

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**FIRST APPEAL NO. 2577 OF 2013
WITH
CIVIL APPLICATION NO. 13119 OF 2013**

- 1] Smt. Shantidevi w/o
Laxminarayan
Agrawal, age 60 years,
Occ. Household,
- 2] Jagdish s/o Laxminarayan
Agrawal, age 43 years,
occ. Medical Practitioner,
- 3] Mahendra s/o Laxminarayan
Agrawal, age 43 years,
occ. Business,
- 4] Krushnachandra s/o Laxminarayan
Agrawal, age 36 years,
occ. Business,

Nos. 1 to 4 R/o Koli Galli,
Jain Mandir, Pachora,
Taluka Pachora, Dist. Jalgaon

- 5] Rajshree w/o Anil Agrawal,
age 34 years, occ. Household,
C/o Anil Agrawal,
1, Bansilal Nagar,
Station Road, Aurangabad,

Through its Spl. Power of
Attorney, Shri Sundarlal s/o
Shankarlal Chainani,
age 38 years, occ. Business
R/o Sindhi Colony, Dondaicha,
Tq. Dondaicha, Dist. Dhule ...Appellants

[Original Defendants 1 to 5]

VERSUS

Seth Kasturmal Dalsukh
Dharmashala, P.T.R. No.A-235,
Dhule, Station Area, Dondaicha,
Taluka Shindkheda, Dist. Dhule
Through its Trustees namely;

- 1] Shamlal s/o Jankilal Agrawal,
age 70 years, occ. Business,
R/o Near Agrawal Dharmashala,
Dondaicha, Taluka Shindkheda,
District Dhule,
- 2] Gopal s/o Jagdish Agrawal,
age 50 years, occ. Business,
R/o Ghat Road, Chalisgaon,
Taluka Chalisgaon, Dist. Jalgaon,
- 3] The Collector,
Dhule, District Dhule,
- 4] The State of Maharashtra,
- 5] The Charity Commissioner,
Mumbai

...Respondents
[Nos. 1 and 2 Orig. Plaintiffs
Nos. 3 to 5 Orig. Defendant
Nos. 6 to 8]

...

Senior Counsel Mr. Vijay Dixit i/b
Mr. M.V.Bhamre, advocate for Appellants
Mr. S.P.Shah, Advocate for Respondent nos. 1 and 2
Mr. S.P.Deshmukh, AGP for respondent nos. 3 to 5

...

CORAM : SUNIL K.KOTWAL, J.

**DATE OF RESERVING
THE JUDGMENT**

: 26.10.2018

**DATE OF PRONOUNCEMENT
OF JUDGMENT**

: 03.12.2018

J U D G M E N T :

This appeal is directed by original defendants in Regular Civil Suit No. 2 of 2004 against the judgment and decree, passed by the District Judge-2, Dhule for declaration and possession.

2. Respondents in this appeal are original plaintiffs.

3. Facts leading to institution of this appeal, in brief, are :

Seth Kasturmal Dalsukh Dharmashala, registered trust under P.T.R. No. A-235, Dhule through its two trustees filed Civil Suit for declaration that Old Plot No. 30 of C.T.S. No. 597 to 600 and 1184 to 1186, admeasuring east-west 98 Feet and north-south 40 feet, situated at Dondaicha, Taluka Sindkheda, District Dhule is trust property of plaintiff trust and for perpetual injunction as well as for decree for possession of the suit property against the defendants. This

suit was filed under Section 50 of the Bombay Public Trust Act (hereinafter referred to as, 'the Trust Act') after obtaining permission under Section 51 of the said Act from the Charity Commissioner. Contention of the plaintiffs, in brief, is that late Kasturmal Dalsukh Agrawal, under his registered will, dated 13.7.1936 created the above said trust, which came to be registered on 30.5.1956 under P.T.R.No. A-235 Dhule, in the name of Kasturmal Dalsukh Dharmashala. On the trust property, specious building was constructed by Seth Kasturmal Dalsukh Agrawal. The plaintiffs are legal heirs of Seth Kasturmal Dalsukh Agrawal. The suit property was in possession of the plaintiff trust and it was used for public purpose. The defendants illegally obtained possession of the trust property and started denying the right of plaintiff trust. Therefore, the plaintiffs were constrained to file this suit for declaration of title, perpetual injunction and for possession of the trust property.

4. By filing written statement, defendant nos. 1 to 5 opposed the suit and denied that plaintiff trust is the owner of suit property. They have denied that under the will, dated 13.7.1936, executed by Kasturmal Dalsukh Agrawal, the trust was created and suit property was given to the trust. Contention of defendants, in brief, is that being legal heirs of Kasturmal Agrawal, they have acquired title to the suit property by inheritance. Contention of the defendants is that Regular Civil Suit No. 26 of 1997 filed by the present plaintiff against the defendants was disposed of, and therefore, the present suit is barred under Order 2 Rule 2 of the Civil Procedure Code. Even Inquiry Application No. 151 of 1997 filed by plaintiffs before the Assistant Charity Commissioner, Dhule was dismissed and Appeal No. 56 of 1999 preferred against that order was subsequently transferred to Nashik office. That Appeal No. 30 of 2001 was also dismissed on 15.1.2002. Even the application filed by plaintiffs under Section 41(e) of the Bombay Public Trust Act bearing No. 7 of 1997 was dismissed by the Charity Commissioner on 3.4.1998

and in that proceeding it was held that the suit property is not trust property. That order is upheld by the appellate Court. Even Civil Revision Application No. 646 of 1997 filed by the plaintiffs before the High Court was dismissed on 9.10.1998. Writ Petition No. 2419 of 1998 filed by the plaintiff before the High Court, Bench at Aurangabad, was subsequently withdrawn. Therefore, the present suit is not tenable. Defendants have specifically denied the will executed by Kasturmal Dalsukh Agrawal. According to the defendants, the suit is barred by limitation. It was filed after more than 12 years from the date of cause of action, which arose in the year 1991.

