**(2016) 11 CHH CK 0006**

**In the Chhattisgarh High Court**

**Case No :** FA No. 18 of 2013

Rajesh Gupta APPELLANT

Vs

Bochasanvasi Shri Akshar Purushottam Sanstha, Sarvajanik Dharmarth Nyas Sahibag RESPONDENT

**Date of Decision :** 04-11-2016

**Acts Referred:**

Bombay Public Trusts Act, 1950 — Section 50(iv), Section 51
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 7 Rule 11 (d)
Court Fees Act, 1870 — Section 13

**Citation :** (2017) AIRCC 740 : (2017) 1 CGLJ 433 : (2017) 1 CivilLJ 289

**Hon'ble Judges :** Shri Sanjay Agrawal, J.

**Bench :** Single Bench

**Advocate :** Shri S.D. Abhyankar with Shri A.K. Prasad, Advocates, for the Appellants; Shri B.P. Sharma with Shri Sameer Oraon, Advocates, for the Respondent No. 1; Shri Vijay Bahadur Singh, Panel Lawyer, for the Respondent No. 2

**Final Decision :** Allowed

# Judgement

Shri Sanjay Agrawal, J. (CAV) - This is plaintiffs'' first appeal under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as the ''Code 1908'') against the order dated 30.04.2011 passed by the 7th Additional District Judge, Raipur in Civil Suit No.37-A/2010 whereby the plaint has been rejected by the trial Court while exercising the powers enumerated under Order 7, Rule 11 (d) of the Code, 1908.

2. The plaintiffs'' claim, in nutshell, is that a registered deed of gift dated 05.03.1997 said to have been executed by them in respect of the suit property in favour of defendant No.1 was in fact never intended to be acted upon and despite of its execution the possession of the suit property was not delivered. It was averred further that on 09.10.2009, the defendant No.1 has started mutation proceedings based upon the alleged gift deed, therefore, the plaintiffs have been constrained in filing the suit in the instant nature for declaration that

the alleged gift deed be declared as cancelled one and for injunction, instituted on 19.07.2010.

3. The defendant No.1, a registered Public Trust, known as Bochasanvasi Shri Akshar Purushottam Sanstha Sarvajanik Dharmarth Nyas Sahibag, Ahmadabad (Gujarat), in whose favour the alleged gift deed was executed, has submitted its written statement and denied the plaintiffs'' claim.

4. During the pendency of the suit, the defendant No.1 has moved an application as per the provisions prescribed under Order 7, Rule 11 (d) of the Code, 1908 by submitting, inter alia, that the suit as framed without seeking prior permission from the Charity Commissioner, as required mandatorily under Sections 50 & 51 of the Bombay Public Trusts Act, 1950 (hereinafter referred to as ''the Act of 1950'') is not maintainable and has relied further upon the principles laid down in the matter of Sainath Mandir Trust v. Vijaya and others, reported in 2011 (1) SCC 623 : AIR 2011 SC 389.

5. The plaintiffs have filed their reply to the aforesaid application by saying that the objection as raised by the defendant No.1 regarding the maintainability of the suit is irrelevant as the said permission from the concerned authority is not required under the facts and circumstances involved in the instant case.

6. After considering the rival submissions with regard to the maintainability of the suit, the trial Court by its impugned order dated 30.04.2011 has observed by placing reliance upon the principles laid down in the matter of Sainath Mandir Trust v. Vijay and others (supra) that since the plaintiffs have not obtained the permission from the Charity Commissioner required mandatorily under Sections 50 & 51 of the Act of 1950 prior to the institution of the suit, is, therefore, not maintainable and in consequence while granting liberty to the plaintiffs to file a fresh suit after taking due permission from the Charity Commissioner has returned the plaint under Order 7, Rule 10 of the Code, 1908.

