

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6412 OF 2013

Pushpak Jugmandar Shah and ors. : Petitioners.
Versus
Smt.Anandibai Hrishchandra Shah
(Phaltankar) Trust and ors. : Respondents.

**Mr. N V Walawalkar, Senior Advocate, with Ms. Meghna Gawalani i/by J
Shekhar & Co. for the Petitioners.**
Mr. Madhav J Jamdar for the Respondent Nos.2 & 3.

CORAM : R. M. SAVANT, J.
DATE : 5th February 2015

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 3/10/2012 passed by the learned 11th Joint Civil Judge, Junior Division & JMFC, Court No.7, Pune by which order the Application (Exhibit 93) for amendment of the plaint came to be partly allowed to the extent mentioned in the operative part of the impugned order. The Defendant No.1 i.e. Manikchand Motchand Shah (Phaltankar) Charitable Trust has been transposed as Plaintiff No.3, in respect of the said trust the name of one Shri Vishal Arinjay Shah is permitted to be shown as the Secretary of the newly transposed Plaintiff No.3. The rest of the amendments i.e. the amendments as sought by the Plaintiff No.3 vide the proposed paragraphs 1 to 12 have been rejected.

2 The suit in question being Regular Civil Suit No.681 of 2008 has been filed by the original Plaintiffs for a declaration that the Surrender Deed dated 30/3/1996 and the Lease Deed dated 9/4/1990 registered in the office of Sub-Registrar, Haveli No.9 are illegal, null and void and that the Defendant No.2 Trust has no legal authority and powers to claim, enjoy and avail the benefits under the said illegal deeds. An injunction was sought that the Defendants be permanently and mandatorily restrained from claiming any legal right under the said illegal deeds and they be restrained from dealing with the same in any manner in contravention with the Lease Deed dated 9/4/1990.

3 The original Defendant No.1 to the suit i.e. Manikchand Motichand Shah (Phaltankar) Charitable Trust was transposed as the Plaintiff No.3 by an order dated 5/3/2011 passed by the Trial Court. It is not necessary to go into the said aspect.

4 The Plaintiff – Pushpak is the grandson of Hirachand whereas the Plaintiff Arinjay is the son of the said Hirachand. The said Plaintiffs had earlier filed two suits being Regular Civil Suit No.117 of 2008 and Regular Civil Suit No.897 of 2008. In so far as Regular Civil Suit No.117 of 2008 is concerned, the same was filed for a declaration that the Development Agreement and the Power of Attorney executed by the Defendant Nos.1 and 2 in favour of the

Defendant No.3 is void and illegal. In so far as Regular Civil Suit No.897 of 2008 is concerned, the relief sought therein was a declaration that late Hirachand Manikchand Shah had no right to execute the any Will in respect of the suit property. A further declaration sought was that the Wills dated 10/2/1995 and 14/5/2001 executed by the said Hirachand Manikchand are illegal void and not binding on the suit property.

5 In the contest of the challenge raised in the present Petition, the Issue Nos. 1 and 2 which were framed in Regular Civil Suit No.117 of 2008 are material and for the sake of convenience are reproduced herein under :-

1] Whether late Hirachand Shah was having only life interest in the suit properties ?

2] Whether on 19/12/2007, the defendants nos.1 and 2 have illegally executed the development agreement and the power of attorney of the suit properties in favour of the defendant no.3?

The said issues were answered against the Plaintiffs and a finding was recorded by the Trial Court that the case of the Plaintiffs that it was the desire of late Manikchand that late Hirachand could enjoy the property allotted to his share till he desires and thereafter the religious trust be formed and the said property be placed in possession of the said trust was not proved by them. Hence in so far as the case of the Plaintiffs' in respect of the desire of Manikchand is concerned, the Trial Court has recorded a specific finding that

the the Plaintiffs have not established the said case.