5. On above pleadings of parties, the trial Court framed issues at Exh.38. After considering the evidence placed on record by both the parties, the trial Court held that the suit properties are trust properties. In the result, the declaration of title and decree for possession was passed against the defendants. The prayer for perpetual injunction was rejected. Against that decree, no

appeal or cross-objection is filed by the original plaintiffs.

6. Heard Shri Vijay Dixit, learned Senior counsel for the appellants, Shri S.P.Shah, learned counsel for respondent nos. 1 and 2 and learned A.G.P. for respondent nos. 3 to 5.

7. After hearing the parties, it reveals that though objection was raised by the defendants that the suit was barred under Order 2 Rule 2 of the Code of Civil Procedure, no issue to that effect was framed. So also, issue was not framed whether suit claim is within limitation, though this point was considered by the trial Court and answered in affirmative. Therefore, following two issues are framed in this appeal and these two issues are disposed of as Point Nos. 1 and 2 while deciding this appeal, as on these both issues arguments are submitted by both parties.

ISSUE NOS. 1 AND 2 :-

- 1) Whether the suit claim is barred under Order 2 Rule 2 of the Civil Procedure Code ?
- 2) Whether the suit property is trust property of plaintiff trust ?

After hearing parties following Points arise for my consideration. I have reproduced these points with my finding thereon as given below.

POINT NOS. 1 TO 7

SR. NO.	POINTS	FINDING
1	Whether the suit claim is barred under Order 2 Rule 2 of the Civil Procedure Code ?	No
2	Whether the suit claim is within limitation ?	Suit is within limitation
3	Whether the suit property is trust property of plaintiff trust ?	No

4	Whether plaintiffs are entitled to declaration as prayed ?	No
5	Whether plaintiffs are entitled to possession of the suit property ?	No
6	Whether decree passed by the Trial Court is correct and proper ?	No
7	What order ?	Appeal is allowed. Suit is dismissed with costs.

8. **POINT NO. 1**

Learned counsel for the appellants submits that original plaintiffs had filed Regular Civil Suit No. 26 of 1997 for perpetual injunction to restrain the present defendants from creating third party interest in the same suit property and in that suit, plaint was returned under Order 7 Rule 11 of the Civil Procedure Code, on the ground of lack of jurisdiction. That order was upheld upto High Court and reached finality. Therefore, the present suit filed on the same cause of action is barred under Order 2 Rule 2 of the Civil Procedure

Code.

In reply, learned counsel for respondent nos. 1 and 2 submits that Regular Civil Suit No. 26 of 1997 was disposed of for want of jurisdiction to that Court by returning plaint. Therefore, there was no adjudication by the Court having jurisdiction to entertain that suit. In the circumstances, the bar under Order 2 Rule 2 of the Code of Civil Procedure is not attracted. He placed reliance on **"Spring Fresh Drinks Pvt.Ltd. Vs Gani Sons Charitable Trust"** [2016 (5) Mh.L.J.400] and **"P. Vijaykumar and Ors. Vs V.C.Gopalkrishnan"** [1997 (2) Mh.L.J. 35].

I have gone through the copy of plaint of Regular Civil Suit No. 26 of 1997 filed on behalf of the plaintiff trust for perpetual injunction to restrain the present defendants from creating third party interest in the same suit property. From the record, it emerges that, Regular Civil Suit No. 26 of 1997 was converted into Regular Civil Suit No. 17 of 2003, as it was transferred from the Civil Judge, Junior Division, Sindkheda to Civil Judge,

Junior Division, Dhule. The order, passed by the learned Civil Judge, Junior Division, Dondaicha dated 5.3.2004 shows that the plaint was returned by the Civil Judge, Junior Division, Dondaicha on the ground that it has no jurisdiction to decide whether the suit property is trust property or not. Thus, it is clear that Regular Civil Suit No. 17 of 2003 (Old No. 26 of 1997) was disposed of for want of jurisdiction to entertain that suit and it was not adjudicated by the Civil Court having jurisdiction to entertain it. In **Spring Fresh Drinks Pvt. Ltd. Vs Gani Sons Charitable Trust** (supra), this Court had occasion to consider similar situation. This Court held that if the suit is disposed of on the ground that Civil Court has no jurisdiction to try the claim, the bar under Order 2 Rule 2 of the Civil Procedure Code would not be applicable. Same view was also taken previously in **P.Vijaykumjar and Ors. Vs V.C.Gopalkrishnan** (supra) by this Court.

Considering this consistent view taken by this Court, when Regular Civil Suit No. 17 of 2003

(Old No. 26 of 1997) was disposed of for lack of jurisdiction to the Civil Judge, Junior Division, the bar under Order 2 Rule 2 of Civil Procedure Code is not applicable, as previous suit was not adjudicated by the Court having jurisdiction to entertain that suit.

9. **POINT NO. 2**

Learned counsel for the appellants submits that as per pleadings of plaintiffs, especially para 12, the cause of action to file this suit arose when plaintiffs filed Inquiry No. 151 of 1997 and after the death of Shri Laxminarayan Ramvilas Agrawal. Thus, the suit for declaration of title as well as for possession, filed on 29.10.2004 is barred by limitation. He submits that limitation for filing such suit for declaration is 3 years from the date of cause of action under Article 58 of the Limitation Act, and for possession, the limitation is 12 years under Article 65 of the Limitation Act. As such, suit is not within limitation. Learned counsel for the appellants placed reliance on "**Keshav Narayan Bharti through**

L.Rs. And others vs State of Maharashtra and others" [2006 (3) BCJ. 550].

