(2008) 06 BOM CK 0094

In the Bombay High Court

Case No : Writ Petition No. 5919 of 1986

Sardar Anandrao Madhavrao Raste (since deceased through Newly appointed Trustee Shri Ashok Anandrao Raste and Others) — APPELLANT

Vs

Vijay Rishideo Shastri and Others — RESPONDENT

Date of Decision : 05-06-2008

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 36, 36(1), 36(2)
Bombay Rent (Amendment) Act, 1971 — Section 36(1)
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15A

Citation : (2008) 4 ALLMR 400 : (2009) 1 BomCR 271 : (2008) 110 BOMLR 1981 : (2008) 5 MhLj 284

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : Raju Moray and V.S. Talkute, for the Appellant; Pankaj Patel, for respondent No. 1, P.G. Karande, for respondent Nos. 2 and 3 and P.S. Cardozo, AGP, for the Respondent

Judgement

B.H. Marlapalle, J.—This petition is directed against the Judgment and Order rendered by the Charity Commissioner at Mumbai on 13/6/1986 thereby allowing the application filed u/s 36(2) of the Bombay Public Trust Act, 1950 (the Act for short). The relevant facts leading to this petition would be briefly stated as under:

The land in old City Survey No. 101 (new City Survey No. 5873) at Panchvati, District Nasik admeasuring 1 Acre and 3 Gunthas along with structures thereon belongs to Shri Balkrishna Prabhudeo Panchwati Trust, which is registered under the Act and the petitioner No. 1 claimed to be the sole trustee of the said trust. Shri Thakkar Vagji Ramdas Seth Bhati was tenant in respect of Survey No. 101 and Mr. Thakkar Vagji filed R.C.S. No. 97 of 1920 against the trust. The suit was compromised and accordingly a compromise decree was passed in 1921. As a result, Vagji was to retain his possession for 50 years from the year 1921 to 1971 and on annual rent of Rs. 90/- and he was thereafter required to hand over the possession to petitioner No. 1 after removing structures, if any, erected during the said period of 50 years. However, Vagji leased out Survey No. 101 to one Shri R.D. Shastri, the predecessor of the present respondent Nos. 1 to 3 on annual rent of Rs. 150/- for the period from 1/2/1924 to 31/1/1972 i.e. till the expiry of the lease period originally granted in favour of Vagji. Mr. R.D. Shastri erected temporary sheds on the suit land and leased them to 26 tenants on a monthly rent of Rs. 900/- and the said tenants continued to be in possession all along (Petitioner Nos. 2 to 27). Mr.Vagji''s rights got extinguished on 31/1/1972 as per the decree passed in RCS No. 97 of 1920. The tenants of Mr.Shastri became deemed tenants of the trust in respect of their respective tenements by virtue of amendment to Section 15-A of the Bombay Rent Act which came into force with effect from 1/2/1973. The tenants inducted by Mr. Shastri formed an Association by name "Niyojit Azad Chowk Bhadekari Sahakari Sangh" with a view to form a Co-operative Housing Society with Petitioner No. 2 as its Chief Promoter.

2. Petitioner No. 1 - trustee entered into an agreement for sale on 14/8/1975 with the Chief Promoter of the said Association of the tenants to sell the suit land for a consideration of Rs. 1,00,000/- and received Rs. 10,000/- as earnest money deposit and the said agreement was subject to the sanction to be granted by the Charity Commissioner. The trustee released advertisement in a local newspaper called "Gaokari" on 9/1/1976 and invited bids for the sale of the suit property. Only one offer for Rs. 70,000/- with earnest money deposit of Rs. 5000/- was received. On 22/1/1976 the petitioner No. 1 submitted an application to the Charity Commissioner purported to be an application u/s 36(1)(a) of the Act seeking sanction for sale of the suit land. Petitioner No. 2 also submitted the similar application on 25/3/1976 to the Charity Commissioner. On 3/6/1976 the said application was allowed and thus the proposed sale in favour of respondent Nos. 1 to 3 was sanctioned. On 12/6/1976 the petitioner No. 2 submitted an application to the Charity Commissioner requesting to reconsider the order dated 3/6/1976. On 12/6/1976 the petitioner No. 1 submitted an application to the Charity Commissioner stating that he did not wish to sell the trust property to respondent Nos. 1 to 3. On 5/1/1978 the petitioner No. 1-Trust filed an application u/s 36 of the Act before the Charity Commissioner for permission/ approval to sell the Trust land as per the agreement dated 4/8/1975 and for a consideration of Rs. 1,30,000/- to the Bhadekaru Sangh. The said application was allowed on 10/12/1979 u/s 36 (1) (c) of the Act for sale of the trust property to Azad Chowk Bhadekaru Sangh for Rs. 1,30,000/-. The respondent Nos. 1 to 3 filed an application purported to be u/s 36 (2) of the Act before the Charity Commissioner on or about 27/2/1980 and the said application was allowed by the Joint Charity Commissioner on 20/7/1981 thereby revoking the sanction order dated 10/12/1979. This order dated 20/7/1981 came to be challenged by the petitioner Nos. 2 to 27 before this Court in Original Side Writ Petition No. 1581 of 1981 and the impugned order was stayed. In the meanwhile, the petitioner No. 1 - trust executed sale deed with petitioner Nos. 2