6 In so far as the case of the Plaintiffs as regards illegal surrender is concerned, the Trial Court in paragraph 26 of its judgment has observed that no serious objection was raised by the Plaintiffs to the surrender of the land. The Trial Court concluded that the surrender of the leased out land by late Hirachand and late Jugmandar on behalf of the trust appears to be legal and valid. The Trial Court therefore by its judgment and order dated 14/7/2009 dismissed the said Suit i.e. Regular Civil Suit No.117 of 2008.

7 In so far as Regular Civil Suit No.897 of 2008 is concerned, the said suit also came to be dismissed by the the Trial Court by its judgment and order dated 14/7/2009. In the contest of challenge raised in the present Petition, the Issue No. 2 which was framed in Regular Civil Suit No.897 of 2008 is material and for the sake of convenience is reproduced herein under :-

“Whether on 10/01/1982, late Hirachand and others have executed a 'Khulasa Patra’”? If yes, its effect?

The said issue was answered against the Plaintiffs and the Trial Court held that the same does not have any binding effect. Hence in so far as the second suit i.e. Regular Civil Suit No.897 of 2008 is concerned, the finding as regards Khulasa Patra is relevant in the context of the amendments which have been

sought by the Plaintiffs in the present suit.

8 The Plaintiffs i.e. the Plaintiff Nos.1 and 2 carried the matter in Appeal by filing Civil Appeal No.508 of 2009 challenging the decree passed in Regular Civil Suit No.117 of 2008, and Civil Appeal No.509 of 2009 challenging the decree passed in Regular Civil Suit No.897 of 2008. The said Appeals came to be dismissed by the Lower Appellate Court by the judgments and orders dated 31/08/2010 and 13/8/2010. The Plaintiff Nos.1 and 2 thereafter carried the matter by way of Second Appeal No.752 of 2010 and Second Appeal No.14 of 2011 to this Court. A learned Single Judge of this Court (Coram : R.G.Ketkar,J.) by his order dated 10/10/2011 dismissed the said Second Appeals. In Paragraph 10 of the order dated 10/10/2011 passed in Second Appeal No.752 of 2010 the learned Single Judge has affirmed the finding recorded by both the Courts below that the Plaintiffs did not establish the desire of late Manikchand about Hirachand forming a religious trust and giving the land of his share to the said religious trust. The learned Single Judge has further affirmed the finding recorded by the Courts below that the Plaintiffs failed to establish that late Hirachand was a limited owner. The learned Single Judge observed that once the suit lands were allotted to the share of Hirachand, it has to be held that he became the absolute owner of the suit lands having regard to Section 11 of the Transfer of Property Act, 1882. In so far as Khulasa Patra dated 10/1/1982 as also Khulasa Patra dated

29/1/1981 are concerned, the learned Single Judge has affirmed the finding of the Courts below that the said Khulasapatras were not acted upon.

9 At this stage it is required to be noted that whilst the Appeals were pending before the Lower Appellate Court, the Plaintiff No.3 i.e. the Petitioner No.3 herein i.e. the Trust had filed an Application under Order I Rule 10 of the Code of Civil Procedure for its impleadment in the Appeals on 24/11/2009. The said Applications were rejected by the Lower Appellate Court by the Order dated 30/12/2009. The Plaintiff No.3 carried the matter by way of Writ Petition No.286 of 2010 and Writ Petition No.285 of 2010. At the hearing of the said Writ Petitions the Plaintiff No.3 i.e. the Petitioner No.3 herein sought liberty to withdraw the said Applications (Exhibits 23 and 27) which were filed in the Lower Appellate Court with liberty to file appropriate proceedings in accordance with law. A learned Single Judge of this Court (Coram : A S Oka,J.) permitted the said withdrawal with liberty to file appropriate proceedings in accordance with law. Prior thereto in Paragraph 2 of the said order dated 2/2/2010 it was mentioned that the liberty sought is for filing an independent proceeding and not fresh application in the same Appeal. It is required to be noted that the instant suit has been filed in the year 2008 for the reliefs which have been adverted to in the earlier part of this Order. It seems that the Plaintiff No. 3 i.e. the Petitioner No.3 herein had also filed proceedings before the Authorities under Bombay Public Trust Act.