Learned counsel for respondent nos. 1 and 2 submits that this suit is filed under Section 50 of the Maharashtra Public Trust Act after obtaining required permission from the Charity Commissioner under Section 51 of the Trust Act. This being special forum under Local Act, the general provisions of the Limitation Act, 1963 are not applicable. He has drawn my attention to the judgment in the case of **"Shri Dev Chavata of Tambulwadi vs Ganesh Mahadeo Deshpande" [1970 Mh.L.J.736]**.

In the case at hand, admittedly plaintiff trust filed suit under Section 50 of the Trust Act after obtaining necessary permission from the Charity Commissioner under Section 51 of the Act. Thus, obviously, this is special forum under Local Act i.e. Maharashtra Public Trust Act.

This Court, in the same matter reported in **"Seth Kasturmal Dalsukh Dharmashala Dhule and others vs Shantidevi w/o Laxminarayan Agrawal and**

others” [2013 (1) Mh.L.J. 695] held that the suit is not the one invoking general civil jurisdiction of the Court within the meaning of Section 9 of the Civil Procedure Code, but is filed before the District Court i.e. Court as contemplated under Section 2(4) r/w Section 50 of the Bombay Public Trust Act. This Court also held that under Section 50 (iv) of the B.P.T. Act a suit can be filed in the Court even for relief of declaration and injunction in favour or against a public trust. Section 50 also explicitly provides that a suit for possession can be filed in the Court. Sub-Clause (q) of Section 50 (iv) further empowers the Court to grant any other relief which would be a condition precedent or consequential to any of the relief provided in Section 50. For claiming relief of possession, a decision on question of ownership would be relevant. Unless the plaintiff proves his ownership or any other status as regards the property of which possession is sought, he would not be entitled for relief of possession. As such, relief of declaration as to the status of plaintiff qua the property would be condition precedent for

grant of relief of possession.

This Court also held that the B.P.T. Act is special Local Act. Suit under Section 50 is a special remedy before special forum under the Act. The bar, as envisaged under Sections 79 and 80 of the B.P.T. Act, would not be attracted in view of the provisions of Sections 50 and 51 of the Trust Act.

So also, in **Shri Dev Chavata of Tambulwadi vs Ganesh Mahadeo Deshpande** (supra), this Court observed that :

" 5. In my judgment, there is nothing in the Bombay Public Trusts Act, 1950, which is a special local Act, which makes the provisions of the Indian Limitation Act, 1908, or of the Limitation Act of 1963 applicable to a suit under Section 50 of the Bombay Public Trusts Act. The suit under Section 50 is a Special remedy before a special forum under the Act. The present suit having been filed on July 21, 1955, the question which will have to be considered is as to whether the Indian Limitation Act, 1908, will apply to it. Section 75 of the Bombay Public Trusts Act applies certain provisions of the Indian limitation Act only to the filing of appeals and applications. The Indian Limitation Act, which is the general law of the land relating to limitation, is applicable in the circumstances mentioned in Section 29 of that Act in the case of

suits and proceedings under Special or Local Law. Now, Section 29(2) comes into operation when a Special or Local Law prescribes for any suit a period of limitation. See Vidyacharan Shukla v. Khubchand Baghel. And Shankar v. Chunilal. However, there is nothing in Section 50 or in any other provision of the Bombay Public Trusts Act, 1950, which prescribes any period of limitation for a suit under Section 50. The suit is to be instituted outside Greater Bombay before a special forum, viz., the District Court, as provided in the section read with Section 3(4). I am, therefore, of the opinion that the Limitation Act is not at all attracted to any suit under Section 50 of the Bombay Public Trusts Act. Section 52-A lays down that suit against even an assignee for valuable consideration is not barred by any length of time and hence It is clear that legislature could not have intended to apply the law of limitation to suits under Section 50. The learned District Judge was, therefore, wrong in applying presume ably Art 142 and in dismissing the suit."

Thus, this suit being filed under Section 50 of the Trust Act, which is special forum, the provisions of Limitation Act, 1963 are not applicable to this suit as under Section 50 of the Trust Act, no limitation is provided for filing such suit for declaration regarding trust property and for possession of the trust property. Therefore, I hold that the suit claim is well within limitation. The Trial Court has rightly

held that the suit is not barred by limitation.

The case of **Keshav Narayan Bharti vs State of Maharashtra** (supra) is distinguishable on facts that in that matter Regular Civil Suit No. 476 of 1978 was filed for declaration and injunction against the Charity Commissioner before Civil Judge, Senior Division, invoking the ordinary jurisdiction of the Civil Court with reference to Section 9 of the Code of Civil Procedure. That was not the suit under Section 50 of the Trust Act, which is special forum under Local Act. Therefore, the ratio of **Keshav Narayan Bharti vs State of Maharashtra** (supra) is not applicable under these distinguishable facts.

Accordingly, my conclusion is that the suit is well within limitation. I answer Point no.2 accordingly.