to 27 in respect of the suit property purportedly on the basis of the sanction order dated 10/12/1979. Writ Petition No. 1581 of 1981 was decided on 6/2/1986 and the impugned order dated 20/7/1981 was set aside by remanding Application No. 1 of 1980 for fresh hearing and decision by the Charity Commissioner who, in turn, heard the parties and passed the impugned order on 13/6/1986.

3. Before I proceed to deal with the petition on merits, it needs to be noted that during the pendency of this petition, some of the petitioners i.e. petitioner Nos. 2 to 27 have already alienated their respective shares or part of it to third parties.

4. The impugned order has held that the order of authorisation dated 10/12/1979 was obtained by misrepresentation and by suppressing material facts and, therefore, the said order was required to be revoked. Mr. Moray the learned Counsel for the petitioners, before proceeding to deal with the impugned order on merits, has raised the preliminary point of maintainability of the application filed by Shastris u/s 36 (2) of the Act, which application has been allowed by the impugned order. As per Mr. Moray, firstly, the trust deed does not provide specifically for the disposal of the immovable property of the trust and, therefore, an application for seeking sanction u/s 36(1)(a) and (b) of the Act could not have been filed and the only remedy for the trustee was to file an application u/s 36(1)(c) of the Act seeking authorisation. In support of this proposition, the learned Counsel has relied upon the following two decisions of this Court:

(i) Bomi Jal Mistry and Others Vs. Joint Charity Commissioner, Maharashtra and Others, .

(ii) Sailesh Developers and Anr. v. Joint Charity Commissioner, Maharashtra and Ors. 2007 (3) Mh.L.J. 717.

Secondly, Mr. Moray submitted that though the application submitted by the petitioner No. 1 on 5/1/1978 was claimed to be u/s 36 of the Act, it was not very specifically stated whether it was filed under Sub-clause (a), (b) or (c) of Subsection (1) of Section 36 of the Act. The Charity Commissioner passed the order u/s 36(1)(c) of the Act and, therefore, the application filed u/s 36(2) of the Act by Shastris was not maintainable.

5. Coming to the second ground first, the record supports the contentions of Mr. Moray. Before the authorisation order dated 10/12/1979 was passed, the Charity Commissioner addressed a letter to the petitioner No. 1 on 17/10/1979 for the following information:

(a) A Court fee stamp of Rs. 10/- for issuance of authorisation u/s 36(1)(c).

(b) Valuation report of an Architect.

(c) To publish one more advertisement in the newspaper calling for offers which may be opened in the presence of all the offerers and to be allowed to enhance their offer.

The order dated 10/12/1979 though in its preamble states that, "sanction is hereby accorded u/s 36(1)(a) for the sale of the immovable property of the Trust...." The concluding paragraph of the said order reads as under:

Since the document creating the trust does not specifically empower the trustees to alienate the immovable property by way of sale, Charity Commissioner hereby authorises the trustees by virtue of the Section 36(1)(c) of the Bombay Public Trust Act, 1950 to perform the aforesaid transaction.

This clearly indicates that the order dated 10/12/1979 which has been revoked by the impugned order was passed u/s 36(1)(c) of the Act. It further confirms that the document creating the trust did not specifically empower the trustee to alienate the immovable property by way of sale and the only way to alienate the same would be by way of obtaining authorisation u/s 36(1)(c) of the Act.

