles required to be followed under the review jurisdiction have been kept in mind and it is only thereafter I proceed to examine the present matter.

9. Keeping in mind the said principles about the review jurisdiction, I proceed to do so.

10. I have perused the plaint. I quote the following paragraphs from the plaint, which are relevant for the decision:-

1. The dispute in this suit relates to land survey no. 19/1 of Kasbe Akot, Tq. Akot, Distt. Akola measuring 2 H 47 AR & 57 AR total 3 H 4 AR.

2. The said land is owned by plaintiff Trust regarding which a scheme has been framed in Enquiry Case No. 323/93 by Asstt. Charity Commissioner, Akola Region, Akola.............................. The title of the plaintiff has been reflected in Record of Right and 7/12 extracts in respect of area which is reflected in the map filed with this plaint, measuring H. 0-57 R.

3. The balance of land was claimed as held by one Rukhmanibai wd/o Narayan Khandole claiming to be legal heir of deceased Narayan Khandole who was son of Dhanaji, shown as tenant in 7/12 extracts. The land is owned by Trust which is a religious Charitable Trust and hence the balance of land (H. 2.47 R) out of suit field could not be purchased by any tenant of the land under the Provisions of Sec. 41 to 49-A of Bombay Tenancy & Agri. Lands Act, 1958 as the land is exempt under the provisions of Sec. 129-B of B.T. & A.L. Act, 1958. The question was agitated by Rukhmani herself by moving an application for fixation of purchase price in respect of suit field u/s. 49-A of Tenancy Act. The order passed by S.D.O., Akot, in Ten. Appeal No. TNC-107 Akot/4/89-90 decided on 28.9.90, it was held that the said land could not be purchased in tenancy rights by Rukhmani. She also challenged the order in revision before M.R.T., Nagpur Bench, Nagpur, in Revn. Appl. No. TNA/43/90 order dt. 29.1.96 and the revision was also dismissed by retaining the finding that the land could not be purchased by the applicants in the said revision. The defts. have not filed writ Petition before the Hon''ble High Court is pending.

4. In spite of all this legal situation and the findings of Competent Court and

 

without a right to purchase the land, Rukhmanibai executed a sale-deed of H. 2-41 R land by excluding 57 R land which was never in possession of Narayan or Dhanaji or their legal heirs as Hanuman Temple and cremation ground, well etc., are located therein shown by letters A B C G F D A in the plaint map.

5. This sale-deed was made on 30.4.90 and the vendor has no title to execute the sale-deed. Therefore the defts have no title to H. 2-47 R. lands mentioned in the sale-deed and they still claim to have entered in possession on the basis of said sale-deed. They have also got such mutation recorded in their favour behind the back of the plaintiff and now on the basis of such mutation are offering to transfer the suit field to others. It is also learnt that they had moved the Irrigation Deptt. to purchase the land.

6. As Rukhaminabai had no title and was not entitled to purchase the suit land under Tenancy Right in view of the provision of B.T.A.L. Act, 1958, she could not pass any title to the defendants. At any rate, even if, Rukhminibai was assumed to be entitled to purchase it under Tenancy Right, she could not make any sale of the land so purchased under Tenancy Right without permission from Collector as required by Sec. 57 of the Tenancy Act......

7. The plaintiff, therefore, brings this suit for declaration that the defendants have no right to transfer or execute sale-deed or hand over possession of any portion of the suit field, at least without obtaining permission from the Collector and for permanent injunction restraining the defendants from transferring or executing sale deeds of any portion of the suit land or handing over possession of the same in any manner whatsoever to third person, at least without permission of Collector.

Para 8 of the plaint regarding cause of action reads thus:-

8. Cause of action for the suit arose when S.D.O., Akot passed the order on 17.11.97 and thereafter on 3.1.98 when the plaintiff learnt about the proposed sale at Akot, Tq. Akot, Distt. Akola, within the local limits of this Hon''ble Court.

Prayers [1] and [2] made in the plaint are as follows:-

1) Decree the suit against the defendants passing a declaration that the defts have no right or title to transfer or execute sale-deeds or handover possession of any portion of the suit field, at least without permission of Collector.

2) Decree permanent injunction restraining the defendants from transferring, executing the sale-deeds or handing over possession of any portion of suit field to third person, at least without permission from Collector.

Along with the plaint a List [Exh. 4] and four documents were filed therewith. The defendants filed the Written Statement and stated thus in Paras 8 and 9 :-

8. It is further submitted that the present suit is in respect of the trust property and the plaintiffs are claiming declaration and injunction claiming to be the owner of the land and thereby claiming injunction in respect of the trust property

 

for which the permission under section 51 of the B.P.T. Act will be necessary and the suit can be only filed before District Court after obtaining permission from charity Commissioner as per provisions of section 50 and 51 of the B.P.T. ACT.....

