

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 29 OF 2009

VILAS RASIKLAL SHAH AND ORS

...Applicants

Versus

DILAWARKHAN DAUDKHAN PATHAN
AND ORS

...Respondents

....

Mr. R.D. Soni i/b. M/s. Ram & Co., for the Applicants.

Mr. Sandeep K. Shinde, Advocate for Respondent No.1.

Mr. Vipin R. Kasle, Advocate for Respondent Nos.2 to 72.

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CORAM : R. G. KETKAR, J.

DATE : 01st APRIL, 2016

P.C.

1. Heard Mr. R.D. Soni, learned Counsel for the applicants and Mr.S.K. Shinde, learned Counsel for respondent No.1, Mr. Vipin Kasle, learned Counsel for respondent Nos.2 to 72, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'CPC'), the applicants have challenged the judgment and order dated 29.11.2008 passed by the learned District Judge-3, Nashik. By that order, the learned

District Judge held that the District Court has jurisdiction to entertain and try the application filed by the first respondent, hereinafter referred to as applicant, under Section 72 of the Maharashtra Public Trusts Act (for short, 'Act') and overruled the objections raised by the respondents, hereinafter referred to as opponent Nos.56, 58 and 59 about the maintainability of the application before the District Court.

3. The parties shall be hereinafter referred to as their status before the District Court. The relevant and material facts giving rise to filing of the application, briefly stated, are as follows.

4. By order dated 20.4.1999, the Joint Charity Commissioner, Maharashtra State, Mumbai allowed the application No.62 of 1997 made by Jumma Masjid, a Charitable Trust, through its Trustees (1) Mr. Hafiz Muniruddin Shaikh Khatib, (2) Mr. Shaikh Kabiruddin Abdul Rehman, (3) Mr. Burhankhan Muradkhan, (4) Mr. Zahid Hussain Mohammed Khatib and (5) Mr. Shaikh Mohammed Yunus Abdul Gani under Section 36 of the Act seeking prior sanction to alienate the trust property. Joint Charity Commissioner accorded the sanction

under Section 36 of the Act to the applicant trust to sell its property, namely, land bearing Gat No.726/1, admeasuring 10 Hectare 38 Ares situated at Nashik in favour of M/s. Shivani Land Developers, for consideration of Rs.15 Crores on the terms and conditions appearing in the agreement dated 25.6.1997, copy thereof was at Exhibit-8.

5. Aggrieved by this sanction, the applicants instituted Writ Petition No.5387/1999 under Articles 226 and 227 of the Constitution of India in this Court. By order dated 16.11.1999, the learned Single Judge (Coram: P.S. Patankar, J.) rejected the petitions. Aggrieved by that decision, the applicants preferred Letters Patent Appeal before the Division Bench of this Court being Letters Patent Appeal No.18/2000. By order dated 18.2.2000, Division Bench of this Court (Coram:A.P. Shah & J.A. Patil, JJ.) dismissed the appeal. The applicants challenged these orders by filing Special Leave Petition before the Apex Court. By order dated 18.8.2000, Special Leave Petition was dismissed.

6. The applicant thereafter instituted proceedings under Section 36(2) of the Act being Enquiry Application No.2/2001 before the Joint Charity Commissioner, Nashik on 14.5.2001. By

order dated 24.9.2003, Joint Charity Commissioner rejected the application. It is thereafter the applicant instituted Trust Suit No.1/2003 on or about 28.11.2003 *inter alia* praying for (a)calling for record and proceedings of Trust Application Nos.2/2001 and 62/1997; (b) setting aside order dated 24.9.2003 passed in Trust Application No.2/2001; (c) setting aside the order dated 20.4.1999 passed in Trust Application No.62/1997; and (d) for declaration that the transfers made on the basis of the orders referred in appeal by respondent No.1 in favour of respondent No.2 or in favour of other respondents Nos.3 to 74 be declared to be null and void.

7. During pendency of the application, opponent Nos.56, 58 and 59 made an application Exhibit-85 dated 7.4.2005 for framing preliminary issue raising maintainability of the trust application instituted by the applicant. The applicant filed reply Exhibit-89 on 22.6.2005 opposing the application. On 4.10.2008, the learned District Judge framed following preliminary issue

“Whether this Court has jurisdiction to entertain and try the application made by the applicant under facts and circumstances set out in the application”

8. By the impugned order, the learned District Judge held that the applicant has rightly filed proceedings under Section 72 of the Act and the District Court has jurisdiction to entertain and try the application. It is against this decision, the opponent Nos.31, 56, 58 and 59 have instituted the present proceedings.

