
(2014) 12 BOM CK 0030

In the Bombay High Court

Case No : Originating Summon No. 774 of 2014

Thakkar Kanji Morarjee Bhatia Niwas

APPELLANT

Vs

The Charity Commissioner

RESPONDENT

Date of Decision : 04-12-2014

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 36, 50, 50(ii), 51, 80

Citation : (2015) 1 BomCR 421

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : Soli Cooper, Sr. Adv., Bipin Joshi and Ashwini Takalkar, Advocate for the Appellant; D.D. Madon, Sr. Adv., Naushad Engineer, M. Sangoi, Advocate i/b. Federal and Rashmikan, Advocate for the Respondent

Judgement

R.S. Dalvi, J.—The plaintiffs who are two trustees of a registered public trust have taken out this originating summons for putting up certain questions before this Court as affecting the rights of beneficiaries and arising in the administration of the estate of the plaintiffs' trust. The questions are rather unique. The plaintiff would want the Court to answer :

(a) Whether the sanction to sale the trust property dated 13th November, 1979 issued by the Charity Commissioner stands complied.

(b) Whether the execution of the conveyance without the simultaneous execution of the lease deed would amount to breach of the condition of sanction dated 13th November, 1979.

(c) Whether such execution is valid and lawful.

(d) Whether the breach of the order dated 13th November, 1979 can be remedied and rectified by execution of appropriate lease deed.

(e) Whether or not the execution of the lease deed will invalidate conveyance. and

(f) Whether the trustees are required to take legal proceedings to recover possession of the trust property from defendant Nos. 2 and 3.

2. Under clause 4A of the agreement dated 18th October, 1978 the sanction of the Charity Commissioner under Section 36 of the Bombay Public Trust Act, (BPT) was to be taken. Under clause 5 of the said agreement upon the completion of sale the purchaser had to enter into a lease with the vendors as the trustees of structure marked "A".

3. The plaintiffs claim that their predecessor-in-title who were the earlier trustees of the plaintiffs' trust entered into an agreement to sell the trust property upon the sanction of the Charity Commissioner and simultaneously upon the sale the purchasers were to lease one structure marked "A" on the plan annexed to the said agreement to the trust.

4. The conveyance deed has been executed on 30th March, 1982. The lease deed has not been executed till date. If the lease deed was not executed as required simultaneously with the conveyance deed the trustees would require to sue the purchasers for specific performance or for directions to execute the lease deed. The suit for specific performance would be required to be filed essentially within three years from 30th March, 1982 since that was the specified date of the conveyance. The suit would become barred on 30th March, 1985. That suit has become barred by Law of Limitation. The plaintiffs contend that pursuant to the agreement between the parties the Charity Commissioner sanctioned the sale. The sale was sanctioned in terms of the agreement. Consequently the sanction was also subject to the execution of the lease deed. The lease deed has not been executed and consequently the plaintiffs claim to know whether order of sanction has been complied or whether the sanction has been breached and consequently whether sale executed of the deed of conveyance without the lease deeds would be valid or if not valid it could be rectified.

5. All these questions would arise at the time of the execution of the conveyance itself or immediately thereafter. The cause of action to sue in the execution of the lease deed or to remedy the act or to obtain a declaration that such execution of the conveyance is not valid would arise from the date of the conveyance itself. The questions which are required to be answered would be required to be answered by the Court if the remedy that the Court may suggest or opinion that it would give would be legally enforceable. If the remedy itself is barred the originating summons would be of little consequence.

6. It would, therefore, have to be seen whether the originating summons would be barred by the Law of Limitation. It is an application made to Court under provisions of Chapter XVII of the High Court Original Side Rules. Under Article 137 of schedule 1 to the Limitation Act, 1963 in application for which the period of limitation is not prescribed would require to be taken out within three years from when the right to apply accrued. The right to apply in this case accrued at least on the date of the execution of the conveyance if not before. The plaintiffs

should have asked the Court the same questions within three years of that date. That having not been done and the remedy in that regard having been seen to be barred by Law of Limitation, the originating summons would not lie.