9. It is further submitted that as pr provisions of section 80 of the Bombay Public Trust Act the jurisdiction of the Civil Court is bared in respect of the matters of the Public Trust which are to be decided by the authorities under the B.P.T. Act and thus the matter is already pending in District Court Akola under section 72 of the B.P.T. Act filed by Rukhaminibai and as such the suit is not maintainable and hence the present application is liable to be rejected. The defendants have already moved application under section 9 (A) of C.P. Code in this suit and the said application be decided along with this application and hence this reply.

The application [Exh. 14] purported to be under Section 9A of the Civil Procedure Code was also filed by the defendants about which I have already made a reference.

11. Upon perusal of the Judgment under review in entirety, to my mind, it is absolutely clear that the plaint, which is required to be carefully read and understood, was not read. The details about the same are given hereafter.

12. In para 2 of the Judgment under review, it is stated thus:-

... As is the usual erroneous practice in such matters, the respondent has filed the suit in the name of the Trust i.e. Marwadi Samshan Hanuman Mandir, Akot through himself i.e., the Trustee, as if a Trust is an independent legal entity. The practice ignores the position in law that a Trust is an obligation annexed to a properties.

With reference to the aforesaid statement in para 2, the correct legal position was set out by the Apex Court in this behalf in the case of Shree Gollaleshwar Dev and Others Vs. Gangawwa Kom Shantayya Math and Others, . The legal position set out in the case of Shree Gollaleshwar Dev [cited supra] was followed by Single Judges of this Court, so also the Division Benches. What was laid down in the case of Shree Gollaleshwar Dev was also stated by the Division Bench decision of this Court in the case of Amirchand Tulsiram Gupta and Others Vs. Vasant Dhanaji Patil and Others, . It is better to quote the following portion from paragraphs 6 and 7 from the case of Amirchand:-

6. The Bombay Public Trusts Act, 1950 was enacted to regulate and to make better provision for administration of public religious and charitable trusts in the State of Bombay. The plaintiffs are the trustees of a charitable trust registered under this Act. Section 50 of the Act deals with the topic "suits by or against or relating to public trusts or trustees or others", and inter alia provides that where a direction or decree is required to recover the possession of a property belonging to a public trust from a trustee, ex-trustee, alienee, trespasser or any other person, including a person holding adversely to the public trust, the Charity Commissioner may institute a suit in the Court within the local limits of whose

 

jurisdiction the subject matter of the Trust is situated. The section provides that apart from the Charity Commissioner two or more persons having the interest and having obtained consent in writing of the Charity Commissioner can institute the suit and seek reliefs which are set out in the section. Section 51 of the Act provides that if person having an interest in any public trust intends to file a suit of the nature specified in section 50, then such person shall apply to the Charity Commissioner in writing for his consent. The Charity Commissioner may grant or refuse consent depending upon the satisfaction of the existence of a prima facie case. The contesting defendants urged before the trial Judge that consent under sections 50 and 51 of the Public Trusts Act is a condition precedent for institution of the suit by the trustees for recovery of possession against the trespassers or a person claiming adversely to the interest of the trust and failure to obtain consent must result in dismissal of the suit. The contention was met by the plaintiffs by relying upon two decisions of this Court reported in Gurusiddappa Tipanna Mugeri Vs. Miraj Education Society, , and Rajgopal Raghunathdas Somani Vs. Ramchandra Hajarimal Jhavar, . The later decision is of a Division Bench and follows the earlier decision recorded by the Single Judge. The Division Bench held that the trustee is the legal owner of the trust property and enjoys all the rights inherent in a natural owner of a property and can sue to recover trust property, and section 50 cannot apply as a bar to the substantive rights of the trustee to institute suit. The Division Bench further held that the provisions of section 92 of the Code of Civil Procedure are analogous to the provisions of section 50 and the separate right of a trustee de hors the provisions of section 50 to file a suit for protection of trust properties cannot be disputed. The Division Bench there upon held that provisions of section 50 are not restrictive but cumulative and it only entitles a person having an interest to sue and does not prohibit any suit being field by trustees of a public trust. The Division Bench then observed :

"The trustee who is in the position of a legal owner of property can sue to recover the property from persons who are in occupation without any right, title or interest without obtaining any previous sanction from the Charity Commissioner".

