

(1996) 02 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No. 2090 of 1989

Mukund Pinjarkar

APPELLANT

Vs

Sarda Education Trust and Others

RESPONDENT

Date of Decision : 16-02-1996

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 19(1)
Trusts Act, 1882 — Section 47, 48

Citation : (1996) 5 BomCR 520

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : R.R. Joharpurkar, for the Appellant; B.N. Mohta, for the Respondent

Judgement

R.M. Lodha, J.—The orders passed by the Maharashtra Revenue Tribunal, Nagpur on 20-7-1989 and 30-9-1988 affirming the order passed by the Sub-Divisional Officer, Daryapur on 20-2-1987 and the order passed by the Tahsildar, Anjangaon on 31-1-1986 are impugned in the present writ petition.

2. Two points arise for consideration in this writ petition, viz. (i) whether the application filed by one of the trustees of Sarda Education Trust u/s 19(1)(d) of the Bombay Tenancy Agricultural Lands (Vidarbha Region) Act, 1958 (for short, the "Tenancy Act") was maintainable having not been filed by all the trustees of the said Trust, and (ii) whether the petitioner who was only a sub-tenant in the land in question, could maintain revision application before the Maharashtra Revenue Tribunal against the orders passed by the Sub-Divisional Officer and Tahsildar when the tenant-in-chief did not challenge the orders in revision before the Maharashtra Revenue Tribunal.

3. Sarda Education Trust is a Public Trust under the Bombay Public Trusts Act, 1950 (hereinafter referred to as the "Trust"). The said Trust has six trustees and it owns agricultural lands including Survey No. 19/1 admeasuring 4 acres situated at village Wadali, Tahsil Anjangaon, District Amaravati. The said agricultural land bearing Survey No. 19/1 admeasuring 4 acres was leased out by

the Trust to Sitaram Lokhe (since deceased and now represented by the respondent No. 2 Prakash). Sitaram Lokhe died on 10-8-1979. In view of the sub-tenancy created by original tenant Sitaram in favour of present petitioner, the Secretary of Trust determined tenancy by serving a notice upon Prakash s/o Sitaram Lokhe, legal heir of original tenant-in-chief Sitaram and notice was also given to the present petitioner treating him as sub-tenant. An application dated 1-10-1983 u/s 19(1)(d) of the Tenancy Act was made by the Trust through its Secretary against Prakash and the present petitioner sub-tenant before the Tahsildar, Anjangaon praying for possession of the disputed land from them. The application was contested by Prakash as well as by present petitioner and the Tahsildar by the order dated 31-1-1986 held that the Trust was entitled to possession of land in question and accordingly directed issuance of warrant of possession of the disputed land in accordance with law. An appeal came to be filed by the present petitioner before the Sub-Divisional Officer challenging the order passed by the Tahsildar on 31-1-1986 and the Sub-Divisional Officer dismissed the appeal. Present petitioner filed revision before the Maharashtra Revenue Tribunal. Before the Tribunal one of the grounds urged by the petitioner was that the application u/s 19(1)(d) made by Secretary of the Trust was not tenable since all the trustees had not made such application. It appears, before the Maharashtra Revenue Tribunal, the Trust placed on record a resolution dated 25-12-1984 authorising Secretary to initiate litigation for recovery of possession of the Trust's agricultural land leased out to tenants. The Tribunal by the order dated 30-9-1988 dismissed the revision application. Review application was filed by the petitioner before the Maharashtra Revenue Tribunal for review of the order dated 30-9-1988 and the said review application was also dismissed by the Tribunal on 20-7-1989. The aforesaid orders are being impugned in the present writ petition.

4. The second question which requires to be decided, may be considered first, because Mr. B.N. Mohta, the learned Counsel for Trust has raised the objection that the concurrent orders passed by the Tahsildar and the Sub-Divisional Officer in favour of the Trust and against the tenant-in-chief were not challenged by the tenant-in-chief in revision application and, therefore, it was not open to the sub-tenant to challenge the order of possession passed by the Tahsildar on 31-1-1986 and affirmed in appeal by the Sub-Divisional Officer on 20th October, 1987.