7. Being dissatisfied with the aforesaid findings of the trial Court, the plaintiffs have filed this appeal on the ground that the observation as made by the trial Court while holding that the suit is not maintainable for want of prior permission of the Charity Commissioner under Sections 50 & 51 of the Act of 1950 is apparently misconceived under the facts and circumstances of the case, and therefore, not sustainable. It assailed further on the ground that the said provisions of the Act of 1950 are not at all applicable as by virtue of the provisions prescribed under Section 51 of the Act of 1950, the permission is required by a person whose interest having been involved in the public trust property. It also assailed that the principles laid down in Sainath Mandir Trust v. Vijay and others (supra) are distinguishable, and therefore, the suit cannot be held to be not maintainable on the basis of the said principles.

8. On the other hand, it is contended by learned counsel for the respondent No.1 that the permission from the Charity Commissioner is required in the instant case while inviting attention of this Court to the provisions of Sections 51 of the

 

Act of 1950 and, stated that if the suit is filed in the nature of section 50 provided in the said Act of 1950, then the said permission is necessary. It is argued further that as the plaintiffs'' claim come within the purview of sub-clauses (ii) and (iv) of Section 50 of the Act of 1950, and therefore, the suit as framed without seeking prior permission from the Charity Commissioner is not maintainable and submitted further that the order as passed by the trial Court does not require to be interfered.

9. I have heard learned counsel for the parties and have gone through the entire record carefully.

10. In order to ascertain the applicability of the provisions prescribed under Sections 50 & 51 of the Act of 1950, it is necessary to examine the same. The provisions, being relevant, are reproduced herein as under :-

"50. Suit by or against or relating to public trusts or trustees or others.- In any case,--

(i) where it is alleged that there is a breach of a public trust, negligence, misapplication or misconduct on the part of a trustee or trustees,

(ii) where a direction or decree is required to recover the possession of or to follow a property belonging or alleged to be belonging to a public trust or the proceeds thereof or for an account of such property or proceeds 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 licensee,

(iii) where the direction of the Court is deemed necessary for the administration of any public trust, or

(iv) for any declaration or injunction in favour of or against a public trust or trustee or trustees or beneficiary thereof.

the Charity Commissioner after making such enquiry as he thinks necessary, or two or more persons having an interest in case the suit is under sub-clauses (i) to (iii), or one or more such persons in case the suit is under sub-clause (iv) having obtained the consent in writing of the Charity Commissioner as provided in section 51 may institute a suit whether contentious or not in the Court within the local limits of whose jurisdiction the whole or part of the subject-matter of the trust is situated, to obtain a decree for any of the following reliefs:-

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

(b) the removal of any trustee or manager;

(c) the appointment of a new trustee or manager;

(d) vesting any property in a trustee;

(e) a direction for taking accounts and making certain enquiries;

 

(f) an order directing the trustees or others to pay to the trust the loss caused to the same by their breach of trust, negligence, misapplication, misconduct or wilful default;

(g) a declaration as to what proportion of the trust or property or of the interest therein shall be allocated to any particular object of the trust;

(h) a direction to apply the trust property or its income cypres on the lines of section 56 if this relief is claimed along with any other relief mentioned in this section;

(i) a direction authorising the whole or any part of the trust property to be let sold, mortgaged or exchanged or in any manner alienated on such terms and conditions as the court may deem necessary;

(j) the settlement of a scheme, or variations or alterations in a scheme already settled;

(k) an order for amalgamation of two or more trusts by framing a common scheme for the same;

(l) an order for winding up of any trust and applying the funds for other charitable purposes;

(m) an order for handing over of one trust to the trustees of some other trust and deregistering such trust;

(n) an order exonerating the trustees from technical breaches, etc.;

(o) an order varying, altering, amending or superseding any instrument of trust;

(p) declaration or denying any right in favour of or against a public trust or trustee or trustees or beneficiary thereof and issuing injunctions in appropriate cases; or

(q) granting any other relief as the nature of the case may require which would be a condition precedent to or consequential to any or the aforesaid relief or is necessary in the interest of the trust;

Provided that no suit claiming any of the reliefs specified in this section shall be instituted in respect of any public trust, except in conformity with the provisions thereof:

Provided further that, the Charity Commissioner may instead of instituting a suit make an application to the Court for a variation or alteration in a scheme already settled:

Provided also that, the provisions of this section and other consequential provisions shall apply to all public trusts, whether registered or not or exempted from the provisions of this Act under sub-section (4) of section 1.

