

(2009) 07 BOM CK 0011

In the Bombay High Court

Case No : Writ Petition No. 3749 of 2008

Shri Raimalbua Sansthan - Trust

APPELLANT

Vs

Sumanbai Wankhade and Ashok Wankhade, Ashok Wankhede (Died) through legal LRs. (Smt. Taibai Ashok Wankhede, Nilesh Wankhede, since minor through his mother Smt. Taibai Ashok Wankhede and Sachin Wankhede Since minor through his mother Smt. Taibai Ashok Wankhede)

RESPONDENT

Date of Decision : 06-07-2009

Acts Referred:

Constitution of India, 1950 — Article 227
Societies Registration Act, 1860 — Section 2(13), 6
Trusts Act, 1882 — Section 47, 48

Citation : (2010) 1 BomCR 289

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : A.M. Gordey, for the Appellant; S.D. Chopde, for the Respondent

Judgement

C.L. Pangarkar, J.—Rule, returnable forthwith. Heard finally with consent of the parties.

2. By this writ petition, the petitioner - Trust challenges the decision rendered by the District Judge - I in Regular Civil Appeal No. 78 of 2006, whereby he set aside the decree for possession in favour of the petitioner/plaintiff.

3. The facts are as follows The petitioner/plaintiff is a trust and is the owner of the suit property. It is alleged that one Namdeo Wankhade was inducted as a licensee in the suit premises and in lieu of the same he used to render the services to the trust. It is also alleged that he used to clean the premises and offer "Puja and Archana". It was agreed that the licensee should not encroach upon any portion of the property belonging to the petitioner. It was further agreed that upon death of the original licensee, the licence was liable to be terminated. After death of Namdeo his son Ramkrushna became a licensee. Ramkrushna was also performing the same job and after his death the

defendants are occupying the premises. The petitioner/ plaintiff contends that since Ramkrishna has died and the licence has come to an end.

4. The defendant resisted the suit by filing written statement. They contend that they are occupying the premises as Vahiwardar to the trust and they have been rendering the Puja in the said temple since last more than hundred years. They have, therefore, still right to continue to perform Puja in the temple and plaintiff cannot violate their rights. The learned judge of the trial court decreed the suit.

5. The defendants/respondents preferred an appeal before the District Judge. The learned District Judge found that the defendants are the licensees. They have not perfected the title by adverse possession. The learned District Judge, however, found that the suit was not maintainable because of the fact that all the trustees of the trust have not joined the action in filing the suit. He, therefore, allowed the appeal and set aside the judgment and decree and dismissed the suit. The petitioner/plaintiff, therefore, feels aggrieved.

6. I have heard the learned Counsel for the petitioner as well as the respondents.

7. The main controversy that is required to be resolved in the petition is whether a suit for possession is maintainable at the instance of only one of the trustees.

8. Mr. Chopde, learned Counsel for the respondents, submits that the suit is not maintainable in view of the provisions of Section 47 of the Indian Trust Act as well as the decision rendered by this Court in 1994 Mh.L.J.280 Nagar Wahan Mandir, Pandharpur v. Akbaralli Abdulhusen and Sons and ors. He submits that even by virtue of the Section 6 of the Societies Registration Act, 1860 a single trustee cannot sue for possession of the trust property. According to him, Section 47 of the Indian Trust Act does not allow a trustee to delegate his powers to another trustee and if said powers cannot be delegated, one trustee cannot institute a suit. He submits that in this case precisely, the petitioner has contended that resolution has been passed authorising one of the trustees to institute the suit. This he submits is in breach of Section 47 of the Indian Trust Act.

9. Shri Gordey, learned Counsel for the petitioner, on the other hand contends that Section 47 of the Indian Trust Act has no application to a public trust at all, as said Act applies to the private trust. He submits that the plaintiff is a public trust admittedly and therefore, is not governed by Section 47 at all and therefore, the impediment as given in Section 47 would not come in the way of the trustees in delegating the powers to one of the trustees. He also submits that every public trust is basically a society registered under the Societies Registration Act and therefore ought to be said to be governed by the provisions of the Societies Registration Act. He also contends that Section 6 of the Societies Registration Act permits a Chairman, President or a Member Secretary alone to institute a suit. He contends that said suit by the trust should be treated in fact as a suit by society and therefore, even if one of the trustees files a suit that should be held to be maintainable. He relies on the decision reported in 2009 (2)

Mh.L.J. 899 Patil Patwari Saraya Sansthan v. Vasant Mahadeorao Akarte (dead) through L.Rs..

