

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO.1546 OF 2020
IN
SUIT NO.1008 OF 2019

Sudhir Popatlal Kotak ...Applicant
In the matter between
Dharamshi Ruparel & Anr. ...Plaintiffs
Vs.
Shri Cutchi Lohana Niwas Graha Trust & ...Defendants
Org.

Mr. Aloukik R. Pai with Mr. Siddhant V. Joshi and Prajakta S. i/b. Neuty Thakkar for the Plaintiffs in S No.1008 of 2019 and for Applicant in I.A. No.1546 of 2020.

Ms. Priya Ranade with Priyanka Sonawane i/b. Mr. Ashish Suryavanshi for the Defendant No.1.

Mr. Shyam Mehta with Rohaan Cama, Kiran Jain, Ish Jain, Duj Jain & Hita C. i/b. Kiran Jain & Co. for Defendant No.2.

Uma Palsuledesai, AGP for Defendant No.3 – State.

CORAM: R.I. CHAGLA, J.

ORDER RESERVED ON 13TH DECEMBER, 2021.

ORDER PRONOUNCED ON **03 RD JANUARY, 2022.**

ORDER (*Per R.I. Chagla, J.*)

1. By this Interim Application, the Applicant / Plaintiff No.2 is seeking transposition of Plaintiff No.1 as Defendant No.4 and to further add the names of proposed Plaintiffs, details of which are set out in schedule 1 to the

Interim Application as Plaintiffs in the above suit and for carrying out consequential amendments.

2. The Applicant together with the Plaintiff No.1 had filed Application No.10 of 2018 before the Charity Commissioner, Greater Mumbai under Section 50 and 51 of the Maharashtra Public Trusts Act, 1950 (“the said Act”) seeking permission to file the above Suit in this Court on the grounds mentioned therein. The Charity Commissioner allowed the application vide order dated 13th May, 2019 granting the Applicant as well as Plaintiff No.1 permission to file the Suit against the Defendants in this Court. Pursuant to the permission granted by the Charity Commissioner vide order dated 13th May, 2019 the Applicant as well as Plaintiff No.1 filed the above Suit No.1008 of 2019 in this Court. The Plaintiffs in the Suit No.1008 of 2019 had taken out Notice of Motion No. (L) 1646 of 2019 which was moved for ad-interim relief before this Court on 16th September, 2019. This Court rejected ad-interim relief by order dated 16th September, 2019.

3. It is the case of the Applicant and the Advocates for the Plaintiffs in the above Suit that they were shocked to learn during moving of Notice of Motion (L) No.1646 of 2019 for ad interim relief that a Suit No.716 of 2011 had been filed in the City Civil Court by Plaintiff No.1 who was one of the Plaintiffs therein. The prayer in the said Suit for declaration that Defendant No.2 herein has no right, title and interest to declare himself as owner was given up in a settlement arrived at in that Suit and recorded in order dated 4th October, 2012. This was pointed out by the learned Counsel for the Defendant No.2 herein during the application for ad-interim relief that the said order dated 4th October, 2012 passed by the City Civil Court had been suppressed in these proceedings. The Applicant has stated that this was the reason attributed by this Court for rejecting the ad-interim relief. The Plaintiff No.1 had not disclosed the fact to Plaintiff No.2 or to the members of the managing committee of the Kutchi Lohana Niwas Grah Mitra Mandal ("the said Mandal") that Plaintiff No.1 herein along with his confidantes had filed Suit against the Defendant No.2 and entered into Consent Terms with the Defendant No.2 in the City Civil Court.

4. In view of this non-disclosure by the Plaintiff No.1 herein, a meeting of the members of the managing committee of the the said Mandal was held on 2nd October, 2019. The explanation given by Plaintiff No.1 herein was not found fully satisfactory. The Applicant has relied upon the minutes of the meeting and the resolution dated 2nd October, 2019 of the managing committee of the said Mandal which records all the transpirations in detail. The resolution passed by the said Mandal authorized the Applicant to file the present Interim Application for amending the Plaint by removing Plaintiff No.1 herein and for making him as Defendant in the above Suit. The authorities and powers conferred upon the Plaintiff No.1 herein vide the resolution of the managing committee dated 25th December, 2017 was accordingly withdrawn upon his removal as Plaintiff and the powers given to the Applicant was confirmed to remain unaffected and continued.