51. Consent of Charity Commissioner for institution of suit.-(1) If the persons

 

having an interest in any public trust intend to file a suit of the nature specified in section 50, they shall apply to the Charity Commissioner in writing for his consent. [If the Charity Commissioner after hearing the parties and making such enquiries (if any) as he thinks fit is satisfied that there is a prima facie case, he] may within a period of six months from the date on which the application is made, grant or refuse his consent to the institution of such suit. The order of the Charity Commissioner refusing his consent shall be in writing and shall state the reasons for the refusal.

(2) If the Charity Commissioner refuses his consent to the institution of the suit under sub-section (1) the persons applying for such consent may file an appeal to the [Maharashtry Revenue Tribunal], in the manner provided by this Act.

(3) In every suit filed by persons having interest in any trust under section 50, the Charity Commissioner shall be a necessary party.

(4) Subject to the decision of the [Maharashtra Revenue Tribunal] in appeal under Section 71, the decision of the Charity Commissioner under subsection (1) shall be final and conclusive."

11. The provisions of Section 2 (10) of the Act of 1950 also relevant for determination of the question involved in the case, are therefore, reproduced herein as under :-

"2(10) "person having interest" [includes]-

(a) in the case of a temple, person who is entitled to attend at or is in the habit of attending the performance of worship or service in the temple, or who is entitled to partake or is in that habit of partaking in the distribution of gifts thereof,

(b) in the case of match, a disciple of the math or a person of the religious persuasion to which the match belongs,

(c) in the case of a wakf, a person who is entitled to receive any pecuniary or other benefit from the wakf and includes a person who has right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah, maqbara or other religious institution connected with the wakf or to participate in any religious or charitable institution under the wakf,

(d) in the case of a society registered under the Societies Registration Act, 1860 (XXI of 1860), any member of such society, and

(e) in the case of any other public trust [any trustee or beneficiary];"

12. A close scrutiny of the aforesaid provisions would show that the permission/ consent under Section 51 of the Act of 1950 would be required only in a case where a suit under Section 50 of the Act of 1950 has been filed by a person whose interest having been involved in any of the ''public trust'' as defined in the aforesaid provision prescribed under Section 2 (10) of the Act of 1950. Moreover,

a mere perusal of Section 50 (ii) of the Act of 1950 would show that it would be applicable only where a suit is filed to recover the possession of the suit property belonging to the ''public trust'' or alleged to be belonging to ''public trust'' by a person having interest in any of the public trust property.

13. However, a bare perusal of the facts involved in the present case would show that the plaintiffs have instituted a suit against the ''public trust'', i.e., defendant No.1 by averring that the alleged gift deed was never intended to be acted upon nor the possession of the suit property was ever handed over. Thus, the pleadings made in the plaint would show that the possession of the suit property was not delivered under the alleged registered deed of gift and that is the reason why the plaintiffs have not claimed for possession of the suit property. Besides, a plain reading of the plaint averment would show further that the suit has been filed by a person whose interest has not been involved as defined in above mentioned provisions of Section 2 (10) of the Act of 1950, therefore, the provisions prescribed under Section 50 & 51 of the said Act of 1950 are not attracted in view of the facts involved in the present case.

14. Now to ascertain whether the principles laid down in the matter of Sainath Mandir Trust v. Vijay and others (supra) have been considered properly or not by the trial Court in arriving at a conclusion that the suit as framed and instituted is not maintainable for want of requisite sanction from the Charity Commissioner, for which, it is necessary for this Court to examine the facts involved in that case. That is the case where a suit was instituted by the plaintiff for possession and damages against the defendant, the public trust, on the premises that he has purchased the suit plot by virtue of the registered deed of sale dated 14.10.1982 from its real owner, namely, Vasant Mahadeo Fartode, who was impleaded as defendant No.1 in the suit. The defendant, a public trust, the main contesting party had contested the claim on the ground that prior to the execution of the alleged sale, the plot in question was already dedicated to the Idol of Sai Baba by the said owner by executing a gift deed on 31.01.1974 and pursuant thereto the possession was also delivered, therefore, the owner of which had no alienable interest to alienate the suit property, subsequent thereto, to the plaintiff.

