
Saikh Husenbi Jansaheb and Others Vs Sayyad Latif Sayyad Imam

Writ Petition No. 24 of 1982

Court: Bombay High Court

Date of Decision: July 30, 1982

Acts Referred:

Bombay Public Trusts Act, 1950 " Section 56B, 56B(2)

Citation: (1982) 1 BomCR 844

Hon'ble Judges: V.S. Kotwal, J

Bench: Single Bench

Advocate: R.M. Agarwal, for the Appellant; V.V. Divekar and D.P. Hegde, A.G.P., for the Respondent

Judgement

V.S. Kotwal, J.

Regular Civil Suit No. 830 of 1975 was filed by the present two respondents in the Court of the Civil Judge, (Senior

Division), Ahmednagar against the petitioners herein for ejectment of a certain piece of land located in Survey No. 64, in cantonment area within

the city limits of Ahmednagar. The said suit also pertains to recovery of rental arrears commencing from October 1, 1972.

2. The suit obviously proceeded for sometime though on account of certain developments the further progress came to be arrested. The petitioners

who are the defendants contested the suit on all counts, the foremost of which was that they questioned the title of the respondents-plaintiffs to the

suit property and further made a specific contention that the said property belongs to a public trust which is known and styled as Shri Bava Bengali

Dargah of Ahmednagar and, therefore, the respondents-plaintiffs had no authority or right to file the said suit. Relevant documents in support of,

their plea about the suit property belonging to the trust were also tendered before the Court. The other contentions pertained to the contest on the

other part of the pleadings including the denial of rental arrears and the necessity for eviction with which we are, however, not much concerned in

these proceedings.

3. We may, therefore, skip over on all other features and can directly go to the development that occurred in the year 1980. By Ex. 41 dated

January 9, 1980 the petitioners herein in consonance with the written statement applied to the trial Court that the Charity Commissioner was a

necessary party as per the provisions contained in section 56-B of the Bombay Public Trusts Act, and in the absence of such necessary party the

liable suit to be dismissed. A notice came to be issued to the plaintiffs in response to which the plaintiffs put in their say at Ex. 42 on January

22, 1980 refuting these contentions and maintaining that the Charity Commissioner was not a necessary party at all. However, a notice came to be

issued to the Charity Commissioner in response to which the Charity Commissioner filed the say which is styled as written statement on September

10, 1980 which is at Ex. 64 under which he denied the allegations of the plaintiffs specifically about the plaintiffs' title. It is on January 13, 1981

that a formal order came to be recorded by the learned Judge by which he directed to implead the Charity Commissioner as a co-defendant and

the plaintiff was directed to amend the plaint accordingly.

4. It is against that order that the respondents-plaintiffs preferred a revision application in the District Court at Ahmednagar, being Civil Revision

Application No. 1 of 1981 wherein it was contended that the order passed by the Court below was unjustified and it was also submitted that the

provisions of section 56-B were misconstrued.

5. A contention was raised in the said Court on behalf of the petitioners herein about the lack of jurisdiction and according to the petitioners the

revision was not maintainable. On merits the petitioners tried to substantiate and support the order of the lower Court.

6. The learned Extra Assistant Judge, Ahmednagar, held that the revision was competent and, therefore, he entertained the same on merits.

However, the District Court disagreed with the finding of the trial Court on merits and held that the Charity Commissioner was not a necessary

party and accordingly the trial Court's order below Ex. 64 was set aside. This order dated October 23, 1981 is being placed under challenge in

this petition on behalf of the original defendants under Article 227 of the Constitution of India.

7. Shri R.M. Agarwal, the learned Counsel for the petitioners has mainly contended that there are voluminous documents and an array of

circumstances in support of this plea that the suit property is a trust property and not of the private ownership of the plaintiffs, and, therefore, the

impleading of the Charity Commissioner as a necessary party cannot find any escape. It was also submitted that significantly no revision was

directed against the previous order whereas it was restricted only to an order below Ex. 64, that was passed. According to him though there is no

direct application made by the Charity Commissioner to be impleaded as a party, it can be safely interfered through his conduct when a say was

filed in response to the notice and by necessary implication the say would tantamount to filing written denying contentions of the plaintiff about the

property being of his owner ship. Reference was also made to the previous litigation and unsuccessful attempts made by the plaintiffs to get a

declaration set aside about the property being trust property.

8. Shri Divekar, the learned Counsel for the respondents countered the submissions and mainly contended that the suit as it has been framed is in a

simple shape of a rent suit asking for possession and rental arrears and, therefore, the Charity Commissioner does not come in the picture at all. He

also stated that the provisions of section 56-B have been obviously, misconstrued by the trial Court. According to him another suit is still pending

wherein the respondents had clearly agitated the validity of the Charity Commissioner"s order in the earlier proceedings. A serious grievance is

made by the learned Counsel that in the previous suit a Court of competent jurisdiction had held that only the small portion out of Survey No. 64

and to be precise hardly 276 sq. ft. is the trust property whereas the bulk of the property is of the private ownership of his clients. According to the

learned Counsel in the face of this decision of a Civil Court it is not open for the petitioners to contend in the instant suit otherwise.