10. Upon going through both the decisions, it is apparent that both the learned judges make reference to Section 47 of the Indian Trust Act as well as Section 6 of the Societies Registration Act. Mr. Justice Naik in N.W. Mandir's case considers the provisions of Section 47 of the Indian Trust Act and Section 6 of the Societies Registration Act and upon consideration reaches the conclusion that a suit by one of the trustees of a public trust is not maintainable for Section 47 prohibits a trustee from delegating his powers to either of the trustees or even to a stranger. Mr. Justice Naik makes the following observations.

7. Being aggrieved and dissatisfied by the aforesaid Judgment and Decree, the petitioners have filed present Writ Petition under Article 227 of the Constitution of India. The learned Counsel Shri Abhyankar appearing for the petitioners points out that error is committed by the two courts below in holding that the suit filed only by the Chairman and the Secretary of the Trust which is registered under the Societies Registration Act is not maintainable. He contends that in plaint para 2, the plaintiffs have specifically stated that the plaintiff institution is registered Society under the Societies Registration Act though it is also registered under the provisions of Bombay Public Trusts Act. He laid emphasis on Section 6 of the Societies Registration Act, 1860 and pointed out that as per Section 6 the Chairman and the Secretary are authorised and they are entitled to file such a suit and in such a case the general provisions of the CPC under Order 31 cannot be an obstacle. Hence, he argued that Section 6 of the Societies Registration Act, 1860 is present and it ought to have been held that the suit filed through Chairman and Secretary is maintainable.

9. As against this Shri Apte, learned Counsel appearing for respondents places heavy reliance upon two sections of the Indian Trusts Act, 1882. He relies upon Section 47 and 48 of the Act. Section 47 is as follows:

A trustee cannot delegate his office or any of his duties either to a cotrustee or to a stranger, unless (a) the instrument of trust so provides, or (b) the delegation is in the regular course of business, or (c) the delegation is necessary or (d) the beneficiary, being competent to contract, consents to the delegation.

Explanation: 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 is as follows:

When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

Placing reliance on these two sections, Mr. Apte points out that instrument of the trust is not produced on the record and it is nobody's case that the instrument of the trust provides any delegation as referred in Section 47. It is also not the case

of the petitioners that the delegation is in regular course of business or the delegation is necessary and hence Shri Apte points out that in view of the provisions of Sections 47 and 48 the suit filed only by two trustees is not maintainable. In order to further substantiate his contention Shri Apte relies upon Full Bench decision reported in *Atmaram Rachhodbhai Vs. Gulamhusein Gulam Mohiyaddin and Another*, and he points out that decision making by co trustees must be joint in absence of severalty in the trust deed, though mere formal act by one is permissible. Thus, he contends that unless the instrument of Trust provides, all co trustees must join in filing the suit to recover the possession of the property from the tenant. He pointed out that almost all the major High Courts have consistently taken a view that suit filed by some of the trustees without exoneration of this, is not maintainable. AIR 1949 Cal 519 *Ramesh Chandra Roy v. Hemendra Kumar Ray* has also taken identical view as expressed by the Full Bench in *Atmaram Rachhodbhai Vs. Gulamhusein Gulam Mohiyaddin and Another*, . He also points out that the view expressed by Full Bench is also followed by Justice S.K. Desai in Special Civil Application 3107/75 though in a different context and hence he points out that the reasoning assigned by the two courts below in holding that the suit is not maintainable is correct and no interference is called for of this Court in exercise of its power under Article 227 of the Constitution. He also supports the finding of the two courts below and the interpretation of Section 6 of the Societies Registration Act, 1860 and he rightly points out that in view of the definition of Section 2(13) the society registered under the Societies Registration Act, 1860 is also included in the definition of the said Public Trust. In view of this, he contends that both the judgments should be confirmed.

