

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 2579 OF 1983

Chandrakant Bhagchand Sanghavi & Ors. ... Appellants
Vs.
Manilal Maganlal Shah (Died)
2. Ambalal Dalsukhabhai & Ors. ... Respondents

Mr. Sachin Khandagale i/b. M/s. Ram & Co., Advocate for the appellants.
None for the respondents.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: 5th **December, 2015**

P.C.:

This Appeal was earlier dismissed on 19th April, 1984, as the appellants and advocate were absent. The said order was challenged in Civil Appeal No. 6761 of 2001 before the Hon'ble Supreme Court. The Hon'ble Supreme Court by its order dated 14th February, 2008 in the said Civil Appeal, has set aside the order passed by the learned Single Judge of this Court with a direction that while dismissing the Appeal, the learned Single Judge of the High Court did not pass reasoned and speaking order after applying his mind and after considering the available records. It is specifically directed that the learned Single Judge to reconsider the case after giving hearing to the parties and dispose of the same after applying the mind in accordance with law. When this matter came before me, I perused previous roznama and it is found that from time to time, the notices were sent to the respondents, order of service of notice by

publication was ordered on 20th October, 2011. It appears that notice by publication was served on respondent no. 10. On 7th February, 2012, submissions were made by the advocate for the appellants that most of the respondents, who were the trustees, were dead and their names were deleted and thus, fresh notices were issued to the remaining respondents. The notice to respondent no. 10 returned back with a remark that "Office not found on given address" and that of Respondent nos. 6 and 8 "incomplete address". Again, through RPAD notices were issued to respondent nos. 6, 8 and 10 on 26th July, 2013. However, the notices were returned again with a remark "Not found on given address" and the appellants did not take steps against respondent nos. 6, 8 and 10 till 18th June, 2014. Again, notice was served on respondent no. 10 by publication. The advocate for the appellants has filed affidavit of service. Thereafter, as per the noting of Registrar (Judicial) dated 18th December, 2014, the advocate for the appellants was given four weeks time to take steps against unserved respondent nos. 6 and 8 and advocate filed affidavit of service of respondent nos. 6 and 8. There is noting of Registrar (Judicial) dated 12th January, 2015 that matter to proceed. Hence, the matter was listed for admission by the registry.

2. When the matter came before this Court for admission, it is found that respondent nos. 1 to 5 are trustees of respondent no. 10-Gujarathi

Jain Visa Oswal Sweatamber Murtipujak Panch Mahajan Sarvajanik Dharmarth Trust and respondent nos. 6 to 8 are the legal heirs of original mortgagor Alamchand Mehta, who is supporting the appellants. Respondent no. 8 Shantibai Alamchand Mehta has deposed at Exhibit 124 in favour of the appellants. Respondent no. 9 is the Charity Commissioner. As the trustees are not found inspite of notice by publication issued on respondent no. 10-Trust, none appeared and therefore, respondent no. 9 Charity Commissioner was called with a query whether respondent no. 9 Charity Commissioner has taken steps by invoking powers under section 47 of the Bombay Public Trust or not and also to find out whether respondent no. 10-trust exists and is functional or not? The Assistant Charity Commissioner, Pune appeared and informed that no record in respect of existence of trust- Gujarathi Jain Visa Oswal Sweatamber Murtipujak Panch Mahajan Sarvajanik Dharmarth Trust is found. No change report is filed and the names of the trustees are also not seen anywhere in the record. Thus, neither the trust nor the trustees were traced.

3. Admit. The Appeal is heard finally and disposed of at the stage of admission, as the respondent no. 10-trust and the respondents-trustees could not be traced. Total 7 witnesses were examined by the trustees and four witnesses were examined by the appellants.

4. Perused the record and proceedings and evidence, which is produced before the Court. The averments of the appellants and the contentions raised by the respondents are considered. The learned counsel for the appellants submitted that it is a old construction with small rooms. On the ground floor there are shops and on the first and second floor, there are rooms which are tenanted. The facts of the case are as follows:

Jivibai, who is the mother of the appellant nos. 1 and 3 and grandmother of appellant nos. 4 and 5, as per the case of the trust, has acquired the property out of her funds on 12th June, 1912 and it is the case of the trust that she dedicated the said property to respondent/trust for the purpose of religious work. Jivibai in writing admitted on 3rd January, 1926 that Dharamshala belongs to Jain Community and she shall render accounts of income thereof to panchas whenever she is called upon to do so and shall hand over the possession. Jivibai executed the will of the said property on 23rd June, 1944. Jivibai died on 18th February, 1947. After the death of Jivibai, as per the will, effect was given and CTS No. 735A and CTS No. 735B, i.e., half portion of the property were taken by appellant nos. 1 and 2. (It is to be noted that some documents in the record and proceedings are not available, because as per the report, some record was destroyed in Panshet flood disaster in the year 1961).