15. Upon due consideration of the submissions advanced by the respective parties and particularly with regard to the fact that the possession of the disputed plot was already delivered to the defendant, i.e., the public trust, it was observed in such circumstances that the plaintiff was required to seek permission from the Charity Commissioner before filing a suit for possession against the defendant, i.e., ''public trust''. It, therefore, held ultimately in para 32 as under:

"32. It also cannot be overlooked that in the instant case, it is the original owner of the property i.e., Respondent 8 who had executed a deed of gift in favour of the appellant Trust and subsequently after ten years, executed a sale deed in favour of the predecessor of Respondents 1 to 7, who approached the Court for recovery of his property in which case it could perhaps have been available for the owner of the property to approach the civil court. But in the case at hand, it is the purchaser of the property, predecessor of Respondents 1 to 7 who filed the suit for possession which clearly can be construed as the suit for recovery of possession from the appellant Trust which was in possession of the property. In that view of the matter, it was the statutory requirement of the Bombay Public Trusts Act, 1950 to approach the Charity Commissioner before a suit could be instituted."

16. The principles so laid down in the above mentioned case, would reveal that a suit, if filed, for possession against the public trust without seeking requisite permission required mandatorily under the provisions prescribed under Sections 50 & 51 of the Act of 1950 would not be maintainable. However, the facts involved in the instant matter would demonstrate the fact that the plaintiffs have filed the suit for declaration and injunction and not for possession by submitting that although the gift deed was executed and registered in favour of the defendant, a registered public trust, but the same was neither intended to be acted upon nor the possession of it was ever delivered in pursuance thereof. Therefore, the considered opinion of this Court is that the principles laid down in the matter of Sainath Mandir Trust v. Vijay and others (supra) are distinguishable from the facts involved in the present case, and therefore, the rejection of the plaint by the trial Court by relying upon it, deserves to be set aside.

17. The second contention of the learned counsel for the respondent No.1 is that since the plaintiffs'' claim covered by virtue of sub-clause (iv) of Section 50 of the Act of 1950, therefore, also the claim of the plaintiffs without prior permission from the Charitable Commissioner is not maintainable. However, from the plain reading of the provision prescribed under the said provision would show that if suit for declaration and injunction is filed, as instituted in the present case, would certainly be covered by clause (iv) of this provision, but that per se would not attract the requirement of obtaining prior permission within the meaning of this provision unless and until the reliefs specified in clauses (a) to (q) thereof are claimed. Undisputedly, a bare perusal of the reliefs as claimed by the plaintiffs in the instant suit would reveal that they are not covered by any of the clauses (a) to (q) of Section 50 of the Act of 1950. Therefore, in my opinion, the requirement of obtaining prior permission of the Charity Commissioner does not require in the present case and the finding so recorded by the trial Court in this regard while rejecting the plaint under Order 7, Rule 11 (d) of the Code, 1908, is accordingly not sustainable and deserves to be set aside.

18. In view of the aforesaid discussions, I hereby set aside the order passed by the trial Court by holding that the suit as framed is not only maintainable but in fact required to be remanded, and therefore, I hereby remand the matter to the trial Court while exercising the powers enumerated under Order 41, Rule 23 of the Code, 1908 for its decision on merit.

19. Since the matter has been remanded by this Court while exercising the powers enumerated under Order 41, Rule 23 of the Code, 1908, therefore, the

 

question which does arise further for determination of this Court is as to whether the plaintiffs/appellants are entitled to get the Court fee refunded paid by them in this memorandum of appeal under Section 13 of the Court Fees Act, 1870?

