IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO.312/2007

Kashiram Sonaji Dahatre Patil
(Since deceased), thr. LRs.

1a. Smt. Gokarnabai wd/o Kashiram Patil,
aged 65 years.

1b. Shri Santoshi s/o Kashiram Patil,
aged 39 years.

1c. Shri Sunil s/o Kashiram Patil,
aged 37 years.

1d. Shri Gajanan s/o Kashiram Patil,
aged 30 years.

1e. Smt. Shantabai w/o Haribhau Raut,
aged 46 years,
Appellant nos. 1 to 5 all agriculturists,
r/o Washim, Tq. Dist. Washim.

1f. Smt. Kantabai w/o Devidas Bhoyar,
aged 35 years, Agriculturist,
r/o Kanadi, Post Kalamba Mahalli,
Tq. Dist. Washim.

1g. Smt. Latabai w/o Prakash Bhoyar,
aged 35 years, Agriculturist,
r/o Chakur, Tq. Ahmadpur, Dist. Latur.

1h. Smt. Geetabai w/o Ashok Mate,
aged 32 years, Agriculturist,
r/o Tapowan, Tq. Shegaon,
Dist. Hingli.

1i. Sangita w/o Sitaram Bhoyar,
aged 27 years, daughter,
agriculturist, r/o CID, Co. Durangabad,
Dist. Aurangabad. .....**APPELLANTS**

...V E R S U S...

1. Samaj Seva Mandal Mangrul Nath, Registered Trust vide registration No. F-323-Akola, by its trustees:

1. Shri Shivraj Bhausaheb Dhanorkar, President, At Post Dhanora (Khurd), Tah. Mangrulpir, Dist. Washim.

2. Shamrao Vithobaji Vyawhare, Vice President, r/o Falegaon, Tah. Mangrulpir, Dist. Washim.

3. Shri Dilip Bhausaheb Dhanorkar, Secretary, r/o At Post Dhanora (Khurd), Tah. Mangrulpir, Dist. Washim.

4. Waman Sopan Mahale, Member, r/o Kamalba (Mahali), Tah. and Dist. Washim.

5. Nirmala Bhausaheb Dhanorkar, Treasurer, r/o At Post Dhanora (Khurd), Tah. Mangrulpir, Dist. Washim.

6. Chhaya Devendra Watane, Member, r/o At Post Dhanora (Khurd), Tah. Mangrulpir, Dist. Washim.

7. Vaishali Shivraj Dhanorkar, Member, r/o At Post Dhanora (Khurd), Tah. Mangrulpir, Dist. Washim. ...**RESPONDENTS**

Mr. A. M. Ghare, Advocate for appellants.
Mr. R. B. Bhuibhar, Advocate for respondent nos. 1 to 7.

CORAM:- ANIL L. PANSARE, J.
Date of Reserving the Judgment: 13.02.2024
Date of Pronouncing the Judgment:29.02.2024

ORAL JUDGMENT

Heard. The appeal has been admitted on the following substantial questions of law.

"1. Whether the suit could have been dismissed in view of provisions contained in Section 4 of Benami Transaction Act, 1988?

2. Whether the Courts below were therefore right in dismissing the suit?

3. Whether the first appellate Court committed an error in not formulating proper points for determination?

4. Whether the suit could have been dismissed since the property is not recorded in the register of the Public Trust as belonging to the Public Trust?

Vide order dated 23.01.2024, additional substantial question of law was formulated, which reads thus:

"5. Whether the Civil Court was barred from deciding the issue of ownership of property in terms of Section 79 read with Section 80 of the Maharashtra Public Trusts Act, 1950?"

2. The facts necessary to decide the second appeal are as follows.

The appellant-original plaintiff filed a suit bearing Regular Civil Suit No.234/2001 for declaration, possession, mesne profit and damages against the respondents-original defendants. On 23.07.2002, Civil Judge Senior Division, Washim was pleased to dismiss the suit. The appellant has unsuccessfully challenged the judgment and decree in Regular Civil Appeal No.207/2002, which came to be dismissed vide judgment and decree dated 26.08.2002.

