IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD

FIRST APPEAL NO. 373 OF 1996
WITH
CIVIL APPLICATION NOS. 5953/2015, 3268, 3717/2014

Madhukar Maharu Kharkar,
R/o. Jaitane, Tal. Sakri,
Dist. Dhule. **....Appellant.**
(Ori. Opponent)

Versus

1. Babulal Fakira Mistri,
R/o. Jaitane, Tq. Sakri,
Dist. Dhule.

2. Charity Commissioner,
Maharashtra State, Bombay **....Respondents.**
(No. 1 Ori. Applicant)

Mr. R.N. Dhorde, Senior Counsel i/b. Mr. A.D. Pawar, Advocate for appellant.
Mr. Amol Savant, Advocate for respondent No. 1.

CORAM : T.V. NALAWADE, J.
DATED : 27th January, 2016.

JUDGMENT :

1) The appeal is filed to challenge the judgment and order of Assistant Charity Commissioner, Jalgaon given in Inquiry No. 237/1988, the judgment and order of appeal No. 67/1990 decided by the Charity Commissioner and the decision of Misc. Civil Application No. 68/1991 decided by the Additional District Judge, Dhule. Both the sides are heard.

2) Application decided by Assistant Charity Commissioner was filed under provisions of Bombay Public Trust Act, 1950 by Babulal Mistri of village Jaitane, Tahsil Sakri for registration of the temple of this village named as 'Vishwakarma Mandir' along with the property, the land on which the temple is constructed. It is his contention that the temple was constructed by persons of Sutar community and in the meeting dated 30.10.1986, they have taken a decision to register the temple as a public trust. It is his case that the community has also elected him as President of the trust and other trustees are also elected by the community.

3) After receipt of the application, for calling the objections, notice of the proceeding was published in a newspaper. Present appellant - Madhukar Kharkar and others raised objection to such registration. It is their contention that their predecessor in title namely Tanaji Nathu was the owner of this property and he had made the construction of temple for his family. It is their contention that property was registered in the name of Tanaji and his heirs succeeded to the property and in the record of assessment of Gavthan, this property was given numbers 23 and 77. It is contended that the land on which temple is constructed was given on the basis of lease by the

Government to Tanaji and so, there was no question of creation of trust by Tanaji. It is contended that the successors of Tanaji got entered their names in the assessment record of the property and the temple property cannot be treated as a trust. It is contended that only members of the family worshiped this idol and the property was never dedicated to public. It is contended that some programmes were arranged by Tanaji and his successors, but they were of private nature and public at large had no right in respect of this property or functions which were arranged.

4) Before the Assistant Charity Commissioner, both the sides produced some record. It appears that some record of Sutar community and its Panch committee was produced. The Assistant Charity Commissioner gave decision that it was a temple of Sutar, carpenter community and it is necessary to register it as a public trust. This decision is confirmed by the Commissioner, the appellate authority and also the District.

5) It appears that in the present proceeding, appeal, civil applications are filed by both the sides and along with the civil applications some documents are produced. Permission is given to the original applicant for producing some documents

and civil application filed by the objection petitioner Madhukar is pending. For the present purpose, this Court has gone through such record, which is additional record and which was not considered by the aforesaid authorities.

6) The parties have the record starting from the year 1925. On one hand, there is record with the preset appellant showing that his predecessor Tanaji had made correspondence with artist of Jaipur for preparing idol of deity and accordingly, in the year 1925 idol was prepared and it was handed over to the predecessor in title of the present appellant Tanaji. Some documents like receipts of money order are also produced to show that the payment was made by predecessor in title of the appellant to the said artist. 7/12 extracts of the land are on the record showing that lands bearing No. 72 and 23 of village Jaitane were initially standing in the name of Maharu and then in the name of his successors. Maharu was successor of Tanaji and that can be seen from the revenue record. Copy of mutation sanctioned in the year 1965 is produced in that regard and there is also Khata extract in respect of these properties. It is the case of appellant that on these properties construction was made both for residence and for temple. The assessment record prepared by the Village Panchayat is produced and the

assessment record shows that in one property description of building was given as house and the names of aforesaid persons were shown as owners. In assessment record of one property, the property was described as temple, Dewool and this was subsequently given name as 'Vishwakarma Mandir'. It was given House No. 194 in the year 1965-67. There is revenue record, sheet No. 7 of C.T.S. Nos. 1489 and 1490 showing that during city survey, the name of Madhukar Kharkar was entered as owner of both the constructions viz. construction of house and construction of temple. Many receipts of payment of assessment are produced and they are of even pre-1950 period showing that the payment was made by the present appellant. On the basis of this record, the claimant is contending that his predecessor had purchased the idol of deity and his predecessor had made construction on the land which was with his predecessor in title. The orders made by the aforesaid three authorities do not show the discussion of aforesaid revenue record. On the other hand, there is no revenue record or private document showing that the land was given or dedicated by Tanaji or his successors to trust for creation of public trust.