The view consistently taken by this Court is also followed by the decision of the Gujarat High Court reported in Nadiad Nagarpalika, Nadiad Vs. Vithalbhai Zaverbhai Patel and Others, , and the Full Bench of the Mysore High Court in the case reported in Gollaleshwar Dev and Others Vs. Gangawa Kom Shantayya Math and Others, .

The learned trial Judge was bound by the decision of the Division Bench and should not have dismissed the suit on the ground that in absence of permission of the Charity Commissioner the suit was not maintainable. The learned Judge accepted the claim of defendants Nos. 5 to 7 that the decision of the Division Bench of this Court is no longer a good law in view of the amendment to section 50 as also to section 2(10) by Maharashtra Act No. 20 of 1971. Section 2(10)

 

Clause (e) provides that "person having interest" in the case of any public trust includes trustees or beneficiaries. Initially the word "trustees" did not find place but was inserted by Amendment Act of 1971. Section 50 initially provided that permission is necessary where the possession of the property of the public trust is sought to be recovered from any person, including a person holding adversely to the public trust. After amendment the section provides that where the property is to be recovered from a trustee, ex-trustee, alienee, trespasser or any other person, including a person holding adversely to the public trust but not a tenant or a licensee, consent is necessary. The learned Single Judge felt that the decisions recorded by the Single Judge and Division Bench of this Court as well as by the Gujarat High Court considered the provisions of section 50 prior to the amendment and therefore are not good law. It was concluded that the amendment demands that when a suit is instituted against a trespasser for recovery of the property belonging to the trust, consent of the Charity Commissioner in writing is obligatory.

Mr. Munshi, learned Counsel appearing for the appellants, complains that the view taken by the Single Judge is entirely unsustainable and we find considerable merit in the submission of the learned Counsel. We are unable to appreciate how the amendment will take away effect of the decision recorded by this Court and which has held field for several years. The inclusion of the word "trustee" in section 2(10)(e) makes no difference whatsoever, because the expression "person having interest" cannot leave out trustees even though the word "trustee" was not specifically included prior to the amendment. Shri Sathe, learned Counsel appearing for the contesting respondents, very fairly stated that it cannot even be suggested that the trustees could not have been treated as ''person having interest'' prior to the amendment. We are also unable to appreciate how the amendment to provisions of section 50 would make it obligatory for the trustees to obtain permission of the Charity Commissioner to institute suit for recovery of possession against the trespasser. The amended section makes no departure from the earlier section. The amendment section clearly provided for obtaining of consent to recover possession from a person including a person holding adversely to a public trust, and surely a trespasser holds the possession adversely to the public trust. The mere fact that expression "trespasser" was specifically used in the amended section makes no difference whatsoever to the ratio laid down by this Court and by Gujarat High Court and the Mysore High Court that section 50 is not a bar for the trustees to institute a suit in exercise of their common law rights. In our judgment, the finding of the learned Single Judge that the suit was not maintainable in the absence of the consent is entirely erroneous. The amendment carried out in 1971 does not alter the ratio laid own by the Division Bench of this Court.

7. It is necessary in this connection to refer to the decision in Shree Gollaleshwar Dev and Others Vs. Gangawwa Kom Shantayya Math and Others, . The Supreme Court held that section 50 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 the right of the manager or a trustee 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. In other words the Supreme Court accepted the view taken by the Division Bench of this Court that the right of a trustee to bring a suit in the usual way, that is in exercise of rights under the Common Law is not affected by provisions of section 50 of the Public Trusts Act. The ratio laid down by the Supreme Court was followed by a Single Judge of this Court in the decision reported in Vidarbha Kshatriya Mali Shikshan Sanstha Vs. Mahatma Fuley Shikshan Samiti, Amravati, , holding that trustees who want to enforce their civil rights are not covered by definition of the expression "person having interest" and are entitled to file suits without obtaining prior permission. The same view was taken by another Single Judge in the decision reported in 1988(2) Bombay Cases Reporter 429, (Leelavati w/o Vasantrao Pingle v. Dattraya D. Kavishar & ors.). The same view was taken by another Single Judge in an unreported decision dated September 13, 1990 delivered in Original Side Suit No. 958 of 1975 and the decision of the Single Judge was confirmed in Appeal No. 1315 of 1990 by the Division Bench by judgment dated March 14, 1991. The Division Bench specifically disapproved the view taken by the trial Court in the present case holding that the decision reported in Rajgopal Raghunathdas Somani Vs. Ramchandra Hajarimal Jhavar, , still holds field and section 50 does not prohibit a suit being filed by trustees to recover possession from a trespasser without obtaining prior permission. We are in respectful agreement with the view taken by the Division Bench and the learned Single Judges, and we entirely disagree with the finding of the trial Judge that the suit was not maintainable in absence of permission. The learned trial Judge was clearly in error in holding that after amendment of section 50 and section 2(10)(e) it is incumbent upon the trustees to obtain prior approval of the Charity Commissioner to institute suit against a trespasser for recovery of possession. As the finding of the trial Judge on this count is set aside, consequently the finding that the High Court had no jurisdiction to entertain the suit and the suit could be filed only in the City Civil Court after obtaining prior approval cannot stand.