6. A Division Bench of this Court in the case of Bomi Jal Mistry (Supra) noted that the Legislature had added Sub-clause (c) to subsection (1) of Section 36 by the Amendment Act of 1971 and to provide for the relief not provided u/s 36(1)(a)(b) of the Act. Regarding the intention of the Legislature as well as the purpose behind the said amendment, the Division Bench observed as under:

...The Legislative scheme is that the Charity Commissioner has been made the final arbiter for this purpose. This is the plain and natural meaning that can be ascribed to the language of Section 36(1)(c) of the Act. As observed earlier, this power has been invested in the Charity Commissioner by amendment of 1971 as it was experienced that certain matters which required relief to be obtained from the court of law took long time, and as a consequence of which many times persons interested, advised to approach the Court of law to redress their grievance, do not approach the court either for want of finance or, some other reasons with the result that the defaulting trustees remain in possession of trust affairs and continue causing more damage to the trust. The legislature was conscious that the Charity Commissioner are judicial officers of the status of District Judges who are already enjoying some of the powers under the CPC and there was no reason why the same powers should not be given to them while administering the provisions of this Act and, supervising the trusts. Therefore, legislature introduced Clause (C) empowering the Charity Commissioner to authorise the trustees to dispose of any immovable property of the trust in the interest or benefit or protection of the trust. The plenitude of this power no doubt apparently appears to be wide. Indubitably, the power of the Charity Commissioner is plenipotentiary, but is specific and limited to the cause of interest or benefit or protection of the trust. We are not at all impressed by the argument of the objectors that Clause (c) has been inserted to cover matters which were left out from Clause (a) and (b). This submission would virtually require us to construe expression "authorise" in Clause (c) as only "sanction". This cannot be countenanced, for the legislature can be ascribed the knowledge of distinction between the two, especially when both these expressions are used in one section. Besides it would mean that all transactions in respect of immovable property of the public trust would require sanction, which is obviously negating the purport of clauses (a) and (b). Moreover, it is seen that Section 36 opens with Non-obstante clause, for it provides that:" Notwithstanding anything contained in the instrument of trust". On its plain language it would mean that even if the instrument of trust prohibits the trustees either expressly or impliedly, even then the Charity Commissioner would be empowered, nay, obliged to authorise any trustee to dispose of such property on any application made in that behalf, regard being had to the interest or benefit or protection of the trust. In any case when the instrument of the trustees in that regard or that it does not expressly or impliedly prohibit the trustees, then surely in such a case the trustees can approach the Charity Commissioner u/s 36(1)(c) for giving authority to dispose of any immovable property of the public trust....

7. The law laid down by this Court in the case of Bomi Jal Mistry has been confirmed by the Full Bench in the case of Sailesh Developers (Supra) and it held that the word "sanction" and "authorisation" are not one and the same and each of them operates in different contexts. The Division Bench confirmed that where the Rules of the Trust do not provide for disposal of the property, the Trust will have to approach the Charity Commissioner by filing an application u/s 36(1)(c) for authorisation. There is no dispute and as has been well settled in law and as is obvious from the plain language of Sub-section (2) of Section 36 that an application under the said sub-section can be filed before the Asst. Charity Commissioner for revocation of the order which has been passed u/s 36(1)(a) or Section 36(1)(b) and such an application cannot be filed for revocation of an order which has been passed u/s 36(1)(c) of the Act. This position in law is squarely applicable to the present case as undoubtedly by the impugned order the Charity Commissioner has revoked the order passed u/s 36 (1) (c) of the Act on an application moved u/s 36(2) of the said Act. Therefore, the preliminary point of jurisdiction raised by Mr.Moray will have to be upheld with a finding that the said application was not maintainable before the Charity Commissioner.

8. This petition has been filed in 1986 and the judgment of the Division Bench in the case of Bomi Jal Mistry was rendered on 27th March 2002, whereas the Full Bench judgment in the case of Sailesh Developers came to be rendered on 14/2/2007. Mr.Moray, the learned Counsel, therefore, rightly submitted that this preliminary point of jurisdiction of the Charity Commissioner to entertain an application u/s 36 (2) of the Act could not be taken up when this petition was filed and as the petition is presently pending, the law laid down by this Court in Bomi Jal Mistry''s case is required to be followed as the same holds the field as of now. The submissions deserve to be accepted.

9. If the petitioners succeed on the preliminary point, it would be an exercise in futility to examine the challenge to the impugned order on merits and further to examine whether the application submitted by the petitioners was by way of

misrepresentation or by suppression of facts. It is also not disputed that consequent to the sale transaction of 1983 between the petitioners and the tenants inducted by Shri Shastri, some of these tenants have sold either fully or partly their respective shares to third parties and, therefore, as of now the property covered by the said sale transaction may have lost the nomenclature of being the trust property.

10. In the premises, this petition succeeds on the preliminary point of jurisdiction of the Charity Commissioner to entertain the application u/s 36(2) of the Act and hence the impugned order is quashed and set aside. It is hereby held that the application filed by Shastris u/s 36(2) of the Act on 27/2/1980 and listed as Application No. 1 of 1980 is hereby dismissed as not maintainable. Rule is made absolute accordingly with no order as to costs.