10 In so far as the orders passed in the Second Appeals are concerned, it was not the Plaintiff Nos.1 and 2 who challenged the said orders, it was the Trust which is Plaintiff No.3 in the present suit and which was not a party to the earlier proceedings who challenged the said order by filing an Application for permission to file Special Leave to Appeal being CC No.3383 of 2012. The said Application for permission to file Special Leave to Appeal was withdrawn with a liberty to seek review of the judgment under challenge or avail other appropriate legal remedy. The Apex Court made it clear that the said order shall not be construed as a mandate of the Apex Court to the High Court to entertain the review petition and if any such petition is filed, the High Court shall decide the same on its own merits. After the Application for permission to file Special Leave to Appeal was withdrawn on 27/02/2012, the Trust filed Review Petitions being Review Petition Stamp No.31008 of 2012 and Review Petition Stamp No.31011 of 2012. Since the original orders were passed by R.G.Ketkar, J, the Review Petitions were heard by the same learned Single Judge. The learned Single Judge recorded a finding that in view of the order dated 02/02/2010 passed by a learned Single Judge of this Court (Coram : A.S.Oka, J.) in Writ Petition Nos.285 of 2010 and 286 of 2010, the Review Petitions were not maintainable. However, since the learned Senior Counsel appearing for the Review Petitioners sought to make submissions on merits, the learned Single Judge (Coram : R.G.Ketkar, J) has also recorded

findings on merits which are in Paragraphs 19 and 20 of the said order dated 10/10/2011. In paragraph 19 the learned Single Judge has re-iterated the findings which were recorded by the Trial Court as regards whether the Plaintiffs established the desire of late Manikchand that late Hirachand had only limited interest in the suit properties. The learned Single Judge has also re-iterated the findings of the Trial Court in so far as Khulasapatras dated 10/01/1982 and 29/01/1981 are concerned. The learned Single Judge in paragraph 20 has also re-iterated the findings as regards the deed of surrender. The learned Single Judge has rejected the submission of the learned Senior Counsel appearing on behalf of the Petitioners, that the suit land is a trust property and that the findings recorded by the learned Trial Court in paragraph 26 that the deed of surrender is legal and valid was really uncalled for, by observing that he did not find any merit in the said submission. The learned Single Judge thereafter adverted to the findings recorded by the Courts below that the suit land belongs to Hirachand and it did not devolve upon the trust. The learned Single Judge has lastly, if one can say, observed that by the Review Petitions an attempt is made to get over the findings recorded by the Courts below and by this Court in the Second Appeals. The learned Single Judge has accordingly dismissed the said Review Petitions by imposing costs of Rs.50,000/- in each of the Review Petitions. Hence in so far as the three issues viz. the issue as to whether Hirachand had limited interest and that after his life time, the property was required to be vested in the Trust which was a

Public Charitable Trust, whether on account of Khulasapatras, the heirs of Hirachand had limited interest, and thirdly whether the deed of surrender was legal and valid are concerned, there are now findings recorded by the Courts below and confirmed by this Court in the Second Appeals and Review Petitions which have become final and binding in view of the fact that the matter was not carried higher by the Plaintiffs Nos.1 and 2 in the said proceedings.

11 It is in the background of the afore-stated facts and adjudication that the amendments sought would have to be considered. In far as the formal amendments sought whereby the name and description are to be changed, the learned counsel appearing on behalf of the Respondent Nos.2 and 3 Shri Madhav Jamdar states that the said Respondents do not have any objection to the same. The objection is to the amendments sought vide proposed amendments in Paragraphs 1 to 12. In so far as the proposed amendments which are contained in the said paragraphs are concerned, they are revolving around the facts which were before the Courts in the earlier adjudication as also the some facts relating to the proceedings before the Public Trust Authorities which have taken place prior to filing of the suit and in respect of which knowledge would have to be attributed to the Plaintiffs prior to filing of the suit. The Plaintiffs by seeking incorporation of the said Paragraphs 1 to 12 in place of original paragraph No.1 are now again seeking to advert to their case which was urged in the earlier round of litigation being the two suits i.e.