It is, thus, held that the provision of Section 50 of the Bombay Public Trusts Act is not restrictive but cumulative and only entitles a person having an interest to sue and there is no prohibitory suit being filed by a Public Trust. In my opinion, the principles set out in the case of Shree Gollaleshwar Dev, as recited in the case of Amirchand were not at all kept in mind while delivering the judgment under review. Viewed in this context, the statement made in para 2 of the judgment under review sounds a mere gurgle and nothing more.

13. A look at para 3 of the Judgment under review shows almost the repeat of the above, having said that the suit was filed in the usual way as a Regular Civil Suit before the Civil Judge [Junior Division], Akot, in an expression of deprecation of practice of filing a suit even against the trespassers. I quote para 3 which states thus:-

 

3 ... Especially, the order suffers from a non-application of mind as it observes that the suit has no concern with the respondent-Trust. There is no reason given why and it is difficult to imagine any....

In the above context, I have perused the order dated 22nd June, 1998 that was passed by the Trial Judge. It says here plaintiff-Trust is suing for its right as to certain property and present suit is having no concern with the said plaintiff-Trust. What the Trial Judge wanted to say and meant is that the suit was filed by the plaintiff-Trust against the rank trespassers in its own right to recover its own property already declared to be owned by it as shown in the revenue record as well as Schedule-I of the Public Trusts Register and, therefore, it had no concern with the affairs or administration or the business or the activities of the Trust so as to attract any of the provisions of Sections 50 and 51 of the Bombay Public Trusts Act.

14. It is then seen that in para 10 of the Judgment under review, the following are the relevant observations:-

10 ... However, on reading the plaint as a whole and that is how it must be read, it is clear that in substance the basic assertion that the property belongs to the respondent and therefore the applicant cannot alienate it. Only if that question is decided in favour of the respondent that the declaration sought by them can be granted by the Court.

Perusal of the above paragraph shows that the plaint was said to have been read as a whole and that the Trust ought to ask for declaration which is a sine qua non for claiming property as its owner. However, reading of the entire plaint, so also the List [Exh. 4] and the documents with the List filed with the plaint clearly shows that in the Scheme Enquiry No. 323/94, Asstt. Charity Commissioner, Akola, had held enquiry and had already declared that the suit property is the property of the Trust and the title of the plaintiff-Trust is also reflected in the record of Right and 7/12 Extracts which were filed with the List [Exh. 4] with the plaint. In para 3 of the plaint, it was stated that Rukhminibai, the vendor of defendants, had filed the tenancy litigation claiming herself to be the tenant entitled to purchase the suit land under Section 49-A of the Tenancy Act and there was no stay order against the judgment and order made by Maharashtra Revenue Tribunal which had confirmed the ownership of the Plaintiff-Trust on the suit property and that, thus, the claim of Rukhminibai was found to be wrong and illegal. In paras 4 and 5 of the plaint, it was stated that though Rukhminibai had no title to the suit land as aforesaid, she illegally executed the sale-deed in favour of defendants who were not entitled to purchase the suit land. A close look at the prayers in the body of the plaint clearly shows that the plaintiff never claimed any declaration from the Civil Court in the suit that it was the owner of the Trust property. It could not and did not because the Charity Commissioner had already declared the suit property as property of the Trust in the scheme proceedings No. 323/94 which was the correct forum and not only that the revenue record and Record of Rights indicated so, so also the scheme and in particular Item No. 2 in para 2 of the of the Scheme in its format under the Bombay Public Trusts Act and the Rules which provide for the said format. It is, thus, clear that the plaint was not at all read, much less sincerely and seriously and was superficially read. There was a little scope for even remotely raising a doubt about the ownership of the property of the Trust. Despite this, in para 12 of the judgment under review, the following observations have been made:-

12 ... Having regard to the aforesaid observation, it is clear that in substance the respondent has claimed ownership of the suit property and thereupon a declaration that the applicants are not entitled to transfer the same property. The suit is therefore clearly involves the question whether the suit property belongs to the respondent-Public Trust or not ...