10. **POINT NO. 3**

On the point no.3, regarding status of the suit property, as to whether it is trust property or not, arguments were vehemently submitted by Shri

Vijay Dixit, Senior Counsel for the appellants, mainly on the ground that the plaintiff trust filed certified copy of the will, dated 13.7.1936, executed by Kasturmal Dalsukh Agrawal. Under this will, plaintiff trust was created and suit property was bequeathed in favour of the plaintiff trust. This will is registered on 19.10.1036. According to the learned Senior counsel for the appellant, learned Trial Court erroneously admitted this will and exhibited it invoking presumption under Section 90 of the Evidence Act. He submits that the will is a special document and it can be proved at least by examining one attesting witness to prove the compliance of Section 63 (c) of the Indian Succession Act, 1925 r/w Section 68 of the Evidence Act. He placed reliance on **"Bharpur Singh and others vs Shamsher Singh"** [2009 (3) SCC 687], wherein the Apex Court held that presumption regarding documents 30 years old is not applicable to will. The will must be proved in terms of Section 63 (c) of the Indian Succession Act, 1925. On the point of proof of will, he placed reliance on following authorities.

- 1] **P.Laxman v/s Thekkayil Padmini and others**
[2009 (3) Mh.L.J. 510]
- 2] **Keshav Narayan Bharti vs The State of Maharashtra and others**
[2006 (3) BCJ 550]
- 3] **M.B.Ramesh (D) by L.Rs. Vs K.M.Veeraje Urs (D) by Lrs and Ors.**
[2013 DGLS (SC) 375]
- 4] **Smt. Jaswant Kaur vs Smt. Amrit Kaur & Ors.**
[(1977) 1 SCC 369]
- 5] **Sridevi & others vs Jayaraja Shetty & ors.**
[(2005) 2 SCC 784]
- 6] **Niranjan Umerschandra Joshi vs Mrudula Jyotirao & ors.**
[(2006) 13 SCC 433]
- 7] **B. Venkatamuni vs C.J.Ayodhya Ram Singh and Ors.**
[(2006) 13 SCC 449]
- 8] **Anil Kak vs Kumari Sharada Raje & Ors.**
[(2008) 7 SCC 695]

In reply, learned counsel for respondent nos. 1 and 2, though fairly submitted that presumption under Section 90 of the Evidence Act is not applicable to the document like will. He submits that at the time of exhibiting the will, objection was not taken by learned counsel for the plaintiffs, and therefore, at the appellate stage, appellants cannot raise objection regarding admissibility of this document as secondary evidence. He placed reliance on "**Dayamathi Bai (Smt) vs K.M.Shaffi**" [(2004) 7 SCC 107].

Next submission of learned counsel for

respondent nos. 1 and 2 is that there are no suspicious circumstances around the impugned will of Seth Kasturmal. Even after the death of Kasturmal, his will came into light. The entries in record of right shows that on the basis of this will, name of trust was recorded in the record of the suit property. Therefore, genuineness of the will of Seth Kasturmal cannot be doubted.

Further submission of learned counsel for respondent nos. 1 and 2 is that the will is registered document and there is endorsement in the handwriting of Sub-Registrar that the executant Seth Kasturmal presented the will for registration and admitted its execution. He submits that under Section 58(1)(c) r/w Section 60(2) of the Indian Registration Act, there is presumption of correctness regarding the endorsement made by the Sub-Registrar on this registered document. Therefore, when both attesting witnesses are dead, on the basis of this presumption under Section 58(1)(c) and Section 60(2) of the Indian Registration Act, respondent nos. 1 and 2 can prove due execution and attestation of the will. He

placed reliance on following.

- 1] **K.M.Varghese & Ors. Vs K.M.Oommen & Ors.**
[AIR 1994 Kerala 85]
- 2] **Shivdas Lokanathsing & Ors. Vs Gayabvai Shankar Surwase**
[1993 Mh.L.J. 1623]
- 3] **Geetabai Ramchandra Pawar vs Rambhau Maruti Pawar and others**
[2015 (2) Mh.L.J. 516]
- 4] **Bandopant Sitaram Bapat & Ors. Vs Sankar Sitaram Bapat and others**
[1996 (1) Mh.L.J. 815]

Next submission of learned counsel for respondent nos. 1 and 2 is that by filling change report Inquiry No. 151 of 1997, the trustees of the plaintiff trust initiated proceedings before the Assistant Charity Commissioner for recording the suit property in the Public Trust Register (P.T.R.) as trust property. Initially, though Inquiry No. 151 of 1997 was rejected by the Assistant Charity Commissioner, Dhule and that order was confirmed by the Joint Charity Commissioner, Nasik in Appeal No. 30 of 2001, present respondents filed Miscellaneous Civil Application No. 26 of 2002 under Section 72(1) of the Trust Act and challenged correctness of that order. Miscellaneous Civil Application No. 26 of 2002 was allowed and the previous order of

the Assistant Charity Commissioner in Inquiry No. 151 of 1997 as well as order of the Joint Charity Commissioner in Appeal No. 30 of 2001 was set aside by 3rd Adhoc District Judge, Dhule and Inquiry No. 151 of 1997 was remanded to the Assistant Charity Commissioner, Dhule for fresh inquiry. He has pointed out that after holding fresh inquiry in Inquiry No. 151 of 1997, the Assistant Charity Commissioner, Dhule passed the order on 13.1.2006 and held that present suit property is property of the plaintiff trust and direction was given to take entry of this property in the register. He submits that the order passed by the Assistant Charity Commissioner, Dhule in Inquiry No. 151 of 1997 has reached finality, as it is not disturbed by any appellate Court. Therefore, since the Assistant Charity Commissioner, being competent authority to decide whether the suit property is trust property under Section 79 of the Trust Act, Issue no.1 regarding status of the suit property does not survive. According to learned counsel for respondent nos. 1 and 2, in view of the finding given by the Assistant Charity Commissioner that

the suit property is trust property, the District Judge, Dhule need not reconsider the status of the suit property.