On 22nd June, 1951 the trust was registered and trustees moved an application under section 18 of the Bombay Public Trust Act to Assistant Charity Commissioner for enquiry of the said trust and also the suit property of the trust on 14th August, 1952 and the Application was allowed. Against the said order of the Assistant Charity Commissioner, Appeal Nos. 145 of 1957 and 49 of 1957 were preferred before the Deputy Charity Commissioner, Mumbai , which are allowed and the matter was remanded back to lead fresh evidence. However, in the year 1961 due to panshet flood disaster, record was destroyed and thereafter the Assistant Charity Commissioner reconstructed the same record. The Charity Commissioner allowed the claim under section 18 on 24th May, 1971. Appeal No. 82 of 1971 was preferred against the said order before the Joint Charity Commissioner by the present appellants, which was dismissed on 30th April, 1974. Against this, Miscellaneous Application No. 101 of 1978 was preferred before the District Court under section 72 of the Bombay Public Trust Act on 25th April, 1983 which was finally dismissed. Hence this First Appeal.

5. This being the Appeal against the order under section 72 of the Bombay Public Trust Act, this is treated as Second Appeal and substantial questions of law are framed as under:

- (i) Whether Charity Commissioner and District Judge have erred in

accepting the suit property as a complete dedication in favour of the trust as per the requirement of the law?

- (ii) Whether the Assistant Charity Commissioner was empowered to reconstruct the record and proceedings of the matter prior to 1971, as Section 79AA giving power of reconstruction came in force on 15th June, 1972?

6. The learned counsel for the appellants has submitted that the appellants have good case on merits. There are only 3 documents referred by the trial Court and the District Courts - (i) Exhibit 25, i.e., trust deed dated 20th June, 1951; (ii) news report in the daily "Kesari" dated 4th January, 1916 (Exhibit 57); and (iii) Agreement between Jivibai and trust dated 3rd January, 1926 (Exhibit 56). He submitted that the case of the respondent/trust entirely stood on these three documents. He submitted that it is the case of the appellants that no endowment was created by Jivibai in favour of the trust. He submitted that assuming that there was a dedication of the said suit property, Jivibai did not handover the possession of the said property to the trust throughout her life. He further argued that in the registration of trust deed, which is marked as Exhibit 25, there is no mention of the suit property as the property of the trust.

7. (On perusal of the judgment of the learned District Judge, it is found

that the learned District Judge has considered the evidence of the witnesses, so also document (Exhibit 56), i.e., Agreement dated 3rd January, 1926 between Jivibai and Jain Trust, however, the learned District Judge did not give any weightage to this document. He has considered the will dated 23rd June, 1944 (Exhibit 16) and trust deed dated 22nd June, 1951 (Exhibit 25).

8. (In order to prove dedication, it is not necessary to bring documentary evidence of actual dedication. There is no bar for oral dedication. If a person has intention to dedicate the property for the relevant purpose, then such property can be dedicated by expressing intention orally and communication of the same to the concerned person. Therefore, non-execution of any document by Jivibai in favour of trust, specifically stating about the dedication, will not come in the way of the trust claiming the property as a trust property. However, that intention of dedication is required to be construed on the basis of conduct of the donor and his/her further transactions in respect of the suit property. It is necessary to examine that further transactions lead to her fulfillment of intention to dedicate the property to trust or not.)

9. In the case of Jivibai, the agreement (Exhibit 56) was entered into between Jivibai and Trust. She has stated that she would give the

accounts to the trust as and when called and also will handover the possession. However, the learned District Judge has discarded the documents rightly so and therefore, it is not necessary to go into the said documents. It is not necessary to perform any religious ceremony to bring the dedication into effect. What is important is express clear manifestation of the intention in conduct and decisions taken by the donor. The news report appearing in 'Kesari' marked as Exhibit 57 dated 4th January, 1916 is produced before the learned District Judge. It is necessary to mention that such report, will and other documents are unfortunately not found in the record and proceedings. However, I accept that such news item in respect of ceremony had appeared in daily 'Kesari' that Jivibai wanted to start Dharamshala in the name of her sister-in-law Mainabai and the news is covered in respect of ceremony but it is not to be considered as public notice given by Jivibai. The learned District Judge has committed error in relying on this report as a document to establish the fact of dedication by Jivibai to the trust. It is mentioned that if the report would have been incorrect, then there would have been immediate denial by Jivibai. However, as there is no denial by Jivibai, the report is accepted to be true. This inference and conclusion is not logical and also not legal.