7) The documents like so called resolutions made by Panchal Sutar community, its committee show that in the year

1925 such committee came in existence after constitution of one religious committee by aforesaid Tanaji. The committee came in existence to see that the decisions taken by the religious committee with regard to the rites and customs are followed by the members of the community. There is record like resolutions made by the committee in the year 1933 with the original applicant Babulal Mistri and this record is to the effect that committee had taken decision to take idol from custody of Tanaji and make construction of temple at Dhule. There is record showing that Tanaji refused to hand over the idol and then the committee decided to have another idol and to make construction of temple at Dhule. The resolutions contained one resolution by which power was given to one Desai to spend for the construction etc., but that temple was to be constructed at Dhule and not at Jaitane. From the record, it can be said that the ancestors of Madhukar and even Madhukar were managing the affairs of temple. It is the case of original applicant - Babulal that the members of the community were visiting this temple and they were arranging some functions and so, the temple premises need to be treated as a public trust. On this point, both the sides have placed reliance on some reported cases. The learned Senior Counsel for appellant placed reliance on the cases reported as **AIR 2003 SUPREME COURT 1685 [Kuldip**

Chand and Anr. Vs. Advocate General to Government of Himachal Pradesh and Ors.] and **AIR 1986 SUPREME COURT 2139 [Haribhanu Maharaj of Baroa Vs. Chrity Commissioner, Ahmedabad].** In these cases, the Apex Court has discussed the requirements, which need to be fulfilled to hold that there was creation of trust. It is observed that person claiming that it is a trust, need to prove that there was complete cessation of ownership of founder and vesting of property for public or religious object. In the guidelines, it is observed that if the record is available to show that the control and management of temple was retained by founder or his descendants, then it can be said that endowment was of a private nature. In one case, it is observed that the fact that the public was visiting Math on specific occasions cannot lead to inference that it was a public trust. The facts of the case of **Haribhanu Maharaj of Baroda** cited *supra* show that the Math construction was made in the family property and it was located in residential area. In the present case also, there is record of aforesaid nature and the evidence on record shows that there is distance of hardly 5 ft. between the two structures and there is compound wall around the space of aforesaid two structures. These circumstances need to be considered in proper perspective and then the law needs to be applied.

8) The learned counsel for respondent - Babulal placed reliance on the case reported as **AIR 1970 SUPREME COURT 2025 [Goswami Shri. Mahalaxmi Vahuji Vs. Shah Ranchhoddas Kalidas (dead) and Ors.].** In this case, at para Nos. 15, 16 and 17 the criteria, the tests to ascertain whether the temple is public or not are mentioned and one criteria is whether worshipers are specific individuals or general public or class thereof. Other criteria are also there like the source of income for maintenance of temple. In the present matter, one authority has observed that the construction was probably renovated by the persons of the community, but there is no record to that effect.

9) To Babulal, this Court has already given permission to produce record like resolution of committee and other record and the application of Madhukar is pending for such permission. This record contains the correspondence made with that artist for preparing the idol and the payment made to the artist. The record also contains various mutations made after the death of Tanaji, the first person, who took steps for purchasing idol and probably for making construction of the temple. All this record needs to be considered and this Court holds that without

considering such material, which is relevant, the property cannot be registered as a public trust. It appears that civil suit is also filed by Madhukar and other successors of Tanaji for relief of declaration that it is a private property. Further relief of injunction is also claimed.

10) In view of the aforesaid circumstances and the importance of record which is not considered by the authorities, this Court holds that fresh inquiry is required in to the matter. Stamping of a property as a trust property is a serious matter and the contentions show that not only the portion covered by the temple is involved, but some other open space surrounding the temple is also involved in the matter and there is dispute over the title.

11) In the result, the appeal is allowed. Aforesaid judgments and orders of Assistant Charity Commissioner, Charity Commissioner and District Court are hereby set aside. Matter is remanded back for fresh hearing to Assistant Charity Commissioner. All Civil Applications are disposed of.

[T.V. NALAWADE, J.]

ssc/