3. The appellant's case is that he owned property bearing Gat No.307 survey No.176/4 admeasuring 0.81 HR along with structure standing thereon. The appellant claims to be the owner of the said premises. He purchased the suit property on 14.06.1983. The appellant has purchased 0.81 HR out of 2.56 HR land bearing Gat No. 307. Respondents are the trustees of the public trust namely; Samaj Seva Mandal, Mangrulnath. The trust runs a school namely, 'Sant Dnyaneshwar Tantra Shikshan Vidyalaya' at village Kalamba Mahali. Respondents approached the appellant and expressed their desire to take the premises on license for running the school. The respondents assured that they will surrender the premises within five years. Accordingly, the appellant permitted to run the school from March, 1984 under an oral agreement of license. Respondents did not vacate the premises after five years and, therefore, the appellant issued notice dated 07.07.1994 and revoked the agreement of license and requested the respondent no.1 to vacate the suit property with effect from 16.08.1994. The respondents did not reply and hence the suit was filed.

4. The respondents resisted the claim by filing written statement. According to them, the appellant was nominated by the respondent – trust as a Chairman of the school committee. The

respondents, in May, 1983 passed a resolution and appointed appellant as Chairman of the school committee. He is said to be relative of respondent no.1 Head Master. He was authorized to purchase the land out of the funds of trust for running the school. The suit property was accordingly purchased by the appellant but in his own name, knowing fully well that the property belongs to the trust. Thus, plea of benami transaction was put forth by the respondents. The trial court found substance in the said plea and, therefore, dismissed the suit. The appellate court concurred with the finding of the trial court but without formulating the points for determination.

5. Having heard both sides and having gone through the record, the moot question, that arises for consideration, is whether the transaction under question is hit by Section 4 of the Prohibition of Benami Property Transactions Act, 1988 (hereinafter referred to as the, "Act"), which reads thus:

> *"4. Prohibition of the right to recover property held benami.—*
> *(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.*
> *(2) No defence based on any right in respect of any property held benami, whether against the person in*

whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,-

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

As could be seen, no suit, claim or action to enforce any right in respect of the property held benami against the person in whose name the property is held shall lie by or on behalf of a person claimed to be the real owner of such property.

6. In the present case, the respondents claim themselves to be the real owners. There is no dispute that the suit property is in the name of the appellant. Therefore, no suit could lie against the real owner. However, the respondents have not lodged the suit but have raised a defence which is also not permissible in terms of Section 4 (2) of the Act. The defence, however, is to be considered in the light of clause (b) of Section 4(3), which provides that where a person, in whose name the property is held, is trustee or person standing in the fiduciary capacity and the

property is held for the benefit of any other person for whom he is a trustee or towards whom he stands in such capacity, this provision shall not apply to him.

7. The respondents are taking aid of this part of Section 4 of the Act to contend that the appellant has purchased the property in the capacity of Chairman of the School Committee and has entered into the transaction in a fiduciary capacity. As such sub section (3) has been omitted vide Section 7 of the Benami Transactions (Prohibition) Amendment Act, 2016, however, the transaction and the judgment having been delivered prior to 2016, the same is considered and tested in the light of provisions existing at the relevant time.

8. In support, the document which is available with the respondents, is a resolution passed by the respondents in the meeting held in the year 1982-83. The respondents resolved in the meeting for a proposal of opening new school at village Kalamba Mahale and to send the same in prescribed format to the appropriate authority including the Government of Maharashtra and appointed appellant as Chairman of School Committee and was authorized to purchase the property from the funds of the trust or donations from the trustees. This resolution has been

noted in the school register. The appellant is not party to the resolution.

9. The counsel for the respondents submits that the resolution was passed only because the appellant had earlier given consent. Thus, the resolution is a unilateral document executed by the respondents. The said document will be of no relevance to jump to the conclusion that the appellant has purchased the property for and on behalf of the respondents – trust, for the following reasons.

