

(1974) 04 GUJ CK 0005
In the Gujarat High Court

Naranbhai Dahyabhai Patel and Another	APPELLANT
Vs	
Suleman Isapji Dadabhai and Another	RESPONDENT

Date of Decision : 26-04-1974

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 18, 19, 72
Bombay Tenancy and Agricultural Lands Act, 1948 — Section 63
Transfer of Property Act, 1882 — Section 122, 5, 5

Citation : (1975) 16 GLR 289

Hon'ble Judges : T.U. Mehta, J

Bench : Single Bench

Judgement

T.U. Mehta, J.—This Appeal arises out of the order passed by the Assistant Charity Commissioner, Baroda Region, u/s 19 of the Bombay Public Trusts Act, 1950, registering the public trust known as "Dadabhai Trust" and holding that agricultural lands bearing Section Nos. 432, 433, 434 and 461 of the village Kholwad, taluka Kamrej of Surat district, are the lands belonging to the said trust. The appellants claim to be the tenants over the lands in question and they have preferred this appeal being aggrieved by the decision given by the Assistant Judge at Surat u/s 72 of the Bombay Public Trusts Act in Misc. Application No. 64/67. The appellants have in this appeal challenged the findings that the lands mentioned above are the lands belonging to the above referred trust.

2. Short facts of the case are that it is an undisputed fact that before the above referred trust was created on 31st December, 1956 one Dayabhai Nathubhai, was cultivating these lands as a tenant. It is not in dispute that the name of the said Dayabhai Nathubhai was entered as protected tenant under the provisions of the Bombay Tenancy and Agricultural Lands Act of 1933 & 1948. The Act of 1948 was subsequently amended by the Bombay Act No. 13 of 1956 and the amendments contemplated by the said Act No. 13 of 1956 came into force on 1-8-56. One of the consequences of this amendment was that the tenant Dayabhai Nathubhai was to be the deemed purchaser of the lands in question according to law on 1-4-57.

3. However, before the said Dayabhai Nathubhai could become the deemed purchaser of the lands under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 as amended by the Act No. 13 of 1956, the present respondent No. 1, Suleman Isapji Dadabhai, had given him a notice dt. 12th December, 1956 terminating his tenancy. When this notice was given, the amendment Act No. 13 of 1956 had already come into force. A few days after the above referred notice, respondent No. 1 created a public charitable trust with regard to the disputed agricultural lands. The object of the trust was to run a dispensary as well as to give scholarships to Muslim students. He drew a regular deed creating the said trust. By virtue of this deed, the suit lands vested in the trustees appointed under the trust. The trustees were directed to utilise the trust properties for the above referred two objects. One of the Clauses of the trust provided that the respondent No. 1 should act as a sole trustee till his life time, with a power to appoint other co-trustees from the members of his own family. After his death, his sons and other members of his family were to act as trustees. It is an admitted fact that this trust deed was also registered under the provisions of the Registration Act.

4. Soon after creating this trust, the respondent No. 1 made an application to the concerned Deputy Charity Commissioner on 28th January, 1957 u/s 18 of the Bombay Public Trusts Act, 1950 for registration of the said trust. Within 3 days thereafter i.e. on 31st January, 1957 the said Deputy Charity Commissioner passed an order contemplated by Section 19 of the Act registering the trust and holding that the suit lands in dispute were the properties of the public trust known as "Dadabhai Trust". It is an admitted fact that before passing this order u/s 19 of the Act, the Deputy Charity Commissioner had not issued any notice to the tenant, Dayabhai Nathubhai.

