

(2014) 12 BOM CK 0024

In the Bombay High Court

Case No : First Appeal No. 1326 of 2014 and Civil Application No. 3861 of 2014

Tukai Devi Trust

APPELLANT

Vs

Nivrutti P. Mujumle

RESPONDENT

Date of Decision : 20-12-2014

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 41D, 41D
Criminal Procedure Code, 1973 (CrPC) — Section 211

Citation : (2015) 1 ABR 616 : (2015) 2 ALLMR 377 : (2015) 2 BomCR 803

Hon'ble Judges : Mridula Bhatkar, J

Bench : Single Bench

Advocate : N.V. Walawalkar, Sr. Advocate i/b N.V. Gangal, Advocate for the Appellant; Kiran Bhagalia i/b Krishna Kelkar, Advocate for the Respondent

Judgement

Mridula Bhatkar, J.—Admit. Respondents waive notice. By consent, the appeal is heard and decided finally at the admission stage.

2. Though it is a First Appeal, under Bombay Public Trusts Act, it is to be considered in the form of Second Appeal. In this Appeal, substantial questions of law is formulated as follows:

i) Whether the decision of the Court violates the Doctrine of Proportionality?

Though only one substantial question of law is framed, the learned Senior Counsel for the appellants argued and suggested more substantial questions of law which were not accepted but only one is framed as a substantial question of law. Before dealing with the said question of law, his submissions are taken into account.

3. Appellant No. 1 is a Trust in the name of goddess "Tukai". The Trust owns immovable property i.e., a temple and land admeasuring 2 to 3 acres. The families of the appellants are appointed as Trustees and they are also "Pujaris" known as "Gurav". Since nearly 100 years they are offering services to goddess. Though they are not from one unit of the family, they are the branches of one

original family. The respondents are the members of the Gram Panchayat of Village Kondhanpur, where the temple and the Trust situate. The respondents are also the members of different units of one original family. The respondents have filed application under section 41D of the Mumbai Public Trust Act praying that there is non-performance of functions as trustee and breach of the scheme and object of trust is frustrated due to misfeasance and malfeasance, on the part of trustees. So, they are to be removed from the Trusteeship. The application filed by the Respondents was allowed and the application made by the appellants was rejected by the Deputy Charity Commissioner on 31.10.1977. Thereafter, an application was moved before the District Court who upheld the order of the Deputy Charity Commissioner. Hence, the appellants are before this Court, in this appeal.

4. Mr. Walawalkar, the learned Senior Counsel appearing for the appellants, made elaborate submissions on the point of substantial questions of law as follows:

"i) Whether the appreciation of evidence by both the Courts below is totally perverse, incorrect and erroneous by reason of reliance placed by the Courts below on the stray sentences of alleged admissions by reading them in isolation with the other evidence and especially by ignoring the Explanations given by the appellants and Respondents" own suggestions given to the witnesses of the appellants which destroyed the effect of those admissions relied on by the lower courts against the appellants?

ii) Whether the charges as framed were sufficient in law to give sufficient and proper opportunity in law to the appellants to meet those charges?

iii) Whether the charges were vague and were not sufficient as required by law to give opportunity to the appellants to meet them and whether that has resulted in miscarriage of justice to the appellants, in as much as the same, if found true, would result into serious consequences for them resulting in a blot on them?

iv) Whether the evidence led by the respondents was sufficient in law to meet the requirement of high standard of proof as required by law in a case of disqualification of a trustee under section 41-D of the Maharashtra Public Trust Act, 1950?

v) Whether the judgments of the lower courts are sustainable in law when they have not addressed themselves to the issue of proportionality of punishment of removal of appellants to be inflicted on them with reference to the vague charges leveled against them?"