5. The objection of Mr. Mohta is wholly devoid of any merit. There is no dispute that the Trust, through its Secretary, made an application u/s 19(1)(d) seeking possession of the agricultural land in question from tenant-in-chief Prakash as well as the petitioner as a sub-tenant. In the application, the tenant-in-chief as well as sub-tenant were impleaded as parties. Once the Trust impleaded tenant-in-chief as well as sub-tenant as parties in the application u/s 19(1)(d), even if the tenant-in-chief had not chosen to challenge the order of possession before the appellate or the revisional authority, it did not take away right of the sub-tenant who was impleaded as party in the application to challenge the concurrent

orders of possession before the revisional authority. It was open to the sub-tenant to challenge the order of possession passed by the Tahsildar and confirmed in appeal by the Sub-Divisional Officer before the revisional authority independently and on the basis of his own rights, even if the tenant-in-chief was content and satisfied with the concurrent orders passed by the Tahsildar and the Sub-Divisional Officer against him. Once the order has been passed in the proceedings in which a person is impleaded as party, he is entitled to and has every right to challenge the order passed in such proceedings in which he is party if he is aggrieved by the order passed in the said proceedings. It is open to him to carry such order in appeal or revision and urge before the Appellate Authority or the revisional authority that the order was illegal, invalid, incorrect or wrong and deserved to be set aside. All permissible grounds are available to such person who was party in the proceedings and against whom an order has been passed to challenge such order. The independent right of sub-tenant is not taken away in challenging the order of eviction or dispossession if he was party in the proceeding as sub-tenant which culminated in passing of the order of eviction or dispossession even if the tenant-in-chief has not chosen to challenge such order of eviction. I am fortified in my view by the judgment of the Apex Court in Karam Singh Sobti and Another Vs. Shri Pratap Chand and Another, , where the Supreme Court has held that in a suit for ejectment of tenant on the ground of sub-letting where the tenant and sub-tenant both have been made defendant a decree of ejectment is passed against both, it can be challenged in appeal by sub-tenant in his own rights even though the tenant decides not to file appeal. The Supreme Court, thus, held :---

"23. The next question is as to the rights of the appellant in the absence of an appeal by the Association from the decision of the trial Court. The question does not present any real difficulty. The suit had been filed both against the tenant and the sub-tenant, being respectively the Association and the appellant. The decree had been passed by the trial Judge against both. The appellant had his own right to appeal from that decree. That right could not be affected by the Association's decision not to file an appeal. There was one decree and, therefore, the appellant was entitled to have it set aside even though thereby the Association would also be freed from the decree. He could say that that decree was wrong and should be set aside as it was passed on the erroneous finding that the respondent had not acquiesced in the sub-letting by the Association to him. He could challenge that decree on any ground available. The Lower Appellate Court was, therefore, quite competent in the appeal by the appellant from the joint decree in ejectment against him and the Association, to give him whatever relief he was found entitled to, even though the Association had filed no appeal."

6. I have, therefore, no hesitation in overruling the objection raised by the learned Counsel for the respondent Trust that revision by the petitioner before the Maharashtra Revenue Tribunal who was only sub-tenant, was not maintainable in the absence of any revision filed by the tenant-in-chief against

the order of eviction or dispossession.

7. The principal question now left to be determined in the present case is, whether the application made by Secretary of the Trust u/s 19(1)(d) of the Tenancy Act was maintainable in the absence of other trustees of the Trust or not. Apparently, this objection was not raised by the present petitioner either before the Tahsildar or before the Sub-Divisional Officer in appeal. For the first time, the petitioner/sub-tenant raised the plea of non-maintainability of the application filed by the Secretary of Trust u/s 19(1)(d) of the Tenancy Act before the Tribunal. Upon such objection being raised by the petitioner before the Tribunal, the Trust placed on record of the Tribunal, resolution dated 25-12-1984 and the Tribunal, on the basis of the said resolution, overruled the objection of the petitioner that Secretary having been authorised to initiate the proceedings for eviction, application filed by the Trust through its Secretary, was maintainable.