9. Mr. Soni strenuously contended that the application instituted by the applicant under Section 72 of the Act is wholly misconceived. He submitted that in pursuance of sanction dated 20.4.1999, registered sale deed was executed on 18.9.1999. He submitted that earlier the applicant has challenged the order dated 20.4.1999 passed by the Joint Charity Commissioner according sanction under Section 36 of the Act by instituting Writ Petition in this Court. The learned Single Judge of this Court dismissed the petition on 16.11.1999. Letters Patent Appeal was dismissed on 18.2.2000. Special Leave Petition, preferred against these decisions, was dismissed on 18.8.2000. The applicant thereafter filed proceedings under Section 36(2) of the Act once again challenging the sanction accorded on 20.4.1999. That application was dismissed on 24.9.2003. It is only thereafter the applicant has instituted Trust Application

No.1/2003 under Section 72 of the Act. Having regard to the provisions of Section 72 of the Act as also the prayers made in the Trust Application, the proceedings initiated by the applicant are not maintainable. The proceedings are nothing but abuse of process of Court as also abuse of process of law. Mr. Soni further submitted that the property is fully developed and the buildings are standing thereon. He, therefore, submitted that the impugned order deserves to be set aside by imposing exemplary costs on the applicant.

10. On the other hand Mr. Shinde supported the impugned order. He submitted that though by the present application filed under Section 72 of the Act and the applicant has challenged the order dated 20.4.1999 passed in Trust Application No.62/1997 as also order dated 24.9.2003 passed in Trust Application No.2/2001, in effect and in substance, enquiry contemplated by application is as regards whether the suit property is the trust property or not. He submitted that the orders dated 20.4.1999 and 24.9.2003 are nullity and challenge to nullity can be set up at any stage. The orders passed by the authorities under the Act are without jurisdiction in view of the enforcement of Waqf Act,

1995. He submitted that after enforcement of Waqf Act, 1995 w.e.f. 1.1.1996, the authorities under the Act have no jurisdiction to deal with any question including according sanction under Section 36 of the Act. He, therefore, submitted that the orders dated 20.4.1999 and 24.9.2003 are null and void and the learned District Judge was fully justified in holding that the District Court has jurisdiction to entertain and try the application.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Trust has made an Application No.62/1997 under Section 36 of the Act seeking prior sanction to alienate the trust property. By order dated 20.4.1999, the Joint Charity Commissioner accorded sanction. It also appears that on 18.9.1999, registered sale deed was executed in favour of opponents. In view of the decision of this Court in the case ***Mrs. Fatmabai B. Bachooali vs. State of Maharashtra and others, AIR 1991 BOMBAY 220***, once the sale deed is executed the property ceases to be the trust property. Aggrieved by that decision, the applicant herein and

others instituted Writ Petition No.5387/1999 under Article 226 and 227 of the Constitution of India, in this Court. Writ Petition No.5679/1999 was filed by one Nandkishor Agharkar challenging the said order. By order dated 16.11.1999, Writ Petitions were dismissed. Perusal of the order passed by this Court does not indicate that the contentions which are sought to be raised in the present proceedings under Section 72 were raised before this Court. Aggrieved by the decision dismissing the Writ Petitions, the applicant instituted Letters Patent Appeal No.18/2000 in this Court. That Letters Patent Appeal was dismissed on 18.2.2000. Even before the Division Bench the applicant did not agitate the contention sought to be raised in the present proceedings. Special Leave Petition preferred by the applicant and others was dismissed by Apex Court on 18.8.2000. Thus, the challenge raised by the applicant to order dated 20.4.1999 attained finality.

12. Despite that the applicant instituted proceedings under Section 36(2) of the Act by filing Trust Application No.2/2001. Perusal of the application shows that no contentions sought to be advanced in the present proceedings were advanced

in those proceedings. By order dated 24.9.2003, application was dismissed. In paragraph-11, the Joint Charity Commissioner specifically dealt with the contention as regards inherent lack of jurisdiction and question as to nullity of order in view of enforcement of the Waqf Act, 1995. The learned Joint Charity Commissioner negated that submission and rejected the application. It is not brought on record by the applicant that against that order any proceedings were filed. Instead of challenging that order, the applicants instituted Trust Application No.1/2003 under Section 72 of the Act. Section 72 of the Act reads thus :

“72. Application from Charity Commissioner's decision under section 40, 41, [41C and 43(2)(a) and (c)], 50A, 70 or 70A], etc.

