

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO.257/2008

Patil Patwari Sarai Sansthan,
Morshi, Registration No.E-59/Amravati
by it's Secretary, Gautamrao alias
Gokulrao s/o. Sheshrao Deshmukh,
aged about 78 years,
r/o. Morshi, Dist. Amravati.

...APPELLANT

VERSUS

Hemandas alias Mannaseth s/o. Kimatmal
Harwni, aged about 67 years,
r/o. Near Z.P. Girls School,
Gujari Bazar Road, Morshi,
Tq. Morshi, Dist. Amravati.

...RESPONDENT

Shri Tejas Dadhe, Advocate h/f Shri N.K. Dadhe, Advocate for
Appellant,
None for Respondent no.2.

CORAM ; SMT. M.S. JAWALKAR,

DATE OF RESERVING THE JUDGMENT : **12/07/2022**
DATE OF PRONOUNCING THE JUDGMENT : **18/07/2022**

ORAL JUDGMENT

Heard learned Counsel for both the parties.

2. Being aggrieved by the Judgment and Decree passed by the Principal District Judge, Amravati, in Regular Civil Appeal No.57/2004, on 12/03/2008, setting aside the Judgment and Decree dated 01/01/2004 passed by the Court of Joint Civil judge, Junior Division, Morshi, in Regular Civil Suit No.31/2002, decreeing the appellant's/plaintiff's suit for declaration of title and perpetual injunction.

3. The case of plaintiff in nutshell is as under :

The plaintiff is a registered Public Trust bearing registration No. E-59/Amravati and the Trust property situated at Morshi near Jaistambha Chowk, Morshi at Ward No.18 (old) bounded by Amravati Warud Road on East, West-Forest bungalow of the Madhya Pradesh State, North-Morshi- Paratwada road and to the South- Social club's landed property which is a Public Trust and has been in possession of the Trust. Some part of the landed property i.e. open plots have been leased out to various persons on monthly rent by the Trust.

4. It is submitted by the plaintiff that it is a Public Trust and the Secretary is functioning all the works of plaintiff/appellant

Trust and also managing the trust property on behalf of Trust. These plots are rented to several persons by plaintiff-Trust. The defendant having no concerned with the suit plot. The respondent/defendant was neither lessee nor licensee of the plaintiff/appellant Trust. On 22/05/2002, he started to dig pits with the help of labourers with ulterior motive to make construction on the open plot owned by the plaintiff-Trust. The plaintiff/appellant reported the matter to the Police Station, Morshi and Municipal Council Morshi on 22/05/2002 and 23/05/2002 respectively. Thereafter, plaintiff also issued notice dated 06/06/2002 by registered post to the defendant. By this notice, he was informed not to make any kind of illegal construction on the plot owned by the plaintiff. The defendant with an intention to grab the property gave a false reply on 10/06/2002 which gave a cause of action to the plaintiff and he filed a suit for declaration and permanent injunction against the defendant. The Plaintiff – trust had prayed to trial Court to declare that defendant has as no right, title or interest in the suit land and not to disturb the peaceful possession of the plaintiff's land.

5. The Learned Counsel for the appellant relied upon the citation in the case of 1) **Shyamabai wd/o Surajkaran Joshi and ors**

Vs Madan Mohan Mandir Santha, reported in **2010(2) Mh.L.J. 476** in this case it was held by the Court that the provisions of the Indian Trust Act are applicable only to the Private Trusts and not to the Public Trusts. And 2) **Smt. Kusumbai wd/o Vasant Akarte and ors. Vs Patil Patwari Saraya Sansthan in L.PA no. 428/2009**, it was held by the Court that the suit filed by the Public Trust filed by the trustee (Secretary) will have to be held as maintainable against the tenant.

6. The defendant appeared and filed his written statement before the learned Trial Court and disputed the description of suit plot. The defendant further admitted that the suit plot is out of the land of the plaintiff and contended that it was already in possession of the defendant, therefore suit for injunction is not tenable. The said suit was decreed and it was declared by the learned Trial Court as the defendant has no right, title or interest in the suit plot as against the plaintiff. The defendant/respondent filed appeal before the learned District Judge, Amravati vide R.C.A. No.57/2004. The said appeal was allowed by the learned District Court and set aside the order passed by the learned Trial Court and suit was dismissed.

7. The Second Appeal was filed before this Court against the judgment and decree dated 12/03/2008 passed by the learned District Court. The substantial question of law framed by this Court on 14/01/2009 is ***“Whether the present respondent has proved his possession over the suit Property?”***. On perusal of record, it appears that the learned Trial Court found that the assessment document relied upon by the respondent show such position related to some other property and learned Lower Appellate Court does not appear to have considered the said findings.

8. On the perusal of record it can be seen that, in support of his submission, the plaintiff has examined one Gautam Sheshrao Deshmukh who is the Secretary of Trust. He deposed that the disputed plot belongs to plaintiff-Trust and the defendant started illegal construction over it, and therefore report was given to the Police Station, Morshi and Nagar Parishad, Morshi. He had also issued notice to defendant to stop construction. The receipt of notice is not disputed. As per deposition of defendant Hemandas-D.W.-1, he purchased structure on 06/01/1999 from Prabhu Maharaj. A sale receipt was executed which is placed on record at Exhibit-48. The said purchase receipt dated 06/01/1999 was

compulsorily registerable document as per Section 17(1)(b) of the Registration Act. Admitted by the said purchase receipt is not registered. Therefore, in view of Section 49(c) of the Registration Act this document cannot be read in evidence. From the said sale receipt it becomes clear that it neither creates any title in the defendant nor give him any right in the suit property. Simply making the payment of Rs.75,000/- does not ipso facto create transfer of property. As per admitted position, the plaintiff is owner and defendant purchased the suit structure from the tenant. It is the settled law that tenant can not transfer the trust property to the third person and therefore tenant had no right or title to pass it to the defendant. Tenant was not having better title to pass it over to third person.