5. The said tenant having come to know about the aforesaid order of the Deputy Charity Commissioner preferred an appeal to the Charity Commissioner. The said Appeal was registered as Appeal No. 56/57. Along with this appeal, he also made an application for condonation of delay. The learned Charity Commissioner condoned the delay but dismissed the appeal by his order dt. 8th August, 1957. One contention which was raised before the learned Charity Commissioner in the appeal on behalf of the tenant Dayabhai Nathubhai, was that the transfer of property made by the present respondent No. 1 in favour of the trust was hit by Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Tenancy Act) and, therefore, the same was void. Section 63 of the Tenancy Act provides that no sale, gift, exchange or lease of any land or interest therein, shall be valid in favour of a person who is not an agriculturist provided that the Collector or an officer authorised by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage, on such conditions as may be prescribed. The contention of the tenant was that the creation of trust and transfer of the suit lands to the said trust amounted to gift and since the permission of the Collector or an officer authorised by the State Government in this behalf was not obtained for this gift,

the properties in question did not vest in the trust. The learned Charity Commissioner rejected this argument holding this transfer of the property in favour of the public in general did not amount to "gift" as contemplated by Section 122 of the Transfer of Property Act and, therefore, Section 63 of the Tenancy Act had no application. The learned Charity Commissioner put reliance upon the Madras decision given in *Pallayya v. Ramavedhanulu* 13 Madras Law Journal 364 for the proposition that transfer of property in favour of the public in general did not amount to a "gift" contemplated by Section 122 of the Transfer of Property Act, because, when donation is made in favour of the members of general public, the donee is not an ascertainable person.

6. Being aggrieved by this decision of the learned Charity Commissioner, the matter was taken up before the Court of the District Judge, Surat, u/s 72 of the Bombay Public Trusts Act, 1950 by the present appellants, who are the legal representatives of the original tenant Dayabhai Nathubhai. In the district Court at Surat, this application was registered as Misc. Application No. 64/67. This application is disposed of by the learned Assistant Judge, Surat who has confirmed the findings of the Charity Commissioner on different grounds. Shortly stated, the learned Assistant Judge has held that the creation of trust, which is represented by the donor himself in a different capacity does not amount to a transfer and, therefore, Section 63 of the Tenancy Act has no application to the facts of the present case. Being aggrieved by this decision of the learned Assistant Judge the legal representatives of the deceased-tenant have preferred this appeal.

7. Shri Desai, who appeared on behalf of the appellants, contended that under the provisions of the Bombay Tenancy Act, the question whether a particular transaction is void for non-compliance of the provisions of Section 63 of the said Act or not, is a question which is exclusively triable by Mamlatdar u/s 70(mb) read with sec. 84C. of the Tenancy Act, and since by virtue of the provisions contained in Section 85 of that Act, the jurisdiction of the Civil Court to decide the questions which are required to be settled, decided or dealt with by the Mamlatdar, under the provisions of the Act, is specifically barred, and since looking to the provisions contained in Sections 73 and 76 of the Bombay Public Trusts Act, the Deputy Charity Commissioner, Charity Commissioner, the court of the District Judge as well as this High Court act as Civil Courts, it is not open to this Court to consider the question whether the transaction of the transfer of the disputed properties in favour of the trust is valid or invalid on account of the non-compliance with the provisions of Section 63 of the Tenancy Act. According to Shri Desai, therefore, the Deputy Charity Commissioner, and for that matter, the Charity Commissioner as well as the learned Assistant Judge, should have referred this question for the decision of the Mamlatdar before proceeding with the merits of the case. Shri Desai, contended that even this Court has no jurisdiction to decide that question and, therefore, the matter should be stayed and a suitable reference should be made to the Mamlatdar on the question of validity of the transfer of the properties, in favour of the trust before disposing it

finally.

8. In reply to this contention, Mrs. Mehta, who appeared on behalf of the respondent No. 1 contended that the validity or, invalidity of the transfer in question would depend upon whether the provisions of Section 63 of the Tenancy Act applies to the facts of the present case. According to Mrs. Mehta, the vesting of property in favour of "Dadabhai Trust" does not amount to a transfer contemplated by Section 5 of the Transfer of Property Act and even if it does amount to such a transfer, it does not amount to a "gift" contemplated by Section 63 of the said Act. According to Mrs. Mehta, therefore, there is no need for making any reference to the Mamlatdar. It was alternatively contended by Mrs. Mehta that even if it is believed that vesting of the suit lands in the trust amounts to a transfer and, therefore, to a gift, Section 85 of the Bombay Tenancy Act, which bars the jurisdiction of the Civil Courts, has no application to the facts of the present case, inasmuch as, neither the Deputy Charity Commissioner nor the Charity Commissioner nor the District Court acting u/s 72 of the Bombay Public Trusts Act, 1950, nor this court, hearing an appeal against the said decision of the District Court, is a Civil Court within the meaning of Section 85 of the Bombay Tenancy Act. According to Mrs. Mehta, therefore, it is not necessary to make any reference to the Mamlatdar for deciding the question relating to the validity of the vesting of the disputed properties in the trust.