In reply, learned Senior counsel for appellants has not pointed out whether the order passed by the Assistant Charity Commissioner in Inquiry No.151 of 1997, dated 13.1.2006 is set aside by any appellate authority.

No doubt, after going through the judgment passed by the 3rd Adhoc District Judge, Dhule in Miscellaneous Civil Application No. 26 of 2002, it becomes clear that the previous order passed by the Assistant Charity Commissioner, Dhule in Inquiry No. 151 of 1997, confirmed by the Joint Charity Commissioner, Nasik in Appeal No. 30 of 2001, is set aside by the Adhoc District Judge, Dhule and Inquiry No. 151 of 1997 was remanded to the Assistant Charity Commissioner, Dhule to decide whether the present suit property is trust property or not. Undisputedly, the property in dispute in Inquiry No. 151 of 1997 and the property in dispute in the present suit is one and the same. Even it is not disputed that under Section 79 of the Trust

Act, the Charity Commissioner is competent having every jurisdiction to decide whether any property is trust property or not. No doubt, under Section 50(iv) of the Trust Act, even District Judge can give declaration regarding the nature of the trust property.

However, in the case at hand, after perusal of record and proceedings, it emerges that after remand of Inquiry No. 151 of 1997 regarding nature of suit property, the inquiry was decided on 13.1.2006 and the competent authority under the Trust Act held that the present suit property is property of the plaintiff trust (Exh.190). It is to be noted that in Inquiry No. 151 of 1997 all the appellants were contesting parties. Thus, this inquiry was decided in between present plaintiffs and defendant nos. 1 to 5. Against the said order, passed by the Assistant Charity Commissioner, Dhule, in Inquiry No. 151 of 1997, dated 13.1.2006, present defendants filed Charity Appeal No. 29 of 2006 and the appeal was dismissed by the Joint Charity Commissioner, Nasik on 26.3.2006. Against that order, passed by the Joint Charity

Commissioner, Nasik, dated 26.3.2006, the defendants filed Regular Civil Appeal No. 21 of 2009 on 4.2.2009. That appeal was ready for hearing since 30.6.2010 and ultimately it was disposed of on 4.4.2012. Even Miscellaneous Civil Application No. 28 of 2013 filed in the said matter before the District Court, Dhule was rejected on 4.3.2015. Thus, it reveals that the judgment passed by the Assistant Charity Commissioner, after remand (Exh.190) holding that present suit property is property of the trust has reached finality.

11. Now the question arises what is the effect of finding given by Assistant Charity Commissioner in Inquiry No.151/1997 dated 13.01.2006, holding that the suit property is the property of plaintiff Trust (Exh.190). The questions arise whether after the decision of Assistant Charity Commissioner regarding nature of the suit property as Trust property, whether defendants can prove their title over the suit property or whether the plaintiff Trust will be held as title holder of the suit property.

12. The Full Bench of this Court had occasion to consider the effect of decision given by Charity Commissioner under inquiry under Section 19 (ii) read with Section 22A of the Trust Act in the case of **"Keki Pestonji Jamadar and anr Vs. Kohodadad Merwan Irani and others"** reported in (1972 Mh.L.J. 427). While considering the procedure prescribed by the Trust Act for the conduct of inquiry under Section 19, the Full Bench observed that,

" The procedure prescribed by the Act for the conduct of inquiries under Section 19 is wholly unsuited to a proper and effective adjudication of disputed titles to the trust property. Under Section 19 the Deputy or Assistant Charity Commissioner has to conduct an inquiry "in the prescribed manner". Rule 7 which deals with the manner of inquiries provides that the procedure prescribed for the trial of the suits under the Presidency Small Cause Courts Act, 1882 or the Provincial Small Cause Courts Act, 1887, as the case may be, would apply to the proceedings under Section 19. Under Section 19 (d) (e), (f) and (g) of the Presidency Small Cause Courts Act, 1882 and under Item 4 of the Second Schedule of the Provincial Small Cause Courts to decide questions of title to immovable property is expressly excluded and the procedure devised for trials under those Acts is consequently far too summary for a proper adjudication of such titles. The provision in Rule 7 that a party to an inquiry can appear through an agent and

the power of the Tribunal to exclude lawyers from the inquiries reveal to some extent the narrow nature of the inquiry envisaged by Section 19.

Rule 11 provides that the officer holding the inquiry may only make a memorandum of the substance of what each witness deposes. It is unthinkable that questions of title could be permitted to be decided by a Tribunal finally and conclusively without any obligation to record the evidence fully. It is matter of common experience that subtle shades of evidence are often missed in a memorandum containing merely the substance of the evidence".