11. After hearing both the learned Counsel I am not inclined to accept the submission of Shri Abhyankar whereas I am inclined to accept the contentions of Shri Apte as I find that the Full Bench decision of Gujarat reported in *Atmaram Rachhodbhai Vs. Gulamhusein Gulam Mohiyaddin and Another*, is directly on the point and arises under the Rent Act. It has been held by the Full Bench of Gujarat that unless instrument of trust otherwise provides all co trustees must joint for filing a suit to recover the possession of the property from the tenant. It is nobody's case in this matter that the instrument of the Trust provides otherwise. In fact, instrument of the Trust is not even produced on the record, and on the proper construction of Section 47 and 48 of the Indian Trusts Act which are reproduced above, the contention raised by Shri Apte is correct. Section 47 clearly deprives the trustee from delegating his office in any of his duties to cotrustee or to a stranger unless conditions mentioned in the said section are complied with. It is not in dispute in this matter that the conditions referred to in section and Section 48, it would not be difficult to record a finding that the present suit filed by the two trustees is not maintainable. The second submission with reference to Section 6 of the Societies Registration Act, 1860 cannot be accepted in view of the definition of Public Trust given in Section 2(13) of the Bombay Public Trusts Act. Section 2(13) of Public Trusts Act reads as

follows:

Public Trust means an express or constructive trust for either public religious or charitable purpose or both and includes a temple, a Math, Wakf, Church, Synagogue, Ajiary or other place of public religious worship a dharmada or any other religious or charitable endorsement and the Society either for religious or charitable purpose or for both and registered under the Societies Registration Act, 1860.

Considering the said definition of the Public Trust, it is very clear that the Society registered under the provisions of Societies Registration Act, 1860 is also included in the definition of the said Public Trust and hence suit filed only by two trustees will not be maintainable. Granting of a lease is a matter which cannot be delegated by a trustee and, therefore, it must follow as a necessary corollary that determination of a lease also cannot be regarded as a matter which can be delegated by a cotrustee to another cotrustee or to any one else. The power and function to determine the lease is of the same nature and as the power and function to grant a lease cannot be delegated, equally other cannot be. Both the functions are effected with beneficiary's judgment. All the co trustees are bound to exercise their judgment and no one cotrustee can delegate these functions to his cotrustee or to any other person. These observations made by the Full Bench apply to the facts of the present case and for the same reasoning I refuse to accept the contention raised by Shri Abhyankar.

11. Mr. Justice Dongaonkar making reference to both these provisions i.e. Section 47 as well as Section 6 finds that a suit for possession filed by even a single trustee is maintainable where there is a resolution to that effect by the other trustees. He makes following observations in 2009 (2) Mh.L.J. Patil Patwari Saraya Sansthan v. Vasant Mahadeorao Akarte (dead) by L.Rs.

8. This Court in Nagar Wachan Mandir, Pandurapur .vs. AkIbaralli Abdulhusen and Sons and others, 1994 Mh.L.J.I 280 has observed in para 11, thus:

After hearing both the learned Counsel I am not inclined to accept the submission of Shri Abhyankar whereas I am inclined to accept the contentions of Shri Apte as I find that the Full Bench decision of Gujarat reported in Atmaram Rachhodbhai Vs. Gulamhusein Gulam Mohiyaddin and Another, is directly on the point and arises under the Rent Act. It has been held by the Full Bench of Gujarat that unless instrument of trust otherwise provides all co trustees must joint for filing a suit to recover the possession of the property from the tenant . It is nobody's case in this matter that the instrument of the Trust provides otherwise. In fact, instrument of the Trust is not even produced on the record, and on the proper construction of Section 47 and 48 of the Indian Trusts Act which are reproduced above, the contention raised by Shri Apte is correct. Section 47 clearly deprives the trustee from delegating his office in any of his duties to cotrustee or to a stranger unless conditions mentioned in the said section are complied with. It is not in dispute in this matter that the conditions

referred to in section and Section 48, it would not be difficult to record a finding that the present suit filed by the two trustees is not maintainable. The second submission with reference to Section 6 of the Societies Registration Act, 1860 cannot be accepted in view of the definition of Public Trust given in Section 2(13) of the Bombay Public Trusts Act. Section 2(13) of Public Trusts Act reads as follows :