9. Another stand was taken by the defendant that he did not purchase plot but he purchased the structure standing over the plot. For that purpose he examined one Prabhunarayan Ramniwas Sharma as D.W.-2, who deposed that about 5 years back he sold his structure to defendant and he admitted during his cross-examination that he has no right to sell the land of plaintiff. As per Section 54 of the Transfer of Property Act, no person can transfer

the property of which he is not the owner. The above mentioned receipt neither proves the title of the defendant nor his tangible possession over the disputed plot.

10. The defendant in support of his contention placed on record assessment list of the year 2001-2002 to 2004 -2005 showing that the House No.167/1 constructed of the bricks and having roof tiles is in possession of the defendant. It is construction in or about the year 1957, but filed nothing on record which shows that this assessment list pertained to disputed open plot. On the other hand, it appears from Exh.-50 placed on record by the defendant himself that Municipal Counsel demanded lay out plan, ownership document etc. this shows that assessment list at Exh. 49 does not pertain to the suit plot. Exh. 50 shows house No.153/2 and not house No.167/1. In addition to this, the defendant in his cross-examination has admitted that his possession is not entered in the record of Municipal Counsel. From the above discussion it sufficiently demonstrate that the plaintiff -trust is the owner of the disputed plot.

11. The learned Trial Court has rightly appreciated at para 11,12 & 13 of the judgment dated 12/03/2008 and observed that Exhibit 48 does not show that the suit plot is in possession of the defendant. The D.W.-2 Prabhunarayan Sharma has admitted in his cross-examination that there is wire fencing towards northern side of land possessed by him and same is in possession of plaintiff. He also had admitted that he had sold the structure and not the land to the defendant.

12. Further in cross-examination of D.W.-1 Hemandas Harwanit admitted that he has not produced any documentary evidence on the record to show his possession over the said plot during the year 1999 to 2001. Thus the present respondent has not proved his possession over the suit plot. Further it is rightly observed by learned Trial Court that there is nothing on record to show that the assessment list pertained to disputed plot. In view of the above said observation I am of the view that, learned Trial Court has rightly held that the plaintiff is owner of suit plot and plaintiff-Trust is in possession of the same.

13. The learned Appellate Court had framed an issue that the suit is bad for non-joinder of all the trustees of the plaintiff-Trust and has wrongly held that there is no power of attorney given by all the trustees in favour of its Secretary, hence suit filed by Secretary of the Trust is not maintainable. The similar question arose before this bench in **Smt. Kusumbai Akarte** (*supra*), relying on the Judgment in **Shyamabai** (*supra*), it was held by the Court that the suit filed by the public Trust filed by the trustee (Secretary) will have to be held as maintainable against the tenant. The said defense that the suit is bad for non-joinder of all trustees to the suit is bad for non-joinder of all trustees was not raised by the respondent in the written statement.

14. The learned Trial Court rightly appreciated the receipt of sale Exh. 48. In fact, this receipt does not reflect any house number or इमला number. The four boundaries mentioned in the said sale receipt are not matching with the suit plot. Moreover, this document is given exhibit only as a receipt of payment of Rs.75,000/-. However, from this document, it is not clear of which structure this receipt was executed. If the structure is a house which is attached to the land naturally, it would have to be

registered as per Section 17, sub Clause(1) B of Registration Act. Thus no interest transferred in respect of suit property in defendant. As against this, plaintiff – Trust duly established that property belongs to the Trust and was in possession of the Trust. Thus, defendant is having no document to show how he is in possession of the suit property. In written statement defendant admitted that he collected building material on the disputed plot and not only started digging pits but also erected pillars on the said plot. Thus without having any document in his favour even showing any possession over the suit property, he started construction over the land of Trust clearly goes to show that the act of the defendant amounts to the obstruction and interference to the plaintiff in his possession and enjoyment of suit plot. The learned Appellate Court lost its sight in considering all these aspects and relying on some rent control proceeding come to the conclusion that Prabhu Pandya was in possession of the suit plot and he sold the structure to the defendant. However, there is nothing on record which structure he sold to the defendant. In fact, in the said विक्री पावती one of the boundary is the house of Prabhunarayan Pandya. If house of Prabhunarayan Pandya is one of the boundary then there is no question of any sale of his structure only on the basis of

presumption such inferences cannot be drawn. As such appeal needs to be allowed and order passed by learned Trial Court needs to be confirmed.

ORDER

- i) The Appeal is allowed.
- ii) The Judgment and order dated 12/03/2008 in Regular Civil Appeal No.57/2004 is hereby quashed and set aside.
- iii) The Judgment and Decree dated 01/01/2004 passed by the Court of Joint Civil judge, Junior Division, Morshi, in Regular Civil Suit No.31/2002 is confirmed.

The appeal is disposed of accordingly.

(SMT. M.S. JAWALKAR, J.)

R.S. Sahare