5. He submitted that this is a quasi criminal trial. Hence, the charges ought to have been precise and the degree of proof should be higher than the general preponderance of probabilities like civil trial. He submitted that though the issue of misfeasance and malfeasance is framed in charge No. 2 and was also in point No. 2 of the appellant Court, the charges are vague. So, question No. 1 is that (i) whether the charges 2, 3 and 4 of the trial Court and the corresponding points of

determination formulated by the appellate Court at 2, 3 and 4 are general and vague. He submitted that (ii) both the judgments of the appellate Court and the trial Court suffer from perverse appreciation of evidence. He pointed out 2-3 instances of the perverse appreciation:

a) The land was sold by one Jagannath, father of one Ganesh i.e., the present trustee in 1960 and not by him. However, that is counted against the present trustee i.e., the appellant.

b) The bank account was opened and accounts of every year audited, though submitted, not properly considered. So also, the admission given in the cross-examination that of big amounts and gifts are deposited in the trust and admission is given about the fact that petty amounts and petty gifts are collected by these people. It is assessed out of context.

c) The Court committed an error in considering that the appellants are beneficiaries. Thus, the Court failed to appreciate that there are no charges of misappropriation of funds collected for deity and no remuneration was paid to the appellants for their services as Pujari.

6. The learned Counsel submitted that failure to organise the celebrations, cannot be considered as breach and violative of the functions of the scheme of the Trust. The punishment of removal from trusteeship given under section 41D is too harsh and against the principle of proportionality. On the point of proportionality, he referred to the judgment of this Court in the case of Santosh Kumar Pande and Others Vs. Vinay Kumar Mishra,

7. Ms. Bagalia, learned Counsel for the Respondents, submitted that section 41D of the Bombay Public Trusts Act empowers the Charity Commissioner to conduct enquiry about the working of the Trust. The land admeasuring 1 hectare 45 ares is granted as class III Inam land to deity and not to the trustees. She submitted that this Court has no scope of reappraisal in the second appeal and it is not permissible. In support of her submissions, she relied on the judgment of the learned Single Judge (Coram: S.S. Parkar, J.) in the case of Eruch Merwan Irani and Another Vs. Sardar Sorabji Ruttonji Patel and Others, Both the Courts i.e., the Charity Commissioner and the District Court have given concurrent findings against the appellant while entertaining the matter under section 41D of the Bombay Public Trusts Act. She submitted that a valid scheme was framed by the Charity Commissioner in 1988 of this Trust. Since then, the appellants are working as trustees and Pujaris. However, they have mismanaged the affairs and they are responsible for the mismanagement and also they have used the property for their own interest and not in the interest of the trust. She relied on the evidence of the appellant Gajanan and Rajendra, especially the cross-examination and the admissions given by them. She submitted that on the basis of the admissions given by the witnesses of the appellants, the trial Courts have rightly considered the evidence as sufficient to arrive at a conclusion in support of her submissions, which is the best evidence". She relied on the Division Bench

judgment of this Court in the case of Deputy Collector (Rev.) and Land Acquisition Office, Panaji-Goa, & anr. vs. Rajendra Vassudev Deshpabhu (dead) through L.Rs. Dr.Vassudev R. Deshpabhu & Ors. 2009 (3) Mh.L.J. 530. She further relied on the judgments of both the subordinate Courts and submitted that the appellants have failed to point out the substantial questions of law.

8. It is a settled position of law that reappraisal of evidence is not permissible in Second Appeal by the High Court and the ratio is laid down by the Division Bench of the Bombay High Court in the case of Shivprasad Shankarlal Pardeshi, since deceased by his heirs Vs. Leelabai Badrinarayan Kalwar since deceased by her heirs and others, . Only if there is a perverse finding while appreciating the evidence or misreading of evidence, then that can be framed as a substantial question of law. It is held that the Court has to consider that if at all the Charity Commissioner or the District Court had really given distorted version by misreading the evidence on record and it is perverse, then only the Court would interfere with the order of the Charity Commissioner and the District Court. In the present case, after considering the substantial questions of law which are placed on record, in my view, the same can be summed up as follows:

ii) Whether the subordinate Courts have committed an error in framing vague and general charges?

iii) Whether there is a perverse appreciation of evidence by the Courts below?

iv) Whether the decision of the Court violates the Doctrine of Proportionality?