20. For consideration of the above issue, the provisions contained in Section 13 of the Court Fees Act, 1870 (hereinafter referred to as ''the Act, 1870'') are relevant, and therefore, reproduced herein as under :-

"13. Refund of fee paid on memorandum of appeal.-If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or if a suit is remanded in appeal, on any of the grounds mentioned in section 351 of the same Code, for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorizing him to receive back from the Collector the full amount of fee paid on the memorandum of appeal:

Provided that, if in, the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall not authorize the appellant to receive back more than so much fee as would have been originally payable on the part or parts of such subject-matter in respect whereof the suit has been remanded."

21. The aforesaid provision speaks of a suit remanded in appeal on any of the grounds mentioned in Section 351 of the same Code, i.e., Code of Civil Procedure, 1859, which was then in force. Section 351 of the Code of Civil Procedure, 1859 provided for the remand of a case by the appellate Court to the lower Court for a decision on the merits of the case. Order 41, Rule 23 of the Code 1908 also provides for the remand of a case to the lower Court by the appellate Court where the suit had been disposed of upon a preliminary point and the decision of such preliminary point was reversed in appeal by the appellate Court.

22. Order 41, Rule 23 of the Code, 1908, being relevant, is reproduced herein as under :-

"Order 41 - APPEALS FROM ORIGINAL DECREES

Rule 23. Remand of case by Appellate Court.- Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand."

23. The reference of Section 351 of the Code of Civil Procedure, 1859 as embodied to the above mentioned provision of Section 13 of the Court Fees Act,

 

1870 has to be construed as a reference to the provisions of Order 41, Rule 23 of the Code 1908, in view of the provisions prescribed under Section 158 of the Code 1908. The said provision is also relevant for the purpose is reproduced herein as under :-

"158. Reference to Code of Civil Procedure and other repealed enactments.---- In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act 8 of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.''

24. By virtue of the aforesaid provision, the only inference that could be followed is that the reference of Section 351 of the Civil Procedure Code, 1859, as mentioned in Section 13 of the Court Fees Act, 1870 has to be read as reference to the provisions of Order 41, Rule 23 of the Code 1908 and since the matter is being remanded by this Court while exercising the powers enumerated under Order 41, Rule 23 of the Code 1908, for its decision on merits, therefore, the appellants are certainly entitled to get back the Court fees paid by them in this memorandum of appeal under Section 13 of the Court Fees Act, 1870. If the Court fee is not refunded under the present facts scenario, then in the said eventuality, the plaintiffs will have to pay the Court fee twice for getting one justice. Therefore, the double jeopardy which will cause is not only against the principles of equity and justice but is also against the principles of law.

25. The plaintiffs/appellants while instituting a suit for declaration and injunction have paid the requisite Court fees of 29,864/- and since the findings so arrived at by the trial Court have been reversed by this Court under Order 41, Rule 23 of the Code 1908, therefore, in the considered opinion of this Court, is that the appellants are entitled to get back the said Court fees paid by them in appeal as per the provision prescribed under Section 13 of the Court Fees Act, 1870.

26. Cumulative effect of the foregoing discussions is that the suit as framed and instituted even without prior permission from the Charity Commissioner is not only maintainable but the plaintiffs would also be entitled to get the Court fee refunded under Section 13 of the Court Fees Act, 1870. Therefore, while exercising the inherent powers provided under Section 151 of the Code, 1908, I hereby direct for grant of certificate to the plaintiffs/appellants authorizing them to receive back from the Collector the full amount of Court fee of Rs.29,864/- paid by them in this memorandum of appeal.

27. The appeal is, therefore, allowed and the order dated 30.04.2011 passed by the trial Court in Civil Suit No. 37-A/2010 is hereby set aside, in view of the above mentioned terms.

28. The record of the trial Court be returned to the concerned trial Court forthwith and the parties are directed to remain present before the concerned

Court of 7th Additional District Judge, Raipur on 02.12.2016.

29. There shall be no order as to costs.

 