5. The Applicant has further stated that in view of the above Suit filed in representative capacity on behalf of and for the benefit of the Defendant No.1 Trust, its members and beneficiaries, the proposed Plaintiffs are covered within

the definition of persons having interest as defined under Section 2(10) (e) of the said Act. The above suit has been filed for recovery of the trust property to follow it into the hands of the assignee of the trust. The Plaintiff No.1 herein was not upon found to be diligent and continuing him with Plaintiff No.2 may harm the chances of success before this Court. It has been submitted by the Applicant that once the present Suit is filed the Plaintiffs do not need further permission of the Charity Commissioner for joining / transposing parties. However, to pre-empt any technical objection the Applicant / Plaintiff No.2 by way of abundant caution made an application before the Charity Commissioner, Greater Mumbai for seeking further directions under Sections 50 and 51 of the said Act for similar transposition. The Applicant has accordingly submitted that the present Interim Application be allowed as no harm or prejudice would be caused to the Defendants if the relief prayed for are granted.

6. The learned Counsel appearing for the Applicant has referred to the proceedings in the City Civil Court viz Suit No.716 of 2011 and has submitted that the Suit

can be distinguished from the present Suit as in that Suit in which Plaintiff No.1 herein was one of the Plaintiffs, the relief had been sought to restrain the Defendant No.2 herein from redeveloping the Suit property except by following due process of law and for declaration that Defendant No.2 herein has no right to dispossess the Plaintiffs therein from tenanted premises without following due process of law. The relief sought for by the Plaintiffs in the City Civil Court was thus personal in nature and concerned their respective tenanted premises. There was no relief sought for as in the present suit for the cancellation of the Deed of Conveyance dated 24th May, 2010 entered into between the Defendant No.1 and Defendant No.2. He has submitted that given the nature of the relief sought for in the Suit filed in the City Civil Court, a settlement was arrived at between the parties therein and by which the Suit was partly decreed by perpetually injunction Defendant No.2 herein from redeveloping the Suit property except by following due process of law. Defendant No.2 herein was further restrained from dispossessing the Plaintiffs from their respective tenanted premises without following due process of law. The

Defendant No.2 herein had unequivocally given admission that they are not going to dispossess the Plaintiffs without following due process of law and they would not redevelop the subject property without complying with the procedure under the Development Control Regulation 33(7) after obtaining the necessary permissions of the MHADA Authorities. Further they had yet to obtain the consent of 70% occupants which they will do so. He has submitted that the declaration that the Defendant No.2 has no right, title and interest to declare himself as owner had been given up on account of these admissions by Defendant No.2.

7. The learned Counsel for the Applicant has further submitted that the present Suit is filed for and on behalf of the concerned members / beneficiaries of the Kutchi Lohana Community. The Suit is filed for recovery of the trust property to follow it into the hands of the assignee of the trust. He has referred to the Application which had been made by the Plaintiff No.1 herein along with the Applicant to the Charity Commissioner under Section 50 and 51 of the said Act read with Rule 27 of the Bombay Public Trusts Rules, 1951 (“the said Rules”) for permission to file the

present Suit. He has submitted that it is clearly mentioned in the said Application that the Application was for the Applicants themselves and on behalf of the beneficiaries of the Kutchi Lohana Community and was in representative capacity on behalf and for the benefit of Defendant No.1 trust, its members and its beneficiaries. The Applicants were covered under the definition of persons having interest as defined under Section 2(10) (e) of the said Act. He has submitted that under Section 51 of the said Act, the permission of the Charity Commissioner was required by persons having interest in the public trust to file a Suit. The nature of the Suit to be filed is provided in Section 50 of the said Act and in particular in this case Section 50(ii) of the said Act applies i.e. where a decree is required for recovering possession of the property belonging to a public trust.

8. In the present case the conveyance of the subject property belonging to the Defendant No.1 trust has been challenged by the Applicant as well as Plaintiff No.1 herein who claim that such conveyance has been entered into fraudulently and by which the property of the Defendant No.1 trust had been conveyed to the Defendant No.2. This has

been brought out in the Application to the Charity Commissioner and reference has been made to the Application No.8 of 2010 which had been made by the Plaintiff No.1 herein and Mr. Chande (since deceased) which challenged the conveyance dated 24th May, 2010 as well as the sanction / order dated 17th May, 2010 under Section 36 (1) of the said Act passed by the Charity Commissioner. It is pursuant to this Application that the Charity Commissioner had by an order dated 24th April, 2017 held that the Applicants therein were required to file an application under Section 50 and 51 of the said Act for permission to file a Suit for challenging the said conveyance as well as recovery of the trust property.