9. The first question which arises to be determined is whether the vesting of the disputed lands bearing the above referred survey numbers in the "Dadabhai Trust" amounts to a "transfer of property" as defined by Section 5 of the Transfer of Property Act, 1882. This Section 5 is in the following terms:

In the following Sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

In this Section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect, any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

Thus, the Section shows that transfer of property is an act of conveyance of that property by a person to one or some other living persons or to himself. The words "or to himself" were inserted in the Section by the Amendment Act of 1929. The point to be considered is what are the implications of this addition. In ordinary circumstances, a transfer implies the change of ownership. This in its turn implies that the property belonging to one person changes hands and, therefore, the word "transfer" implies the existence of two distinct persons one called the transferor and the other called the transferee. The identity of both the transferor and the transferee should therefore be distinct. A person cannot transfer his property to himself and it was for that reason that Section 5, as it

stood originally before it was amended by the Act of 1929, contemplated the conveyance of the property from one person to one or other living persons. The insertion of the words "or to himself therefore has a great significance. If a person cannot transfer a property to himself, the question which would naturally arise is why these words were inserted in the section. The obvious explanation is that the insertion of these words were meant to cover those cases wherein a property is required to be transferred by a person standing in one capacity, to himself standing in altogether another capacity. An obvious illustration of this situation is the case where the man makes a settlement of his property in trust constituting himself as the sole trustee. In such a case the legal ownership of the property continues to remain with him but he no more holds the beneficial interest in the property after the property is conveyed to him in his capacity as the sole trustee, as he is merely the representative of the beneficiaries of the trust. Here it need not be emphasised that the law in India recognises no distinction between legal and equitable assets as is done by the English law. Therefore, when a property which is of the personal ownership of a particular person is converted into a trust property and that very person is appointed as the sole trustee of that trust, what actually happens is that though the legal ownership of the property continues to remain in him, the beneficial ownership of that property changes hands. It was with a view to cover such cases of transfers that Section 5 of the Transfer of Property Act was amended by the Act of 1929. Under the circumstances, Mrs. Mehta's contention that when a property is vested in a trust and the transferor himself becomes the sole trustee there is no change of ownership and, therefore, the transaction does not amount to transfer contemplated by Section 5 of the Transfer of Property Act, is devoid of any substance.

10. Now what has happened in this case is that the lands in dispute were previously of the sole ownership of the respondent No. 1. On creation of the trust on 31st December, 1956 this property vested in the trust of "Dadabhai Trust", and since respondent No. 1 became the sole trustee of that trust, the said vesting resulted in transfer by respondent No. 1 "to himself in his capacity as the sole trustee of the trust. Thus, the requirement of Section 5 of the Transfer of Property Act, as it stood in the year 1956, were fully satisfied.

11. Mrs. Mehta relied upon the Calcutta decision of Himansu Kumar Roy Chowdhury Vs. Moulvi Hasem Ali Khan and Others, , and contended that when a person transfers property in favour of a trust of which he is the sole trustee, the transaction does not amount to a "transfer" but amounts merely to a vesting declaration. According to Mrs. Mehta such vesting declarations do not amount to a transfer. The learned Assistant Judge, against whose order the present appeal is preferred, seems to be of the view that when a property vests in a trust by mere vesting declarations, the transaction does not amount either to a "transfer" or to a "gift." I find that the Calcutta decision above referred to does not lay down any such proposition. What it says is that Section 6 of the Trusts Act, 1882, contemplates that the author of the trust should transfer the trust property, and

the word "transfer" which is used in that Section is used in a wider sense than in the Transfer of Property Act which was passed in the same year. The High Court has further held in that case that the said word when it appears in Section 6 of the Transfer of Property Act, includes not only the sales, mortgages, gifts, but also includes vesting declarations. It is further said in that case that in case of Immovable property only a vesting declaration is necessary for the purpose of "transfer". Thus, all that this decision says is that Immovable properties can be "transferred" by a vesting declaration. But the decision is not an authority for the proposition that vesting declarations do not amount to a "transfer". In these circumstances, the Calcutta decision is of no help to the respondent No. 1.