(1) Any person aggrieved by the decision of the Charity Commissioner under section 40, 41, [41C and 43(2)(a) and (c)], [50A], [70 or 70A] or on the questions whether a trust exists and [whether such trust is a public trust] or whether any property is the property of such trust [* * *] may, within sixty days from the date of the decision, apply to the court to set aside the said decision.

(1A) No party to such application shall be entitled to produce additional evidence, whether oral or documentary, before the Court, unless

the Deputy or Assistant Charity Commissioner or the Charity Commissioner has refused to admit evidence which ought to have been admitted or the Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause the Court thinks if necessary to allow such additional evidence:

Provided that whenever additional evidence is allowed to be produced by the Court, the Court shall record the reason for its admission.]

(2) The Court after taking [evidence if any,] may confirm, revoke or modify the decision or remit the amount of the surcharge and make such orders as to costs as it thinks proper in the circumstances.

(3) Pending the disposal of an application under sub-section (2) all proceedings for surcharge shall be stayed if the person aggrieved makes out a *prima facie* case for a stay order.

(4) An appeal shall be to the High Court, against the decision of the court under sub-section (2) as if such decision was a decree from which an appeal ordinarily lies.

[*Explanation.*-- In this section, the expression "decision" shall include a scheme framed or modified under section 50A.]”

13. Perusal of Section 72(1), extracted hereinabove, shows that any person aggrieved by the decision of the Charity Commissioner under Sections 40, 41, 41C and 43(2)(a) & (c), 50A, 70 or 70A or on the questions whether a trust exists and

whether such trust is a public trust or whether any property is the property of such trust may, within sixty days from the date of the decision, apply to the court to set aside the said decision. Section 2(4) defines the expression “Court” to mean in the Greater Bombay, the City Civil Court and elsewhere, the District Court. The moot question is whether the application filed by the applicant is concerning “whether any property is the property of such trust” is maintainable or not ? Perusal of the prayers made in the application, however, shows that the applicant has challenged the order dated 20.4.1999 passed in Trust Application No.62/1997 and order dated 24.9.2003 passed in Trust Application No.2/2001. By these orders, challenge to the sanction accorded under Section 36 of the Act was repelled. In short, the application is not for holding enquiry as to whether any property is the property of such trust or not. That apart, in view of the decision of this Court in the case of **Fatmabai Bachooali** (supra), the moment sale deed is executed, the property ceases to be the trust property. The learned District Judge, however, observed in paragraph-11 that the dispute falls under Section 72 of the Act on the ground as to whether the disputed property was the property of the trust on the date of

sanction or ceased to be the property of the trust from 1.1.1996 and the question can be gone into in the proceedings under Section 72 of the Act. In my opinion, the learned District Judge totally misdirected himself in posing this question. The application made under Section 72 of the Act essentially challenges the orders dated 20.4.1999 and 24.9.2003 which attained finality as the challenge was repelled by the Apex Court. The present round of litigation is the third round challenging the self same orders. In my opinion, the present proceedings are not only misconceived but also abuse of process of Court as also abuse of process of law. The learned District Judge committed serious error in entertaining application and overruling the objections raised by opponent Nos.56, 58 and 59. In my opinion, the learned District Judge should have dismissed the application under Section 72 by imposing exemplary costs. That apart, the land is fully developed and buildings are standing thereon. Hence, the following order.

- [i] Impugned order is quashed and set aside and the application, namely, Trust Application No.1/2003 (Regular Civil Misc. Application No.1/2006) is dismissed with

exemplary costs of Rs.1,00,000/- [Rupees One Lac Only] to be paid to opponent Nos.56, 58 & 59, within four weeks from today. If the cost is not paid, the Collector, Nashik shall recover it as land revenue from the applicant – Dilawarkhan Daudkhan Pathan. In case the applicant obtains any suitable order from higher Court, the same shall be communicated to the Collector, Nashik.

[ii] Rule is made absolute in aforesaid terms. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)