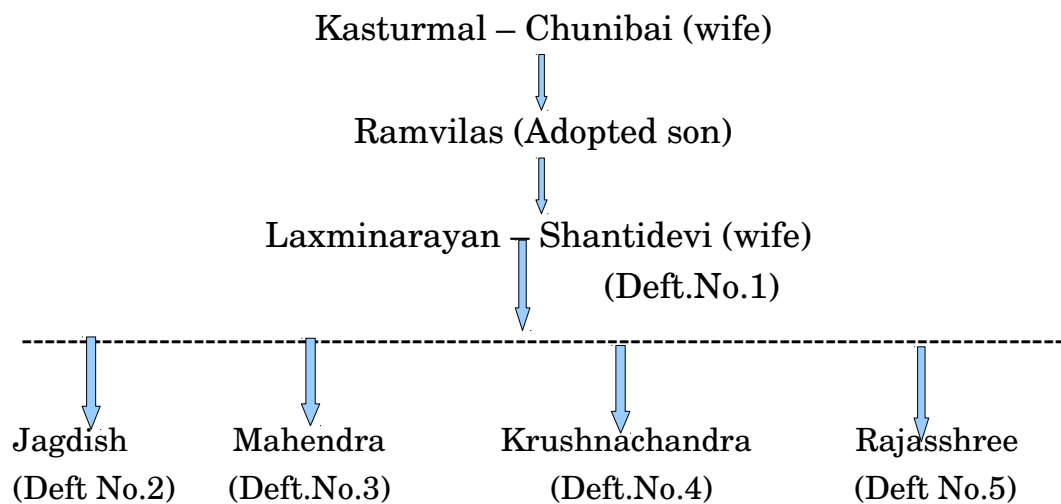
13. Full Bench of this Court considered Section 26 of the Trust Act under which any Court of competent jurisdiction deciding any question relating to any public trust, which by or under the provisions of Act it is not expressly or impliedly barred from deciding, has to send copy of such decision to the Charity Commissioner and Charity Commissioner has to cause entries in the register to be made or amended in accordance with such decision. This Court held that if a Civil Court upholds the title of third party to the property, which under Section 19 has been found to belong to the trust, the record of the Charity Commissioner

has to be amended so as to accord with that decision. The decision of Civil Court will have priority over the decision recorded in the inquiry under Section 19 of the Trust Act. While explaining the above-said judgment of the Full Bench, the Division Bench of this Court, in the case of **"Samastha Lad Vanjari Samaj, Ram Mandir Trust Vs. Waman Kisan Sanap and others"** reported in (1976 Mh.L.J. 806), has explained that the true owner is not affected by an inquiry under Section 19 of the Act because the question which has to be decided by the Authorities is a different question operating at different level. The decision of the Authority and decision of the Civil Court operates at different levels and different areas so that there is no conflict between the two.

14. Thus, in view of this legal position though the Assistant Charity Commissioner held that the suit property is the property of Trust, when adverse title is set up in the suit property by the defendants, by inheritance, as legal heirs of

Kasturmal Agrawal, the original title holder, the decision of Civil Court regarding title over the suit property will prevail over the decision of Assistant Charity Commissioner. In accordance with the decision of Civil Court, necessary changes in the entries in public trust register will have to be made by Charity Commissioner under Section 26 of the Trust Act. Thus, now I proceed to examine whether under the Will of Kasturmal Agrawal, the suit property is bequeathed in favour of the trust?

15. To clarify the relationship of defendants with the original title holder Kasturmal Agrawal, following genealogy tree is set out.



16. Undisputedly under Kabulayat dated

16.03.1937 (Exh.58) the disputed land was allotted to Kasturmal Agrawal by Collector as lessee for the period of 30 years. On this land, during his lifetime, Kasturmal Agrawal constructed structure of Dharmshala. Plaintiff Trust claims that under the registered Will dated 13.07.1936 (Exh.73) Kasturmal Agrawal created Trust and appointed three trustees for construction of Dharmshala. That Trust was not registered till 1957. Even it is not disputed that Kasturmal Agrawal died on 12.08.1937. Plaintiff Trust claims right over Dharmshala as trustees under the terms of registered Will dated 13.07.1936 alleged to be executed by Kasturmal Agrawal. Defendants, in their written statement, have specifically denied execution of this Will and creation of trust by Kasturmal Agrawal. According to defendants, after the death of Kasturmal Agrawal, being his legal heirs they have become title holders of the suit property. Therefore, entire fate of this case revolves around the point whether the plaintiff Trust can prove that under Will dated 13.07.1936 the plaintiff Trust was created and the suit property was bequeathed in

favour of the Trust. Thus, heavy burden lies on the plaintiff Trust to prove registered Will dated 13.07.1936 alleged to be executed by Kasturmal Agrawal.

17. However, to prove this Will the plaintiff Trust has only examined one of the trustees namely Shamlal Jankilal Agrawal (PW-1). In his examination-in-chief this witness has merely deposed that "this is the certified copy of Will dated 13.07.1936 of Kasturmal Agrawal and this Will bears his signature, it is correct, it be exhibited". From the judgment delivered by the Trial Court, it emerges that though no attesting witness was examined by the plaintiff Trust to prove the Will, in accordance with Section 68 of the Indian Evidence Act read with Section 63 (c) of the Indian Succession Act, the trial Court exhibited this Will as 30 years old document with the aid of Section 90 of the Indian Evidence Act.

18. The first important aspect to be noted is that, Shamlal Agrawal (PW-1) has admitted in his

cross-examination that he was not present at the time of execution of Will. Therefore, this witness cannot prove due execution and attestation of Will as required under Section 63 (C) of the Indian Succession Act.

19. No doubt, though the plaintiff Trust filed certified copy of registered Will of Kasturmal Agrawal, as the defendants did not raise any objection at the time of execution of this document, in view of judgment in the case of **"Dayamathi Bai Vs. K.M. Shaffi"** (supra), now at this appellate stage the appellants cannot take objection regarding admissibility of this secondary evidence though no foundation was laid down by the plaintiff Trust entitling it to give secondary evidence. Otherwise also, even at the stage of argument the learned Counsel for the appellants did not raise any objection regarding admissibility of the certified copy of Will as secondary evidence. Therefore, this point i.e. whether the certified copy of registered Will can be admitted in evidence or not, needs no more consideration.