8. Resolution dated 25-12-1984 reads as under :---

"Resolution : The property of the Trust is under the lessees and the said land of Trust has to be acquired for ploughing, for the same the litigation in different Court proceedings are to be started and for the said, J.J. Laddha brought this matter before the Trustees. All the trustees are unable to attend the Court proceedings and, therefore, all the necessary proceedings are to be entrusted to Secretary J.M. Laddha and if necessary he can appoint Dr. R.M. Sarda, Trustee. This was decided by all Trustees. The resolution is passed by all Trustees."

9. Section 47 of the Indian Trust Act provides that a trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger unless the instrument of trust so provides, or the delegation is in regular course of business or the delegation is necessary, or the beneficiary, being competent to contract, consents to the delegation. Explanation is appended to section 47 which explains that the appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section. Section 48 of the Indian Trust Act prohibits co-trustees to act singly and it provides that when there are more trustees than one, all must join in the execution of the trust except where the instrument of trust otherwise provides.

10. There is no dispute and rather, it is admitted by Mr. Mohta, the learned Counsel for Trust that the Trust had six trustees. Obviously, therefore, there were more trustees than one in the Sarda Education Trust. Application u/s 19(1)(d) is undisputedly filed by Secretary of the Trust. The instrument of the Trust, admittedly, has not been produced or placed on record by the Trust and, therefore, presently it cannot be said that the instrument of the Trust provides for delegation of the office by the trustee or delegation of any of the duties by the trustees to a co-trustee.

11. The provisions contained in sections 47 and 48 of the Indian Trust Act and in any case the principle embodied in sections 47 and 48 must apply to public, religious or charitable trusts under the Bombay Public Trusts Act, 1950 when

there are more trustees than one. In *Nanalal Girdharlal and Another Vs. Gulamnabi Jamalbhai Motorwala and Others*, , a Full Bench of Gujarat High Court through P.N. Bhagwati, C.J., (as he then was) considered the true nature and character of the office of co-trustees and after relying upon *Leman v. Lardeur* 1946 KB 613, *Harihar Banerjee v. Ramshashi Roy* AIR 1918 P.C. 102, *Kanji v. Trustees of the Port of Bombay* AIR 1963 S.C. 461 and various other decisions, held that whether the Trust was private trust, governed by the Indian Trust Act or public, charitably or religious trust, a trustee cannot delegate any of the duties or powers to a co-trustee or to a stranger unless the instrument of Trust so provides or the delegation is necessary, or the delegation is in regular course or the beneficiary, being competent to contract, consents to the delegation. Except the four circumstances where the delegation was permissible, in no other case, trustees can even by unanimous resolution authorise one of themselves to act as managing trustee for discharging the duties, functions and powers relating to the Trust and every of them must join in the discharge of such duties, functions and powers. A plain reading of section 47 of the Indian Trust Act referred to hereinabove also leads to an irresistible conclusion that a trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger unless either the instrument of trust so provides or the delegation is in the regular course of business or the delegation is necessary or the beneficiary, being competent to contract, consents to the delegation. Unequivocally, therefore, it can be held that the delegation by a trustee to a co-trustee of his duties or office except provided in section 47 is not permissible and even if the unanimous decision or resolution was adopted by all the trustees to authorise one of the co-trustees to discharge his duties as trustee, would not clothe that person with that authority and power of the trustee who has delegated such power unless such delegation is covered u/s 47 of the Indian Trust Act.

12. The resolution referred to hereinabove and relied upon by the Trust authorising its Secretary to initiate litigation in different courts against its lessees for recovery of possession, does not show that the instrument of Trust provided such delegation. Whether the delegation to its Secretary by all the trustees of the Trust was covered in any of the exceptions u/s 47 of the Indian Trusts Act, has not been enquired into nor gone by the authorities below and, therefore, on facts, in the absence of any enquiry, it cannot be held that the resolution is covered by any of the exceptions u/s 47 of the Indian Trust Act.