15. The above observations are, thus, contrary to the entire body of the plaint and the averments therein. That is a serious mistake and error apparent on the face of record and has clearly caused miscarriage of justice to the Applicant-Trust. Therefore, no question at all arose in the suit whether the suit property belonged to the Trust or not which is clear in the light of the above discussion. Reliance placed on the decision of the Supreme Court in the case of Church of North India in the aforesaid para 12 of the Judgment is also misplaced, since the said decision does not deal with the specific aspect about permission from the Charity Commissioner to recover the possession of the Trust property as contemplated by Sections 50 and 51 of the Bombay Public Trusts Act from the rank trespassers like the defendants. The decision in the case of Church of North India has no bearing on the question of the eviction of a person holding the Trust property without even a semblance of legal title. In that case, the prayers were for a declaration that the former First District Church of the Brethren had ceased to exist and further that the Church of North India was the legal continuation and the successor of the First District Church of the Brethren together with the right, title, claim, interest in and over its properties and constitution, decisions and resolutions of the Church of North India etc. That was not the case at hand and hence the Judgment in the case of Church of North India was not correctly applied, which is also an error apparent on the face of record.

16. In so far as the principles underlying Order-VII, Rule 11, Civil Procedure Code, are concerned, the decision in the case of Saleem Bhai and Others Vs. State of Maharashtra and Others, is relevant. I quote para 9 therefrom, which is as follows:-

9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction

 

to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial Court.....

In the case of Popat and Kotecha Property Vs. State Bank of India Staff Association, , the Apex Court relied on the decision in the case of Saleem Bhai [cited supra] and held thus in paras 14, 15, 16, 17, 18 and 19 :-

14. In Saleem Bhai v. State of Maharashtra it was held with reference to Order 7 Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Order 7 Rule 11 of the Code, the averments in the plaint are the germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.

15. In I.T.C. Ltd. v. Debts Recovery Appellate Tribunal it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.

16. The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See T. Arivandandam v. T.V. Satyapal.).

17. It is trite law that no any particular plea has to be considered, and the whole plaint has to be read. As was observed by this Court in Roop Lal Sathi v. Nachhattar Singh Gill only a part of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected.

18. In Raptakos Brett & Co. Ltd. V. Ganesh Property it was observed that the averments in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 was applicable.

19. There cannot be any compartmentalisation, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or

 

subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time, it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.

17. In C. Natrajan Vs. Ashim Bai and Another, , in Para 8 of its Judgment, the Supreme Court stated thus:-

8. An application for rejection of the plaint can be filed if the allegations made in the plaint even if given face value and taken to be correct in their entirety appear to be barred by any law. The question as to whether a suit is barred by limitation or not would, therefore, depend upon the facts and circumstances of each case. For the said purpose, only the averments made in the plaint are relevant. At this stage, the court would not be entitled to consider the case of the defence. (See Popat and Kotecha Property v. SBI Staff Assn.)

However, the ratio laid down in the aforesaid judgments was not followed in the judgment under review.

18. It would be appropriate to note the following decisions on the issue about recovery of possession from the trespassers:-

1. Amirchand Tulsiram Gupta and Others Vs. Vasant Dhanaji Patil and Others, [Para 7 which is already quoted in para 12 above].

2. Gafoor Ali Hussain through legal heirs Vs. Ram Mahadik and others, [Para 14]

3. Surayya Afzal Khan Vs. Raza Shah Fakir Takiya and Masjid Trust and Others, [Para 17] , and

4. Shri Samarth Seva Mandal and Others Vs. Shri Ramdas Swami Sansthan and Others, .

19. Looking to the ratio of the decisions, it is axiomatic that for recovery of the Trust property from the rank trespassers or as the case may be, no permission from the Charity Commissioner was at all required, as has been the consistent view of this Court, and in terms of the doctrine of stare decisis, the said legal position is binding on this Court. Thus, due to the judgment under review, serious miscarriage of justice has been caused to the Applicant-Public Trust. This is, therefore, a fit case where exemplary cost is required to be imposed upon the trespassers-defendants, who had purchased the property from Rukhminibai who was not even found to be the tenant, much less had any saleable interest. That being so, the following order is passed:-

ORDER

[a] Misc. Civil Application No. 661 of 2014 is allowed.

[b] The Judgment and Order dated 8th February, 2006 passed by this Court in Civil Revision Application No. 1242 of 1998 is quashed and set aside.

 

[c] Non-applicants-defendants shall pay cost in the sum of Rs. 10,000-00 [rupees ten thousand only] to the Applicant-Trust within eight weeks.

[d] Misc. Civil Application No. 661 of 2014 stands disposed of accordingly.

 