9. The learned Counsel for the Applicant has sought to argue on the merits of the present Suit including placing reliance upon a decision of this Court in ***N.D. Construction, Bombay and Ors. Vs. State of Maharashtra & Ors.***¹ which has held that fraud vitiates everything and when the Charity Commissioner has come to the conclusion that he was misled, he was perfectly justified in invoking powers under Section

1 2011(6) Mh.L.J. page 762.

36(2) of the said Act and revoking the sanction for disposal of immovable property of a public trust. He has further relied upon the decision of the Supreme Court in *Baldevdas Shivlal & Anr. Vs. Filmistan Distributors (I) P. Ltd. & Ors.*² in the context of a consent decree which according to this decision, does not operate as resjudicata, because a consent decree is merely the record of a contract between the parties to, a suit, to which is superadded the seal of the court. A matter in contest in a suit may operate as resjudicata only if there is an adjudication by the Court. He has submitted that in the present case the order passed by the City Civil Court was by consent of parties and the Plaintiffs therein had agreed to give up prayer of declaration that Defendant No.2 herein has no right, title and interest to declare himself as owner. This will not be binding on the present Suit.

10. The learned Counsel for the Applicant has thus submitted that the transposition of the Plaintiff No.1 as Defendant No.4 and further adding the proposed Plaintiffs is for the benefit of all the beneficiaries of Defendant No.1 trust as well as in line with the decision taken by the said Mandal.

² 1969 (2) Supreme Court Cases 201.

The proposed Plaintiffs are required to be joined as Plaintiffs in the Suit as per Section 51 of the said Act as two or more persons having interest under Section 2(10) (e) of the said Act are required to obtain consent in writing of the Charity Commissioner as provided in Section 51 of the said Act for instituting the Suit in this Court. He has submitted that the consent of the Charity Commissioner for transposing the Plaintiff No.1 as Defendant is not required but, out of abundant caution an application has been made to the Charity Commissioner for seeking directions under Sections 50 and 51 of the said Act.

11. The learned Counsel appearing for Defendant No.1 supported by learned Senior Counsel appearing for Defendant No.2 has submitted that under Rule 27 of the said Rules, it is provided that the Application under Section 51 of the said Act is to be made to the Charity Commissioner by persons having interest for his consent to file a Suit of the nature specified in Section 50 of the said Act. The Application shall set out concisely the material facts and contain the particulars mentioned in Rule 27 which include the nature of the Applicants interest in the trust. It is further provided in

Section 51 of the said Act that for persons having interest in the public trust to file the Suit of the nature specified in Section 50 of the said Act shall apply to the Charity Commissioner in writing for his consent. It is only upon hearing the parties and making such enquiries (if any) as the Charity Commissioner thinks fit and upon being satisfied that there is a prima facie case he may within a period of six months from the date on which the application is made, grant or refuse his consent to the institution of such suit. There is an appeal provided for in Section 51(2) in the event that the Charity Commissioner refuses his consent to the institution of the suit under sub-section (1) of Section 51, and such order shall be treated as an order passed by the District Court for which an appeal lies within sixty days from the date of the said order, which shall otherwise be final. The Charity Commissioner shall be made a party to every Suit filed by the persons having interest in any trust under Section 50 of the said Act. The Suit is required to be filed by two or more persons having interest in case the Suit is under sub clauses (i) to (iii) of Section 50, in the present case Sub-clause (ii) of Section 50. That is the reason why the Applicant

as well as the Plaintiff No.1 herein were both Applicants seeking permission under Section 50 and 51 of the said Act before the Charity Commissioner for institution of the Suit.

12. It is further submitted that it is clear in the present case from the Application made to the Charity Commissioner for permission under Section 50 and 51 of the said Act read with Rule 27 of the said Rules that the Application was made by the Applicants on their own behalf apart from stating to be on behalf of concerned members / beneficiaries of the Kutchi Lohana Community. In paragraph 8(n) at page 17 of the Application to the Charity Commissioner it is recorded that the Plaintiff No.1 herein and one Mr. Chande (since deceased) had initially filed Application No.8 of 2010 before the Charity Commissioner wherein they had challenged the conveyance dated 24th May, 2010 as well as the sanction / order dated 17th May, 2010 passed under Section 36(1) of the said Act by the Charity Commissioner. The Application No.8 of 2010 was decided by the Charity Commissioner who held that the Applicants therein were required to file Application under Section 50 and 51 of the said Act for permission to file a Suit

for challenging the conveyance as well as recovery of the trust property. The Applicant had accordingly made the Application before the Charity Commissioner and pursuant to which permission had been granted by the Charity commissioner after considering the interest of the Applicants in the Defendant No.1 trust upon the relevant disclosures being made under Rule 27 of the said Rules.