(a) The sale deed is exclusively in the name of the appellant.

(b) Copy of resolution is not annexed with the sale deed.

(c) There is absolutely no evidence that money was parted from the account of the trust or the trustees to the vendor of the suit property.

(d) The respondents have not lodged change report of the alleged acquired property in terms of Section 22 of the Maharashtra Public Trusts Act, 1950. In fact, the respondents have never claimed ownership over the suit property until the suit is filed. The claim is raised for the first time as a defence.

10. Despite the above facts, the trial court has shifted the burden of proof of ownership upon the appellant, may be because he sought formal declaration of ownership over the suit property. More importantly, the trial court, by ignoring the above vital facts,

has held that the appellant is not owner of the suit property. The trial court has undertaken the exercise of handwriting expert by stating that he has put in 22 years of service and has an occasion to examine handwriting experts in the court of law in the issue of disputed handwriting and signatures and that he has undergone training at the Judicial Academy where handwriting experts were invited and has thus gained sufficient knowledge to examine and compare the disputed signatures with the admitted signatures and to form its opinion on the subject, to arrive at a conclusion. The trial court has undertaken this exercise on the ground that the appellant has disputed his signature on the minutes book Exh.-73, in which the minutes of proceedings of the respondent-trust have been recorded for the period from 02.06.1983 to 31.12.1991. The trial court has compared the signatures of the appellant on vakalatnama and the applications filed in the court with that of signatures on minute book and held that said signatures were of the appellant.

11. The counsel for the appellant has rightly argued that the trial court ought not to have gone into this aspect in absence of any evidence of respondents parting with money for purchasing the suit property. There is absolutely no evidence that respondents have paid any sum to the vendor of the suit property. He has

further rightly argued that even if the finding of the trial court that the appellant has put his signature on the resolution passed by the respondents – trust, is accepted, that by itself will not lead to an inference that the suit property has been purchased by the appellant for and on behalf of the respondents – trust.

12. The trial court has relied upon the audit report of the trust for the period from 1982 till 1989. The audit report is prepared by the chartered accountant of the trust. He has shown entry for the year 1984, which shows that Rs.10,000/- was spent to purchase the suit property (Exh.-106). The audit report further indicates that in the year 1987-88, the trust has spent Rs.25,000/- approximately to construct the building. The trial court has noted that the second witness of the respondents, Anand Mahale is the attesting witness to the sale deed Exh.-57. He has deposed that the property was purchased by the appellant for and on behalf of the trust.

13. This evidence is hit by Section 92 of the Indian Evidence Act, 1872. However, the trial court has relied upon this evidence. The trial court ought to be mindful of rigor of section 49 of the Registration Act, 1908, which carries presumption of the genuineness of a document registered before the Sub Registrar.

The genuineness is as regards the contents of the document. The Sub Registrar is duty-bound to inquire with the parties to the document as regards its contents and upon satisfying himself the Sub Registrar would permit registration of the document. As stated earlier, the document nowhere indicate that either trust or trustees have paid any sum to the vendor as a consideration for purchasing the suit property nor is there any cogent evidence to show that the respondents have paid Rs.10,000/- or any such amount to the appellant to purchase the property. Mere entry in the audit report prepared by the chartered accountant of the trust cannot be treated as proof of such a payment. The respondents could have well placed on record the statement of bank accounts in support, which they have not.

14. The trial court thus committed serious error in jumping to the conclusion that the transaction under question is a benami transaction. The trial court has lost sight of the fact that the sale deed is in the name of plaintiff – appellant. There is no evidence of respondents – trust making payment of consideration for purchasing the suit property and most importantly the respondents trust has never claimed ownership over suit property. As stated earlier, it is only by way of defence the respondents – trust has raised the claim for the first time. Had the defence any truth,

firstly the respondents would have filed change report in terms of section 22 of the Maharashtra Public Trusts Act, 1950 and secondly the respondents would have raised the claim of benami transaction immediately upon service of the notice in the year 1994 to vacate the suit premises. Having not done so, the documents furnished by the respondents, which were prepared by them and were in their exclusive custody, will not carry any weightage to dislodge the registered document as regards its true intention.