20. The main grievance of the appellants' Counsel is that the Will being a special document, needs to be proved in accordance with Section 68 of the Evidence Act read with Section 63 (c) of the Indian Succession Act. His objection is that the Will cannot be admitted under Section 90 of the Evidence Act as 30 years old document, without complying Section 63 (c) of the Indian Succession Act. In the case of **"Bharpur Sing Vs. Samsher Sing"** (supra), the Supreme Court held that presumption regarding document 30 years old, is not applicable to the Will. The Will must be proved in terms of Section 63 (c) of the Indian Succession Act, 1925. In the cases of **"P. Laxman Vs. Thekkayil Padmini and others"** [2009 (3) Mh.L.J. 510], **"M.B. Ramesh Vs. K.M. Veeraje and others"** [2013 DGLS (SC) 375], **"Jaswant Kaur Vs. Amrit Kaur and others"** [(1977) 1 SCC 369], **"Sridevi and others Vs. Jayaraja Shetty and others"** [(2005) 2 SCC 784], **"Niranjan Umeshchandra Joshi Vs. Mrudula Jyotirao and others"** [(2006) 13 SCC 433], **"B. Venkatamuni Vs. C.J. Ayodhya Ram Singh and others"**

[(2006) 13 SCC 449] and **"Anil Kak Vs. Kumari Sharada Raje and others"** [**(2008) 7 SCC 695**] the Apex Court laid down the following principles :-

- (i) When there are suspicious circumstances regarding execution of Will, onus of proof is on the propounder to explain them to the satisfaction of the Court.
- (ii) Presumption under Section 90 does not apply to Will.
- (iii) Will has to be proved in terms of Section 63 (c) of the Indian Succession Act read with Section 68 of the Evidence Act. Mere proving of signature of executors and attesting witnesses is not sufficient.

21. In the case at hand, as observed above, no attesting witness is examined by plaintiff under the pretext that both the attesting witnesses are dead. However, in cross-examination of Shamlal Agrawal (PW-1) it emerges that in one breath he deposes that he was going to examine attesting witnesses and in the next breath he says that attesting witnesses are dead and he cannot file their death certificates. Thus, it emerges that even Shamlal Agrawal (PW-1) was not certain as to whether the attesting witnesses were dead or alive. Even by filing death certificates of attesting

witnesses the plaintiff Trust has not proved that examination of attesting witnesses was impossible for them. In the circumstances, only one inference is to be drawn that the plaintiff Trust failed to prove due execution and attestation of the Will as mandated under Section 68 of the the Evidence Act by examining at least one attesting witness.

22. Another important aspect is that, to prove due attestation as mandated under Section 63 (c) of the Indian Succession Act, the plaintiff Trust must prove that the testator Kasturmal Agrawal signed the Will in presence of two witnesses and both the attesting witnesses also put their signatures on the Will in presence of Kasturmal Agrawal. However, neither Shamlal Agrawal (PW-1) deposed regarding signing of Will by Kasturmal Agrawal in presence of two witnesses and signing of Will by witnesses in presence of Kasturmal Agrawal, nor the plaintiff has examined any witness to prove the same compliance.

23. During the course of arguments the learned

Counsel for Trust respondent Nos.1 and 2 placed reliance on the presumption under Section 58 (1) (c) and 60 (2) of the Indian Registration Act i.e. presumption of correctness available to the endorsement made by Sub Registrar at the time of registration of document. However, after going through the certified copy of registered Will (Exh.73) of Kasturmal Agrawal, it emerges that the endorsement recorded by Sub Registrar on the last page of the Will does not speak that the Will was signed by Kasturmal Agrawal in presence of two witnesses and both witnesses signed it in presence of Kasturmal Agrawal, as required under Section 63 (c) of the Indian Succession Act. This endorsement is only regarding admission of Kasturmal Agrawal before Sub Registrar that he executed that Will. Such vague endorsement by Sub Registrar is not sufficient to prove the compliance of Section 63 (c) of the Indian Succession Act. The judgment in the case of **"Bandopant Sitaram Bapat Vs. Sitaram Bapat"** (supra) relied by learned Counsel is distinguishable on facts that in that case one attesting witness was examined to prove the

compliance of Section 63 (c) of Indian Succession Act. The case of "**Ved Mitra Verma Vs. Dharam Dev Varma**" (supra) relied by learned Counsel for the respondents is also distinguishable on facts for the reason that in that case Sub Registrar was examined as witness to prove the compliance of Section 63 (c) of the Indian Succession Act. In the case of "**Theressa Vs. Fransic J. Misquita**" (supra) the person who made mark of testator on the Will was examined to prove the Will. The case of "**Shivdas Vs. Gayabai**" (supra) is distinguishable on the ground that it does not pertain to proof of the Will. The Case of "**K.M. Varghese Vs. K.M. Oommen**" (supra) is also distinguishable on the facts that in that case also attesting witness was examined to prove the Will.

24. Thus, in the case at hand, I have no hesitation to hold that the Will of Kasturmali Agrawal cannot be admitted in evidence as 30 years old document under Section 90 of the Evidence Act. I hold that plaintiff Trust miserably failed to

prove due execution and attestation of the Will as mandated under Section 68 of the Evidence Act read with Section 63 (c) of the Indian Succession Act. As the Will is not proved, it follows that the plaintiff Trust cannot prove that under the registered Will Kasturmal Agrawal created trust and bequeathed the suit property in favour of the plaintiff Trust or suit property vested in the alleged trustees.