10. In the public function, a person may declare dedication of a particular thing and hence it is morally binding on him or her to dedicate

that property. However, dedication includes cessation of all ties from that property by the donor. This is to be brought on record to show that there was a complete dedication. Such declaration may not necessarily be done out of free will but it can be out of social or religious pressure on that person. Therefore, the only way to find out complete dedication is the conduct of the parties and the transactions in future by the donor in respect of the said property. There is evidence of Keshav Narayan Raji (Exhibit 37). He stated that the house was called Jivibai Jain Dharamshala. Thus, no name of Mainabai was given to Dharamshala. In the sale deed, it was mentioned that Jivibai purchased the property with an intention to dedicate it to Jain Community, as she wanted to convert it as Dharamshala in the name of Mainabai. However, nothing is brought on record to show that this Dharamshala was in fact named as Mainabai Dharamshala during the life time of Jivibai. Keshav has stated that though trustees issued rent receipts earlier, he was paying rent to Jivibai. The evidence of respondent no. 1 Manilal Shah, who was one of the trustees, is tendered on behalf of the trust. He gave evidence on the dedication ceremony and also how the property was managed. However, the learned District Judge has stated that this evidence was discarded by the Charity Commissioner rightly in respect of Exhibit 56, i.e., Agreement between the trust and Jivibai. Thus, it appears from the record that on the point of dedication, Charity Commissioner and learned District Judge, has relied

only on the dedication ceremony which was reported in daily 'Kesari' and it was attended by one of the trustees Popatlal Shah, another witness. It is to be noted that the trustees ought to have produced the trust deed, to prove that suit property is the property of the trust. However, it is not seen. The learned counsel in support of his submissions has relied on the judgment of (i) **Menakuru Dasaratharami Reddi vs. Dadaukuru Subba Rao, reported in AIR 1957 SC 797**; (ii) **Sri Gopal Jew Thakur & Ors. vs. Pravasini Das & Ors., reported in AIR 1967 Orissa 85 (V 54 C 41)**.

11. In the case of **Menakuru Reddi** (*supra*), a question before the Hon'ble Supreme Court was "Whether the properties in suit are the subject matter of public charitable trust or are merely burdened with the obligation in favour of the specified charities.

The principles of the Hindu Law applicable to the consideration of questions of dedication of property to charity are well settled. Dedication to charity need not necessarily be by instrument or grant. It can be established by cogent and satisfactory evidence of conduct of the parties and use of the property which show the extinction of the private secular character of the property and its complete dedication to charity. On the other hand, in many cases, Courts have to deal with grants or gifts showing dedication of property to charity.

In such cases, it is always a matter of ascertaining the true intention

of the parties; it is obvious that such intention must be gathered on a fair and reasonable construction of the document considered as a whole. The use of the word “trust” or “trustee” is no doubt of some help in determining such intention; but the mere use of such words cannot be treated as decisive of the matter.

If the income of the property is substantially intended to be used for the purpose of the charity and only an insignificant and minor portion of it is allowed to be used for the maintenance of the worshipper or the manager, it may be possible to take the view that dedication is complete. If, on the other hand, for the maintenance of public charity, a minor portion of the income is expected or required to be used and a substantial surplus is left in the hands of the manager or worshipper for his own private purposes, it would be difficult to accept the theory of complete dedication.

12. In the case of **Gopal Thakur** (*supra*), a relevant passage in Mukherjee Hindu Law is quoted wherein it is mentioned -

“When there is a deed of dedication executed by the donor, the mere execution of the document though it purports on the face of it to dedicate property to religious or charitable uses, is not enough to constitute a valid endowment. It must be proved that the donor intended to divest himself of his ownership in the property dedicated. The tests of a bona fide or nominal

endowment are : how did the founder treat the property or how have the descendants treated it; has the income of the endowed lands been continuously applied to the object of dedication.”

13. Thus, in the present case, it can be seen that there is no evidence to show that the property was entirely handed over to the trust. On the contrary, the legal heirs of Jivibai remained in possession of the suit property and they are enjoying the income out of the suit property. As it is mentioned in the beginning that no trust is in existence and the entire building is given on rent. Under such circumstances, though there are concurrent orders of three authorities in favour of the respondents and appellants have lost all the three stages and in view of the legal position and the facts and evidence which are produced herein and the submissions of learned counsel for the appellants, I have to answer the first substantial question in affirmative.

14. As regards the second substantial question of law, the submissions of the learned counsel for the appellants cannot be appreciated because the post of the Assistant Charity Commissioner though is not a Court under the Civil Court Act, however, the proceedings were pending before the Assistant Charity Commissioner and the Deputy Charity Commissioner has remanded the matter. In between, panshet flood disaster occurred

and so the original proceedings were spoiled. Because of the peculiar circumstances, it was necessary for the Assistant Charity Commissioner to reconstruct the proceedings and thus, there cannot be said to be any illegality in reconstructing the proceedings. Section 76A though was subsequently enacted and came into force in 1972, enactment of the said section cannot render the act of reconstruction of the proceedings by the Assistant Charity Commissioner illegal. I answer the second question of law in negative.

15. First Appeal is allowed. The orders of the District Judge and Assistant Charity Commissioner are set aside. Parties to bear the costs.

(MRIDULA BHATKAR, J.)