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Considering the said definition of the Public Trust, it is very clear that the Society registered under the provisions of Societies Registration Act, 1860 is also included in the definition of the said Public Trust and hence suit filed only by two trustees will not be maintainable. Granting of a lease is a matter which cannot be delegated by a trustee and, therefore, it must follow as a necessary corollary that determination of a lease also cannot be regarded as a matter which can be delegated by a cotrustee to another cotrustee or to any one else. The power and function to determine the lease is of the same nature and as the power and function to grant a lease cannot be delegated, equally other cannot be. Both the functions are effected with beneficiary's judgment. All the co trustees are bound to exercise their judgment and no one cotrustee can delegate these functions to his cotrustee or to any other person. These observations made by the Full Bench apply to the facts of the present case and for the same reasoning I refuse to accept the contention raised by Shri Abhyankar.

9. On perusal of these two judgment, it would be seen that the facts of those cases were such that the instrument of trust did not provide for filing the suit or defending the suit by one of the trustees or chairman or the secretary of such trust.

10. In this regard, therefore, it is necessary to closely note the provisions of Section 47 and 48 of the Indian Trust Act, which reads thus-

47. Trustee cannot delegate - A trustee cannot delegate his office or any of his duties either to a cotrustee or to a stranger, unless (a) the instrument of trust so provides, or (b) the delegation is in the regular course of business, or (c) the delegation is necessary or (d) the beneficiary, being competent to contract, consents to the delegation.

Explanation: The appointment of an attorney or proxy should act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section.

48. Cotrustees cannot act singly When there are more trustees than one, all

must join in the execution of the trust, except where the instrument of trust otherwise provides.

The provisions require that if there are more trustees than one, then all trustees must join in the execution of the trust, except where the instrument of trust otherwise provides.

11. The Societies Registration Act, 1860, Section 6 provides thus

6. How suit by and against societies - Every society registered under this Act may sue or be sued in the name of the President, Chairman, or Principal Secretary in default of such determination, in the name of such persons as shall be appointed by the governing body of the occasion:

Provided that it shall be competent for any person having a claim or demand against the society, to sue the president or chairman, or principal secretary or the trustees thereof, if on application to the governing body some other office or person be not nominated to be the defendant.

12. Mr. Justice Dongaonkar refers to judgment in N.W. Mandir's case and finds that the same cannot be applied to the set of the facts in the case before him. But it appears to me that the questions involved in both the decisions were identical. Apparently there is a conflict of opinion as to the application of Section 47 of the Indian Registration Act to a public trust as well as Section 6 of the Societies Registration Act. Both the decisions are of coequal bench. The controversy involved is of a general importance and it affects rights and property of the public trust.

13. I may observe that Section 47 of the Indian Trust Act cannot have an application to a public trust. Section 47 to my mind necessarily applies to the private trust. Section 47 could not be an impediment in the way of the trustees of the public trust to delegate their powers to one of their colleagues. But since there is a conflict of opinion, it would be necessary to make a reference to the larger bench for the reasons as stated above.

14. The questions that can be referred to are as follows

(1) Whether Section 47 of the Indian Trust Act is applicable to a public trust and thus limits the powers of the Board of Trustees to delegate their powers in regard to institution of suit for recovery of the trust property to one of their colleagues ?

(2) Whether therefore a suit instituted by one of the trustees for possession would be maintainable ?

(3) Whether by virtue of public trust being a society, a suit for recovery of property at the instance of the Chairman, President, Secretary of the public trust alone is maintainable u/s 6 of the Societies Registration Act ?

15. The Registrar (Judicial) is directed to place the matter before the Hon'ble the Chief Justice for constitution of larger Bench.