12. Mrs. Mehta further put reliance upon the above referred decision of *Pallayya v. Ramavedhanulu* 13 MLJ 364 on which even the learned Charity Commissioner has put reliance. The facts of that case show that there was a dedication of an idol and land for the building of a temple. The question which arose to be considered in that case was whether the dedication in question amounted to a "gift" within the meaning of Section 122 of the Transfer of Property Act. The court held that the word "donee" appearing in Section 122 of the Transfer of Property Act refers to an ascertained or ascertainable person or persons by whom or on whose behalf the gift can be accepted or refused and has no application to an unascertained number of persons such as the public. It was further observed that Ex. 1 in that case which evidenced dedication favour of the idol did not really amount to transfer of property as the plaintiff declared and constituted himself under that document as the "Dharmakarta" or a trustee of the temple. In the opinion of the learned Judges, who decided that case, that Ex. No. 1 amounted only to a declaration of trust in relation to the Immovable property for public religious purpose because the plaintiff, the author of the trust, declared himself to be a trustee "without transferring his ownership in the trust property to another." A strong reliance was placed by Mrs. Mehta on this decision in support of her proposition that when a property is transferred by a person to himself as the sole trustee of a trust, the transaction does not amount either to a transfer or a gift.

13. In the first place it should be noted that this decision of the Madras High Court was given in the year 1903 when Section 5 of the Transfer of Property Act was not amended by the Act of 1929 and the words "or to himself" were not inserted therein. Apart from this, the decision is clearly distinguishable because therein the property was transferred to an "idol" and, therefore, the court came to the conclusion that the beneficial interest in the property was transferred to the members of the general public which are not ascertained or ascertainable. The facts of the case here are totally different because here the property is transferred to a trust in which the members of the general public have merely a beneficial interest. As already noted above, the law in India does not recognise any distinction between legal and equitable estates, because according to Indian Law, the legal ownership of the trust property vests in the trustees and, therefore, it cannot be said that the property was transferred in favour of any

unascertainable number of public in general. So far as this case is concerned, the properties were obviously transferred in favour of the trustee of "Dadabhai Trust" and the fact that this trustee was the transferor himself, would not make any difference in view of the insertion of the words "or to himself in Section 5 of the Transfer of Property Act by the amending Act of 1929.

14. In my view, therefore, the Madras decision on which the learned Charity Commissioner has put reliance and which is sought in aid by Mrs. Mehta has no application to the facts of the present case.

15. It is thus evident that the transfer of the disputed lands in favour of "Dadabhai Trust" amounted to a "transfer" contemplated by Section 5 of the Transfer of Property Act. If this is so, the next question is whether it amounted to "gift"? The word "Gift" is defined by Section 122 of the Transfer of Property Act, "as a transfer of certain existing moveable property or Immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Looking to this definition, it is evident that if requirements of "transfer of property" as contemplated by Section 5 of the Act are satisfied, then there remains no difficulty in holding that respondent No. 1 in his personal capacity was the donor and in his capacity as a trustee of Dadabhai Trust, he was the donee, who accepted the gift of the property without any consideration on behalf of the beneficiaries. In my opinion, therefore, the transaction in question did amount to a "gift" as defined by Section 122 of the Transfer of Property Act.