25. Assuming the best situation in favour of plaintiff Trust that the registered Will of Kasturmal Agrawal can be read in evidence, even then, after going through the relevant portion of the Will regarding creation of Trust, it reveals that under the Will by reserving Rs.5,000/- Kasturmal Agrawal created one another Trust for charity purpose and appointed Chunibai Kasturmal Marwadi and Jivanram Jaynarayan Marwadi as trustees of that Trust. That Trust has no concern with the plaintiff Trust. Relevant portion of the Will is reproduced as under :-

“दोंडाईचे येथे धर्मशाळा बांधावयाची म्हणून मी एक जागा घेतलेली आहे त्या धर्मशाळेचे काम मीच सुरू करणार आहे परंतु मजकडून ते काम नच झाल्यास माझी बायको चुनिबाई ईने रुपये ७००० सात हजार खालील प्रमाणे ट्रस्टीचे स्वाधीन करून धर्मशाळा बांधवी आणि त्या धर्मशाळेस माझे नाव दयावे. या कामी मी नेमीत असलेले ट्रस्टी खालील प्रमाणे आहेत.

- १) जिवनराम जयनारायण मारवाडी, रा. ४० गाव पु.खा.
 - २) जानकीलाल जगन्नाथ मारवाडी, रा. दोंडाईचे प.खा.
 - ३) चुनिबाई भ्र. कस्तुरमल मारवाडी, रा. दोंडाईचे
- माझी या त्रिवर्ग ट्रस्टीची रक्कम रुपये ७००० सात हजार खर्ची घालुन या धर्मशाळेचे बांधकाम मी धर्मशाळे करिता घेतलेले जागेवर करावयाचे आहे”.

26. After going through the recitals of the Will, it emerges that Kasturmal Agrawal intended to construct structure of Dharmshala on one land which was acquired for that purpose. He intended to construct that Dharmshala in his own lifetime. In the event if he could not construct Dharmshala, then only his wife Chunibai was instructed to pay Rs. 7,000/- to the three trustees namely Jivanram Jaynarayan Marwadi, Jankilal Jagannath Marwadi and Chunibai w/o Kasturmal Marwadi for construction of Dharmshala and name of Kasturmal Agrawal was to be given to that Dharmshala. These recitals of Will make it clear that the trustees were appointed only

for the purpose of construction of Dharmshala and not for the purpose of managing the affairs of Dharmshala.

27. Undisputedly, Kasturmal Agrawal himself constructed the structure of Dharmshala in his lifetime, by spending his own money. Therefore, when Dharmshala was constructed by Kasturmal Agrawal himself, the purpose of creation of Trust was already frustrated, and therefore, under Will no Trust would be created by Kasturmal Agrawal to construct and look after the management and affairs of constructed Dharmshala. In the circumstances, by no stretch of imagination, it can be said that under registered Will Kasturmal Agrawal created Trust in the style "Kasturmal Dharmshala" and appointed trustees to look after and managed affairs of Dharmshala. Under the terms of Will, no property of Kasturmal Agrawal, was given to the so called created Trust.

28. Even on the date of execution of Will on 13.07.1936 even the suit property was not allotted

by Collector to Kasturmal Agrawal, because Kabulayat regarding allotment of suit property to Kasturmal Agrawal was executed subsequently on 16.03.1937 (Exh.57). Thus, when on the date of execution of Will, Kasturmal Agrawal was not aware as to exactly which land would be allotted to him by Collector and as on the date of execution of Will he had no transferable title in the said lands under his Will he cannot bequeath that land in favour of the alleged Trust. Even no description of said land is given in the will.

29. The other oral evidence brought on record by plaintiff is of no help to prove title of plaintiff trust, and therefore, it is not considered. Even the entries in record of right, other revenue record and municipal record cannot establish title in the suit property of either parties. Therefore, that evidence is redundant to determine the right of parties.

30. In the circumstances, when the plaintiff cannot prove the registered Will of Kasturmal

Agrawal, bequeathing the suit property as Trust property, after the death of Kasturmal Agrawal and his successors, by inheritance the defendants have acquired title in the suit property. In the circumstances, I have no hesitation to hold that the title set up by defendants in the suit property is duly proved by them. Therefore, the suit property cannot be held as "Trust Property". I answer point No.3 in negative.

31. **AS TO POINT NO. 4 :-**

In view of my finding against point No.3, the suit property is not Trust property, but it is a property of original defendant Nos.1 to 5. Therefore, the declaration as sought by plaintiff Trust cannot be given. I answer point No.4 in the negative.

32. **AS TO POINT NO. 5 :-**

Plaintiff Trust is claiming possession of the suit property on the ground that it is a Trust property. However, in view of my finding against point No.3, defendant Nos.1 to 5 are title holders of the suit property and admittedly they are also

in lawful possession of the suit property. Therefore, plaintiff Trust cannot recover possession of the suit property from the defendants. I answer point No.5 in the negative.

33. **AS TO POINT NOS.6 AND 7 :-**

In view of my findings against point Nos.1 to 5, the decree passed by trial Court granting declaration of title and decree for possession is bad in law and deserves to be set aside by allowing this appeal. Suit claim deserves to be dismissed with costs. I answer point No.6 in the negative and point No.7 accordingly and proceed to pass the following order.

ORDER

1. First Appeal No.2577 of 2013 is allowed.
2. Judgment and decree passed by District Judge-2, Dhule in R.C.S. No.2/2004 is set aside.
3. R.C.S. No. 2/2004 is dismissed with costs.
4. Respondent Nos.1 and 2 shall pay costs of the appeal to the appellants and shall bear their own costs. Other respondents shall bear their respective costs of the appeal. Copy of judgment be sent to Assistant Charity Commissioner, Dhule for making correction in Public Trust Register.

34. Civil Application No. 13119 of 2013 is
disposed of.

[**SUNIL K.KOTWAL, J.**]

dbm