7. The fact that the period of limitation is material to consider emanates from the observation in the Division Bench of this Court in the case of Charu K. Mehta Vs. Lilavati Kirtilal Mehta Medical Trust and Others, . In that case the Court observed that under Article 137 the originating summons taken out by the plaintiff in that case would have been barred by Law of Limitation. The Court observed that originating summons was also barred by under Section 80 of the BPT Act. Since it was barred under that provision the Court did not consider the issue of limitation. The observation of the Court in paragraph 67 of the judgment shows that if the bar under Section 80 was not shown the consideration of the issue of limitation by the learned Single Judge could have been directed. Upon such observation this Court would require to consider the issue of limitation which has been considered as above.

8. It is argued on behalf of the defendant Nos.2 and 4 that this application is also barred by under Section 80 of the BPT Act. Under Section 80 Civil Court's jurisdiction is barred with regard to any question by or under the BPT Act which is required to be decided or dealt with by the Charity Commissioner finally and conclusively. Mr. Madon on behalf of defendant Nos.2 and 3 argued that under Section 50(ii) and (iii) of the BPT Act the consent of the Charity Commissioner is required for any suit which is filed inter-alia to recover possession of any property from any person or in a suit for the administration of any public trust.

He would claim that for want of consent of Charity Commissioner this Court cannot entertain the originating summons. He relied upon the aforesaid judgment in the case of Charu (Supra) that the Court in a similar matter held that the originating summons was barred by Section 80 of the BPT Act. He would argue that question No. 6 in this originating summons is with regard to the filing of the suit relates to recovery of possession from defendant Nos. 2 and 3. Without the consent of the Charity Commissioner under Section 50 r/w. Section 51 of the BPT Act the suit could not be filed. The judgment in the case of Charu (Supra) holds that such an originating summons would be barred under Section 80 of the BPT Act. The reading of that judgment is incorrect. In that case there were several matters arising before the Assistant Charity Commissioner in change reports in which the interpretation of deeds of trust was directly in question. Those matters were disputed and contested and partly heard by Assistant Charity Commissioner. The change reports would have to be decided by the Assistant Charity Commissioner finally and conclusively. The Court would not have any jurisdiction to decide any application with regard to change reports. The originating summons for interpretation of deed of trust with regard to the change reports, therefore, would be barred under Section 80 of the BPT Act. This originating summons is specifically shown to be taken out for questions arising in the administration of the trust of the plaintiffs as specifically averred in

paragraph 21 of the summons. A suit required to be filed for recovery of possession would have to be filed in a Civil Court. Orders and directions for administration of any public trust may also be given by the Civil Court. This would only be subject to the Charity Commissioner's consent / sanction. Under Section 50 or 51 of the BPT Act, they would not be matters required to be decided by the Charity Commissioner or any other officer under the Act finally and conclusively. This is not, therefore, one such matter. The Court's jurisdiction to otherwise answer question in an originating summons would not be barred by under Section 80 of BPT Act.

9. However, a originating summons taken out under Rule 238 would require to be only for questions relating inter-alia to the rights of beneficiaries and the determination of a question arising for the administration of the trust. Under Rule 245 of the High Court Original Side Rules a person claiming under an instrument may apply for declaration of the rights of such person's interest. The aforesaid questions in this originating summons also relates to the right to the beneficiaries of the trust. The declaration of the rights of the beneficiaries are sought. The originating summons would, therefore, fall within the latter part of Rule 245.

10. The answers of the questions would be given in a suit for recovery of possession, if filed. That suit, as aforesaid is seen to be clearly barred by Law of Limitation.

11. Under Rule 255 of the High Court Original Side Rules the Court may refuse to pass any order on the originating summons and dismiss it and refer the parties to a suit in ordinary Courts and make order for costs of the originating summons. In view of the aforesaid facts the Court need not answer the questions which would be in the nature of the opinion of the Court and not the construction of any instrument though it may be for declaration of the rights of the beneficiaries save and except stating that the originating summons should have been taken out so soon as the right to apply for originating summons accrued and before it was barred.

12. Consequently, originating summons is dismissed.