15. In fact, the first appellate court has rightly found fault in the exercise undertaken by the trial court to compare the signatures. The first appellate court however got swayed away with the fact that the agreement of license was not a written document and has placed reliance upon the resolution passed by the respondents – trust. Thus, both the courts below have placed reliance on the resolutions which are recorded in the ordinary register kept with the respondents. The courts below have thus committed serious error by giving more weightage to the resolutions than to the registered document.

16. The learned counsel for the respondents then argued that the Civil Court had no jurisdiction to try and entertain the suit

in terms of sections 79 and 80 of the Maharashtra Public Trusts Act, 1950.

17. Section 79 provides that the question whether a particular property is a property of trust shall be decided by Deputy or Assistant Charity Commissioner and Section 80 provides that the Civil Court shall not have jurisdiction to decide or deal with any question which is by or under this Act to be decided or dealt with by any officer or the authority under the Act.

18. To my mind, the question of ouster under Section 80 will have to be decided by considering the facts of the case. Firstly, the respondents – trust is not claiming the suit property to be trust property. The plea has been raised by way of defence. The respondents have not assigned any cause muchless sufficient cause for not filing change report in terms of section 22 of the Maharashtra Public Trusts Act, 1950. The document under question i.e. sale deed of the suit property does not indicate any role of the respondents – trust in purchasing property. In the circumstance, when the appellant's claim is based on the registered sale deed, there appears no reason why should he approach the Charity authorities to seek any relief including relief of vacating the suit premises. The dispute of nature of possession and

vacating suit premises cannot be entertained by the Assistant or Deputy Charity Commissioner. In that sense, bar under sections 79 and 80 will not be attracted.

19. The sum and substance of above discussion is that the courts below have committed error in dismissing the suit. Accordingly, the first two substantial questions of law are answered in the negative. The third question of law will not arise as it is well settled that the first appellate court has to formulate the points for determination, in terms of Order XLI Rule 31 of the Code, which the first appellate court has not. The fourth question of law cannot be said to be question of law inasmuch as merely because the property is not registered in schedule of the trust the same cannot be a ground to dismiss the suit. So far as the fifth question of law is concerned, as discussed supra, the bar will not be attracted and thus the question will have to be answered in the negative.

20. The plaintiff has sought various reliefs including declaration of ownership, decree of possession, damages, interest at the rate of 2% per month on decreetal amount, inquiry under Order XX Rule 12 of the Code, etc. Learned counsel for the appellant has, however, not pointed out the evidence on the point

of entitlement of damages and, therefore, the said relief cannot be granted. Therefore, there arises no question of granting interest on the damages.

21. In the result, the appeal is partly allowed.

Judgment and decree dated 23.07.2002 passed by Civil Judge Senior Division, Washim in Regular Civil Suit No.234/2001 so also judgment and order dated 18.12.2006 passed by Ad hoc Additional District Judge, Washim are set aside.

Regular Civil Suit No.234/2001 is decreed in terms of prayer clauses (A), (B) and (G), which read thus:

(A) The plff be declared as a owner of the property explained in para 1 above as against the defendants.
(B) A decree of possession may be passed in favour of the plff and against the defendants and the plff be put in possession of the suit site i.e. field, building, tin-sheets spread over it and along with other materials, door windows, electric connection.
(G) Enquiry under Order XX 20 Rule 12 of C.P. Code may kindly be ordered."

Decree be drawn up accordingly. No order as to costs.

(Anil L. Pansare, J.)

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At this stage, Mr. Bhuibhar, learned counsel for the respondents, makes a request to stay the effect and operation of the judgment for 12 weeks on the ground that the respondent no.1 – trust is in possession of the property.

Since, the concurrent finding of the courts below has been upset, let the judgment be stayed for 12 weeks from today.

(Anil L. Pansare, J.)

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