Out of the above, as mentioned earlier, only question No. (iii) is framed as a substantial question of law.

9. The submissions of the learned Counsel that this is a quasi criminal trial under section 41D, though accepted, the procedure applicable to the said trial is of the Civil Procedure Code and therefore the charges framed against the appellants, are not required to be framed like under section 211 of the Code of Criminal Procedure. The charges are to be framed on the basis of the contentions raised and averments made in the pleadings. The pleadings are descriptive with more details and charge is a gist of it. In the present case, appellants are facing the charges of negligence while performing their functions as trustees and so also there are charges of misfeasance and malfeasance. Misfeasance is a lawful act done wrongfully and malfeasance is doing a wrongful act and this is related to their functions as trustees. The evidence is more detailed and elaborative than the pleadings. On perusal of evidence, a question raised whether the Court has really misread the evidence out of context by picking up few admissions or there is no sufficient evidence to prove the charges is answered in negative. The Courts below have not committed error of framing vague charges or no illegality in appreciating evidence is found.

10. As regards the reliance placed by the learned Counsel for the appellants on the judgment in the case Santoshkumar s/o. Nandkishor Pande & Ors. (supra) on

the point of proportionality, it is true that neither the Charity Commissioner nor the District Court has framed a separate issue or point on the proportionality of punishment. Removal of trustees is a harsh action, however, it is not that such penalty cannot be imposed which is provided under section 41D. It appears from the orders of both the Courts below that the issue of proportionality was not raised before the Courts. It is accepted that there was no occasion to raise such issue before the first forum. However, the issue was not raised before the appellate Court though all the trustees were removed from the post of trusteeship. If the point was not raised before the Court or if it is not discussed at length, then, it can be raised in second appeal, as to whether the punishment granted was proportionate to the acts done or committed and is it necessary to remand the matter to the District Court to decide this issue.

11. It is not the case that such penalty is not prescribed in the statute and it is awarded. The proportionate penalty is a matter of fact. After going through the entire evidence especially the cross-examination of Gajanan and Rajendra, it appears that both the Courts have properly appreciated the evidence not only with regard to negligence in duty but of malfeasance and misfeasance. The Courts have dealt with instances of wrongful acts and omissions in performing their lawful acts one after the other and rightly held that the appellants have been using the property not in the interest of the trust but for their own interest. The submission of the learned Counsel for the appellants that the Court has failed to appreciate the inconsistent stands in respect of getting rent out 10 rooms is not acceptable because a witness who enters the box later, always tries to cover up the admissions sought in the cross-examination of the earlier witness. The Courts are correct in holding that the constructed ten rooms should have been used for the source of income of the deity. Though the account number and the name of the bank are given, it was the duty of the appellants to show how much amount was deposited from time to time. Admittedly, no registers were maintained. There is no account of daily collections and how much money was taken by the Pujaris; the scheme of the trust is also considered by the Courts below. I do not find that there is any perverse appreciation of evidence by the Court below that they have considered admissions or statements of the witnesses out of context. The charges are not vague and are fully proved.

12. High standard of proof is required in a quasi civil, criminal enquiry under section 41D of the Mumbai Port Trust Act and therefore, the Court cannot infer and conclude on the basis of preponderance of probabilities but specific instances of the breach of the scheme or misfeasance or mal-feasance are to be brought on record. However, once evidence is tendered by the party demanding action under section 41D, then, unlike criminal trial, the onus of proof is not constantly on the applicants throughout but the onus shifts at that point on the trustees. The trustees thereafter are required to show their bonafides and they must bring evidence which is within their knowledge and which is in their custody. Benefit of right of silence which is given to the accused throughout the criminal trial cannot be enjoyed by the trustees in the enquiry under section 41D once sufficient