13. The answer to the question whether one of the several co-trustees of the Trust can effectively determine the tenancy by giving notice to quit and whether an application for possession u/s 19(1)(d) of the Tenancy Act could be filed by one of the trustees of Sarda Education Trust without joining other co-trustees would depend on the resolution dated 25-12-1984 and whether such resolution was covered under any of the exceptions u/s 47 of the Indian Trusts Act or not. Similar questions came up for determination before the Full Bench of Gujarat High Court in *Nanalal's* case (cited supra) and the Full Bench of the Gujarat High Court held, thus:---

"8. We must also refer to one other decision which was strongly relied upon on behalf of the plaintiff. That was the decision in Harihar Banerji v. Ramshashi Roy AIR 1918 P.C. 102 : 45 Ind. App. 222. We have carefully gone through this decision but we do not see how it can possibly help the plaintiff to make good his contention. The only question before the Privy Council in this case was whether notice to quit served on some of the joint tenants, was sufficient to determine the tenancy. While dealing with this question, the Privy Council observed, "In the case of joint tenants", each is intended to be bound, and it has long ago been decided that service of a notice to quit upon one joint tenant is prima facie evidence that it has reached the other joint tenants". This observation far from helping the plaintiff goes against him. It postulates that notice to quit must be given to all joint tenants but says that if it is shown that notice to quit is served upon one joint tenant, it would be prima facie open to the other joint tenants to rebut this prima facie evidence and show that in fact the notice to quit has not reached them and if they do so, the notice to quit given by the landlord would be ineffective to determine the tenancy. Moreover, the question before us is whether one of several co-owners can determine a tenancy by giving notice to quit and not whether notice to quit must be given to all joint tenants, where there are more tenants than one. The decision of the Privy Council cannot therefore be regarded as having any compelling authority to deflect us from the view we are taking."

"11. The result, therefore, is that where there are two or more co-owners of property and either they grant a lease acting together or anyone of them grants a lease on behalf of himself and acting as agent on behalf of the other co-owners no one single co-owner can give notice to quit determining the lease. The notice to quit must be given by or on behalf of all co-owners in accordance with the rules which we have just discussed. The same would be the position where a lease is granted by a landlord who is the sole owner of the leased property and thereafter by estate or intestate succession or by transfer inter vivos, the leased property comes to be owned by two or more co-owners. But where a lease is granted by a co-owner professing or claiming to be the sole owner of the leased property or one of the co-owners grants the lease without disclosing that he is also acting on behalf of the other co-owners the doctrine of estoppel would apply and the tenant would be precluded from showing that his landlord was not the exclusive owner of the leased property but was only one of the co-owners and that the notice to quit given by him is, therefore, not sufficient to determine the lease."

14. I am fully in agreement with the view of the Full Bench decision of the Gujarat High Court and in my view, since the question has not been gone into by the Maharashtra Revenue Tribunal whether the delegation to Secretary of the Trust to initiate the proceedings for eviction against lessees was legal, proper and covered u/s 47 of the Indian Trusts Act or not, the order passed by the Maharashtra Revenue Tribunal on 30th September 1988 deserves to be set aside. Upon setting aside the order of the Tribunal, the order passed by the Tribunal on

20th July 1989 rejecting the review application of the petitioner automatically goes and does not survive. Since the question would depend on the evidence, the proper course would be to set aside all the orders passed by the authorities and send the matter back to the Tahsildar, Anjangaon to decide the question about the maintainability of application u/s 19(1)(d) of the Tenancy Act filed by the Trust through one of the trustees viz. Secretary, after permitting the parties to lead evidence and the observations made hereinabove.

15. The writ petition is accordingly partly allowed. The order passed by the Maharashtra Revenue Tribunal on 30-9-1988 and 20-7-1989, the order passed by the Sub-Divisional Officer on 20-2-1987 and the order passed by the Tahsildar on 31-1-1986 are set aside and the matter is sent back to the Tahsildar, Anjangaon to decide the application filed by the respondent No. 1 afresh in accordance with law. No costs. Rule is made absolute in the aforesaid terms.