13. It has been submitted that the Plaintiff No.1 herein cannot now be transposed as Defendant No.4 in view of the permission having been obtained by the Applicant as well as Plaintiff No.1 herein for institution of the Suit before this Court challenging the conveyance of the property by the Defendant No.1 trust to Defendant No.2. This Interim Application for transposition is made with the view to overcome the order of the City Civil Court dated 4th October, 2012 which had recorded that the prayer of declaration that Defendant No.2 herein has no right, title and interest to declare himself as owner of the subject property had been given up. Further this Court had rejected the ad-interim relief sought in the Notice of Motion taken out in this Suit by its order dated 16th September, 2019 upon being satisfied

with the submission of the learned Counsel for Defendant No.2 herein that the Plaintiffs herein were duty bound to disclose that the declaration sought in the City Civil Court suit that the Defendant No.2 herein had no right and interest in the property as owner had been given up.

14. It has been submitted that having alleged the purported inability of Plaintiff No.1 herein to pursue action for the benefit of the beneficiaries of the Defendant No.1 Trust cannot turn around and put forward a totally contrary case that the order dated 4th October, 2012 does not operate as resjudicata. The decision of the Supreme Court in *Baldevdas (Supra)* is not applicable to the facts and circumstances of the present case. In that case the Supreme Court has observed that a consent decree which had not decided the transaction between the parties would not operate as resjudicata. In the present case, the Suit filed by the Plaintiff No.1 herein in City Civil Court was primarily for declaration that Defendant No.2 herein had no right, title or interest in the property in question as owner of the suit property which is the very contention put up by the Plaintiff No.1 in the present Suit. It is accordingly submitted that the

order dated 4th October, 2012 can operate as res-judicata in the present matter. The other decision of this Court in *N.D. Construction, Bombay (Supra)* is on the merits of the Suit and hence has not been dealt with. It has accordingly been submitted that there is no merit in the present Interim Application.

15. The Interim Application is to be considered keeping in mind the relevant provisions of the Maharashtra Public Trusts Act, 1950 (referred to as the “said Act”) and the Bombay Public Trusts Rules, 1951 (referred to as “the said Rules”). From a reading of Sections 50 and 51 of the said Act with Rule 27 of the said Rules, it is clear that a Suit relating to public trust which is for recovery of possession of property belonging to the public trust, as in the present case, can be filed by two or more persons having interest in the Public Trust only upon obtaining consent in writing of the Charity Commissioner as provided for in Section 51 of the said Act. Thus, the persons having interest in the public trust intending to file a Suit of the nature specified in Section 50 of the said Act are to mandatorily apply to the Charity Commissioner in writing for his consent. It is only upon the

Charity Commissioner hearing the parties and making such enquiries, (if any), as he think fit, is satisfied that there is a prima facie case, he may within a period of six months from the date on which the application is made grant or refuse his consent to the institution of such Suit. The refusal by the Charity Commissioner shall be in writing and shall state the reasons for refusal is treated to be an order passed by the District Court from which appeal lies within 60 days from the date of the said order, which shall otherwise be final. In the suit to be instituted by the person having interest, the Charity Commissioner shall be a necessary party. Rule 27 of the said Rules further makes it clear that every application to the Charity Commissioner by persons having interest for his consent to file a Suit of the nature specified in Section 50 of the said Act shall set out concisely the material facts and the particulars mentioned in the said Rule which includes the nature of the Applicants interest in the trust.