16. It is in context of this legal position that I shall now proceed to consider the relevant provisions of the Bombay Tenancy Act, 1948. Section 63 of the said Act is in the following terms:

63. (1) Save as provided in this Act-

(a) no sale (including sales in execution of a decree of a Civil court for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue), gift, exchange or lease of any land or interest therein, or

(b) no mortgage of any land or interest therein in which the possession of the mortgaged property is delivered to the mortgagee, shall be valid in favour of a person who is not an agriculturist or who being an agriculturist cultivates personally land not less than the ceiling area whether as an owner or tenant or partly as owner and partly as tenant or who is not an agricultural labourer:

Provided that the Collector or an officer authorised by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage, on such conditions as may be prescribed:

Provided further that no such permission shall be granted, where land is being sold to a person who is not an agriculturist for agricultural purpose, if the annual income of such person from other sources exceeds five thousand rupees.

The Section contains Sub-section (2), (3) and (4) which are not relevant for our purpose and are, therefore not quoted. It is an admitted fact that gift of disputed properties in favour of Dadabhai Trust, was not a gift in favour of a person, who was an agriculturist. Under the circumstances, the provisions of Section 63 are attracted to the facts of the present case.

17. But then the question which arises to be considered is whether this Court can hold that the said gift is valid or invalid? For deciding this question, I have to make further reference to some of the relevant provisions of the Tenancy Act.

18. Section 85 of the said Act bars the jurisdiction of the Civil Courts and is found to be in the following terms:

85. (1) No civil court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided, or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector, the Gujarat Revenue Tribunal or the State Government in appeal or revision or the State Government in exercise of their powers of control.

(2) No order of the Mamlatdar, the Tribunal, the Collector or the Gujarat Revenue Tribunal or the State Government made under this Act shall be questioned in any civil or Criminal court.

Explanation: For the purposes of this section, a Civil Court shall include a Mamlatdar's court constituted under the Mamlatdar's Courts Act, 1906.

Looking to these provisions of the section, it is necessary to find whether the validity or invalidity of a gift is a question which is required to be decided or dealt with by the Mamlatdar under the provisions of the Act.

19. Section 70 of the Act prescribes the duties and functions to be performed by the Mamlatdar, under the provisions of the Act. Clause (mb) of this Section provides the following functions as that of the Mamlatdar:

(mb) to issue a certificate u/s 84A, and decide u/s 84B or 85C whether a transfer or acquisition of land is invalid and to dispose of land as provided in Section 84C.

If a reference is made to Section 84C it will be found that it provides for the disposal of the land, transfer or acquisition of which is invalid. It authorises the Mamlatdar to make an inquiry suo motu if he has reason to believe that transfer or acquisition of any land becomes invalid under any of the provisions of the Act. Thus this Section makes it clear that validity or invalidity of a transaction is one of the functions and duties of the Mamlatdar under the Bombay Tenancy Act. Therefore, as held by the Supreme Court in Jambu Rao Satappa Kocheri Vs. Neminath Appayya Hanammannavar, , the question about the validity or invalidity of any transfer of agricultural lands to which the provisions of the Bombay Tenancy Act apply, the jurisdiction of the Civil court is barred. This proposition is not in dispute.

20. Mrs. Mehta, however, contended that what is barred by Section 85 of the

Bombay Tenancy Act is the jurisdiction of "civil court", but the Deputy Charity Commissioner, or the Charity Commissioner or the courts including the High Court acting under the provisions of the Bombay Trusts Act, 1950, do not constitute a "civil court" contemplated by Bombay Tenancy Act and, therefore, there is no need of making any reference to the Mamlatdar to decide the question as regards the validity or invalidity of the transfer of suit lands in favour of Dadabhai Trust. In this connection, Mrs. Mehta contended that neither the Deputy Charity Commissioner, nor the Charity Commissioner constitutes a civil court, because, they are merely administrative officers appointed under the Bombay Public Trusts Act, 1950 and exercise the quasi-judicial powers. She further contended that even though ordinarily the District courts and the High Court are civil courts, they cease to be the civil courts when they act under the provisions of the Bombay Public Trusts Act.