Regular Civil Suit No.117 of 2008 and Regular Civil Suit No.897 of 2008 which suits have been adjudicated and where the findings have been recorded against the Plaintiffs which have been confirmed right up to this Court. In my view, therefore, the rejection of the said amendments by the Trial Court though on a different ground can be justified on the touchstone of the earlier adjudication which has taken place between the parties. The attempt of the Plaintiffs to incorporate the said facts seems to be another attempt to keep the issue regarding the alleged desire of late Manickchand as also the legality and validity of the surrender deed as also the Khulasapatras alive though the findings have been recorded on the said aspect against the Plaintiffs which findings have been confirmed and have become final and binding. Hence the Plaintiffs obviously cannot be allowed to amend the plaint so as to now incorporate the facts which have no relevance in view of the earlier adjudication.

12 In so far as the reference to the proceedings that have taken place before the authorities under the Public Trust Act are concerned, in my view, a reference is made to the said proceedings just to give a cloak of credibility to the amendments sought so as to make it appear that the amendments sought are not only in respect of the facts which were the subject matter of the adjudication in the earlier round. The Plaintiff No.3 who is now represented by Vishal Arinjay Shah as its Secretary must obviously be aware of the

proceedings which have taken place before the authorities under the Public Trust Act. In my view therefore the order rejecting the Application in so far as the substantive amendments sought vide paragraphs 1 to 12 cannot be found fault with and is therefore sustained also on the ground of the earlier adjudication which took place between the the parties. However, in so far as paragraph 18 is concerned, it is made clear that no deletions are allowed, and the said paragraph in original would be retained.

13 In so far as other paragraphs i.e. paragraphs 13 to 24 excluding paragraph 19 are concerned, the amendments sought i.e. existing paragraphs 2 to 13 however excluding the original paragraph 8 (i.e. paragraph 19), the same are necessitated in view of the change in the status of the parties. In so far as the Defendant No.1 is concerned, it has been transposed as the Plaintiff No.3. The same change is also necessitated in view of the clause 2 of the operative part of the impugned order dated 3/10/2012. The learned counsel appearing for the Respondent Nos.2 and 3 states that the said Respondents have no objections to paragraphs 13 to 24 of the amendments sought, excluding paragraph 19.

14 The learned Senior Counsel for the Petitioners fairly states that the Petitioners are not challenging the order in so far as refusal of deletions sought vide Paragraph 19 of the amendments is concerned. In so far as reformulation

of original paragraph 8 is concerned, in my view, the same would also be covered by the earlier adjudication which has been taken place and hence reformulation of paragraph 8 also cannot be allowed to be incorporated in view of the fact that inspite of the earlier adjudication to which the Plaintiff Nos.1 and 2 were the parties and the Plaintiff No.3 later on entered into the fray by filing Writ Petition Nos.285 of 2010 and 286 of 2010 in this Court, and thereafter the Application for permission to file Special Leave Application in the Apex Court and the Review Petitions in this Court, the said deletions and reforming of paragraph 8 is sought. The learned Senior Counsel appearing on behalf of the Petitioners sought to place reliance on the judgment of the Apex Court reported in (2012) 11 SCC 341 in the matter of Abdul Rehman and another v/s. Mohd. Ruldu and others. In the light of what has been stated herein above, the said judgment would have no application as the facts in the present case on account of the earlier adjudication stand apart from the facts before the Apex Court in the said case.

15 Considering what has been stated herein above, in my view, it would be appropriate to impose costs of Rs.10,000/- on the Petitioners to be paid within four weeks from date. The learned counsel appearing on behalf of the Respondent Nos.2 and 3 Shri Madhav Jamdar states that the said costs may be paid over to the State Legal Aid Fund. The Petitioners to accordingly deposit the said costs within four weeks from date.

16 No case for interference in the writ jurisdiction of this Court is therefore made out. The above Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]