evidence is produced by the other party. A creation of trust and trustees is founded on very high values which are accepted by the society and trustees and, therefore, trustees are expected to rise up to the expectations and the trust of people. The trustees are supposed to offer selfless services which is consistent to the object and scheme of the trust and deviation in any manner definitely cracks the fundamental object of the creation of the trust. When there is a creation of the trust in the name of deity, then, the responsibility of the trustees is very high as everyday devotees offer money, valuable articles and other things to the deity out of their faith. The trustees are supposed to take care of the deity and they are accountable to the faith and belief that people have in the deity. Where everyday cash and valuables are collected and there is no fixed amount of such everyday offerings and as it varies everyday depending on the number of devotees, the persons working as trustees are definitely entirely accountable for maintaining list and accounts of it in the name of the deity. Unless the accounts are produced, definitely this money is taken away for the personal interest of the trustees or pujaris. In the present case, the appellants are in dual roles i.e., the trustees and also pujari. It was necessary on the part of these trustees to fix a monthly remuneration of pujaris and keep accounts of the daily collections and the expenses incurred for the management of deity, devotees and administration of the property. Such defaults cannot be viewed with let-go attitude but it demands selfless observance of the duty.

13. In the case of Santoshkumar s/o. Nandkishor Pande & Ors. (supra), a learned Single Judge of this Court at Nagpur has held in paragraph 6 thus:

"The punishment of either suspension, removal or dismissal as the case may be, has to be proportionate to the gravity of the charge/charges held to be proved. It is not the every lapse or every act of misconduct which invites the punishment of dismissal. The Charity Commissioner is therefore bound to record reasons for imposing a particular punishment."

In the above case, the Joint Charity Commissioner has framed 7 charges against the appellants and out of which only charge nos.1, 2 and 5 were proved and other charges of misappropriation of trust funds and also the charge of malfeasance and misfeasance and the charge of violation of the provisions of rules and regulations of the trust and breach of trust were not established. However, the Joint Charity Commissioner imposed the punishment of removal of the appellants as trustees. In the said case also, the trust was formed in the name of the deity. In the present case, though the charge of misappropriation is not framed, all the charges including the charge of malfeasance and misfeasance are proved. The learned trial Judge has given finding in respect of these charges and hence, the case is distinguishable.

14. The doctrine of proportionality desires objectivity in the decision taking process of the penalty because it necessarily involves subjective approach of that particular Judge. The nature of penalty depends upon a mindset of a Judge wherein a number of factors are involved like his own experience, his idea of

morality, his pragmatic approach, etc. Therefore, the appellate Court needs to examine reasoning of the trial Court to find out whether the Judge has imposed penalty by considering the proportionality objectively or not. The penalty imposed should not be based completely on a subjective approach but it should reflect his thinking process and the considerations to justify the penalty imposed.

15. Thus, the appellate Court needs to find out whether reasons are given by the trial Court while imposing the punishment especially harsh punishment like removal or dismissal of trustees under section 41D. As per the judgment of the learned Single Judge, reasons are bound to be given by the trial Court. However, a separate opportunity is not to be given to the party to make submissions and the reasons need not be given in the last paragraph like quantum of punishment in criminal trial. If the appellate Court after going through the judgment, finds that the reasons for giving harsh punishment are satisfactory, based on proper marshalling of evidence and it is proportionate then, the issue of proportionality, is answered in affirmative.

16. The doctrine of proportionality is a principle in law, which gives direction to a thought of a Judge while imposing penalty. It is based on the idea of justice and objectivity. The penalty imposed on a person should be commensurate with the wrong done by him. Therefore, it is always a matter of fact depending on each case and the evidence tendered by the parties. When statute prescribes certain punishment and if charges are framed accordingly, then, the Court after weighing the wrong done by a person, can impose a penalty, even though it is harsh, but is just. In the present case, I am satisfied that the penalty of removal of the trustees is necessary and proper.

17. Hence, the Appeal is dismissed. Civil application also stands disposed of.