21. In my opinion, even though it is true that the Deputy Charity Commissioner and Charity Commissioner do not constitute civil courts, when they act under the provisions contained in Sections 18, 19, 20 and 70 of the Bombay Public Trusts Act, 1950, the fact remains that when the matter comes before the District Court or the High Court u/s 72 of the said Act, these courts do remain civil courts within the meaning of Section 85 of the Bombay Tenancy Act and are, therefore, barred from deciding the question which is required to be decided or dealt with by the Mamlatdar under the Bombay Tenancy Act, 1948. Since the decisions of the Deputy Charity Commissioner and the Charity Commissioner are not final and are made subject to the orders passed by the District Court in application u/s 72 and of this Court in an appeal against the order of the District court, even the decisions given by the Deputy Charity Commissioner u/s 20 of the Act and Charity Commissioner u/s 70 of the Act, are tantamount to the decision of a civil Court and, are, therefore, subject to the provisions of Section 85 of the Bombay Tenancy Act. The main purpose of the provisions contained in Section 85 of the Bombay Tenancy Act is to make the decisions of concerned revenue authorities under the Bombay Tenancy Act final without any interference of a civil court. This purpose would be frustrated if it is held that the decisions of the Deputy Charity Commissioner or the Charity Commissioner, which are subject to the decision of the civil courts, such as District Courts and High Court, are not the decision of Civil courts. Therefore, even though strictly speaking a Deputy or Assistant or a Charity Commissioner does not constitute a civil court, in so far as their decisions which are subject to the provisions of Section 72 of the Act are concerned, they are the decisions of a civil court and are, therefore, governed by the provisions of Section 85 of the Bombay Tenancy Act. If this be so, it is obvious that the question relating to the validity or invalidity of a transaction contemplated by Section 63 of the Bombay Tenancy Act must be referred to the Mamlatdar for his decision.

22. Mrs. Mehta further contended that the Deputy Charity Commissioner or Charity Commissioner is a special authority created with regard to the provisions of the Bombay Public Trusts Act and hence if any question arises incidentally with

regard to a public trust, the said authority has got jurisdiction to decide that question. She further contended that at any rate the power of the Mamlatdar to decide the question of validity of a particular transaction in view of Section 63 of the Bombay Tenancy Act, is a general power while the power of Deputy Charity Commissioner or the Charity Commissioner is a special power and, therefore, the said special power should prevail over the said general power of the Mamlatdar.

23. I find that none of these contentions is acceptable. It is no doubt true that the Deputy Charity Commissioner and the Charity Commissioner are special authorities created with regard to the administration of a special Act, namely, the Bombay Public Trusts Act, 1950 and are invested with sole jurisdiction to decide certain questions falling within the purview of the said Act, but that does not mean that if the question, even though it is an incidental question, is required to be decided by a different authority, he has got jurisdiction to decide the same. As stated above, the only reasonable meaning which can be put to the implications of Section 85 of the Bombay Tenancy Act is that only the Mamlatdar can decide certain questions which fall within his purview and if that is so, the Deputy Charity Commissioner or the Charity Commissioner would have no jurisdiction to decide such questions. He is expected to proceed with the subject matter which falls within his jurisdiction only after obtaining the decision of the Mamlatdar on the question which falls within his exclusive jurisdiction, under the Bombay Tenancy Act.

24. So far as the contention as regards the general power and special power is concerned, I find that there is no contradiction between the exercise of the two powers. The authority of the Mamlatdar acting under the Bombay Tenancy Act and the authority of the officers of the Charity organisation under the Bombay Public Trusts Act are operative in altogether different fields, and, therefore, it is wrong to contend that the authority of the Mamlatdar under the Bombay Tenancy Act is of general type while the authority of the Charity Commissioner under the Bombay Public Trusts Act is of a special type. Both the authorities are functioning for different purposes in different fields. Under the circumstances, even this contention of Mrs. Mehta is found to be of no substance.

25. The result therefore is that any further proceedings of this appeal shall be stayed and in the mean while reference shall be made to the Mamlatdar to decide the question whether the transaction evidenced by the vesting of the disputed properties in Dadabhai Trust under the document dt. 31st December, 1956 is valid or not in view of the provisions contained in Section 63 of the Bombay Tenancy Act.

26. The appeal shall be listed in the dormant file till the decision of the Mamlatdar is received. After the decision is received by this court, the appeal shall be put for further hearing. Orders accordingly.