16. In the present case, it is clear from the Application No.10 of 2018 made before the Charity Commissioner that the Applicants were filing the Application for permission under Section 50 and 51 of the said Act read

with Rule 27 of the said Rules for themselves apart from the application being stated to be for and on behalf of the concerned members of the Kutch Lohana Community. The subject conveyance by which the property was transferred to Defendant No.2 had in fact been challenged by the Plaintiff No.1 herein whose transposition has now been sought by the Applicant. The Plaintiff No.1 herein along with Mr. Chande (since deceased) had filed Application No.8 of 2010, wherein they had challenged the subject conveyance dated 25th May, 2010 as well as the sanction / order dated 17th May, 2010 passed under Section 36(1) of the said Act by the Charity Commissioner. The Charity Commissioner had decided the Application No.8 of 2010 by order dated 24th April, 2017 wherein it was held that the Applicants therein were required to file Application under Section 50 and 51 of the said Act for permission to file a Suit for challenging the said Conveyance as well as for recovery of the property of the Defendant No.1 trust. It is pursuant to said order that the Application had been filed by the Plaintiff No.1 herein and the Applicant herein as Mr. Chande had expired, for permission of the Charity Commissioner under Sections 50 and 51 of

said Act read with Rule 27 of the said Rules to institute the Suit in this Court.

17. It is necessary to note that the Plaintiff No.1 was one of the Plaintiffs in S.C. Suit No.716 of 2011 filed in the City Civil Court wherein the Suit had inter alia, sought a declaration that the Defendant No.2 herein had no right, interest to declare himself as owner of the subject property. This declaration had been given up upon the Defendant No.1 unequivocally giving admission that they will not dispossess the Plaintiffs therein without following due process of law and shall not redevelop the subject property without following the procedure prescribed under Development Control Regulation 33(7). It is to be noted that the Plaintiff No.1 herein had suppressed the Order dated 4th October, 2012 which partly decreed the Suit filed in the City Civil Court in these proceedings. It is due to such suppression that this Court in Notice of Motion filed in the present Suit found no case was made out for grant of ad-interim relief.

18. It appears that the Applicant by this Interim Application seeks transposition of the Plaintiff No.1 herein as

Defendant No.4 to overcome the case of suppression which had been made out by the Defendants and which had found favour of this Court in rejecting the ad-interim relief sought by the Plaintiffs by order dated 16th September, 2019. The Applicant in the present Interim Application has sought to make out a case for transposition as if it would not be in the interest of the members / beneficiaries of the Defendant No.1 Trust and / or Kutchi Lohana Community for the Plaintiff No.1 herein to continue to act as Plaintiff as he had not been diligent in pursuing the Suit and may harm the chances of success before this Court. Such a submission on behalf of the Applicant cannot circumvent the provisions of the said Act viz. Sections 50 & 51 read with Rule 27 of the said Rules. It is clear from Section 51(2) of the said Act that, the refusal of the Charity Commissioner to consent to the instituting of the Suit is treated as an order of the District Court which is appealable. The Charity Commissioner has to therefore, make a reasoned order in writing after hearing the parties and making the necessary enquiries (if any) as he thinks fit to grant or refuse his consent to institute such Suit. It is clear from the facts of the present case that the Charity

Commissioner has upon being satisfied that there is a prima facie case granted his consent to the Applicants therein which are the Plaintiff No.1 and the Applicant herein for institution of such Suit. Further, the Applicants therein had made out a case for themselves for institution of the Suit. From a reading of the relevant Sections 50 and 51 of the said Act and Rule 27 of the said Rules, it is clear that the Charity Commissioner's permission is mandatory and it cannot be circumvented by transposition of the Plaintiff No.1 as a Defendant and adding the proposed Plaintiffs, particularly when Plaintiff No.1 together with the Applicant had obtained consent of the Charity Commissioner for institution of the Suit.

19. The decision of the Supreme Court in *N.D. Construction (Supra)* is on the maintainability of the Suit particularly concerning Section 36(1) of the said Act which is the power of the Charity Commissioner to revoke the sanction granted for disposal of the immovable property of the Defendant No.1 trust. This has no bearing on the present Interim Application. Further, the decision in *Baldevdas (Supra)* is not relevant for deciding this Interim Application.

The issue as to whether the order dated 4th October, 2012 passed by the City Civil Court by which the Suit had been partly decreed and wherein it was recorded that the prayer of declaration that Defendant No.2 herein has no title and interest to declare himself as owner of the subject property had been given up operates as res judicata is not required to be decided at this stage. The present Interim Application for transposition of Plaintiff No.1 as Defendant No.4 and for adding the proposed Plaintiffs is the only issue being decided at this stage.

20. I am of the considered view that the transposition of Plaintiff No.1 as Defendant No.4 and adding of proposed Plaintiffs cannot be allowed as this would be in circumvention of Sections 50 and 51 of the said Act read with Rule 27 of the said Rules. Hence the following order:-

- (a) The Interim Application is rejected.
- (b) There shall be no order as to costs.

(R. I. CHAGLA J.)