9. Shri D.P. Hegde, the learned Additional Government Pleader for the State has, however, submitted that having regard to the nature of the

controversy, impleading of the Charity Commissioner has become absolutely necessary.

10. Since the matter can be disposed of conveniently and effectively on merits, a debatable question as to whether a revision is competent in the

District Court against an interlocutory order in the rent suit need not detain us and requires no determination in these proceedings and this is

accepted by all the parties.

11. On going through the relevant material and the rival contentions canvassed, the petitioners must succeed since there is an error apparent on the

face of the record and even otherwise the impleading of the Charity Commissioner as a necessary party is absolutely essential for the effective

adjudication of the issues involved in the suit and also in the interest of justice. The learned Additional Government Pleader appearing on behalf of

the Charity Commissioner, who is equally vitally interested also supports this plea. There are several interesting features to strength this conclusion

though reference to only a few is quite enough to dispose of this proceeding.

12. As stated earlier, the petitioners had taken a specific plea in the written statement about the plaintiff"s title and further made it specific that, the

suit property is a trust property. Even thereafter no attempt was made by the plaintiffs to move in the matter by amending the plaint. Therefore, on

January 9, 1980, the petitioners filed Ex. 41 making it clear that the non-joinder of Charity Commissioner should entail into the dismissal of the suit.

The plaintiffs gave their say at Ex. 42 on 28-1-1980 denying this claim. Now it after the receipt of the say of the plaintiffs that an order was

recorded by the learned Judge on 29th January, 1980 to the effect that notice of pendency of the proceedings be issued to the Charity

Commissioner at the Costs of the defendants along with the copy of the plaint. In the said order the reference to the provisions of section 56-B of

the Trust Act finds place. It is on the basis of the pleadings and the said provisions that the learned Judge felt that the issuance of the notice to the

Charity Commissioner was absolutely essential. A point can be disposed of at this juncture itself. Shri R.M. Agarwal, the learned Counsel

submitted that the plaintiffs ought to have filed a revisional application if they so desired against the order dated 29th January, 1980 under which

notice was directed, to be issued to Charity Commissioner. I find no substance in this contention since the order entails only to the issuance of the

notice and nothing further, though the necessity for such an issuance is supplemented by certain reasons in the said order. Non-filing of any

revision, in my opinion, is of no consequence and, therefore, Shri Divekar, the learned Counsel in that behalf appears to be justified.

13. In response to this notice, the Charity Commissioner filed the say on September 10, 1980. Shri Agarwal, the learned Counsel submitted that

this say is styled as a written statement. However, a mere wrong losels attached to that document does not change its character and since it cannot

be said in the strict sense a written statement. However, by that time the Charity Commissioner was not clearly impleaded as co-defendant and,

therefore, in reality it remained as the say to the notice. Thus this may not be relevant. However, it does appear that the Charity Commissioner put

in a detailed reply with reference to all the paragraphs in the plaint. This was obviously because the copy of the plaint was forwarded to him along

with the notice. It is clearly mentioned in the said reply that the plaintiff's suit was not maintainable as it stood. Here most significant feature is that

the Charity Commissioner has specifically raised the contention that the plaintiffs therein are not the owners of the property and the suit was not

maintainable as the other remedy under the Trust Act was not followed.

14. Two things clearly emerge out of this say. The first is that the Charity Commissioner did contest the plaintiff's suit contending that it was not

maintainable. However, the second point is more important wherein the Charity Commissioner clearly denied the title of the plaintiffs and not only

that but unmistakably indicated that it was the trust property and the suit was not maintainable on the Court alone. It was ultimately pressed that the

suit be dismissed. It is very interesting to note that what is asked for in the said say is that the suit was not maintainable against the Charity

Commissioner and be dismissed against him with costs. This was an addition to the other contentions that the suit itself is not maintainable being

pertaining to the trust property.

15. It appears that the revisional Court was impressed by this submission that there is no formal application as such from the Charity Commissioner

as required by sub-clause (2) of section 56-B of the Act and asking for impleading him as a party. It is true that the scheme of the said provision

does indicate that the Court in certain cases is obliged to issue a notice when a contention is raised, and this is what has been actually done in the

instant case. It is also indicated in the said provision itself that even without a formal notice having been issued to the Charity Commissioner the

latter can move in the matter if it comes to his knowledge otherwise. However, further requirement is to the effect that after getting knowledge of

any such contention or litigation it is for the Charity Commissioner to apply in that behalf for being added as a party. Thus it may be that in the strict

sense there was no formal application by the Charity Commissioner. However, the tenor of the say given by him at Ex. 64 can justifiably be

construed as tantamount to an application for being added as a party which is more so inasmuch as the Charity Commissioner has practically

submitted in his written statement through the said say ventilating all the contentions and specifically contending that the suit was not maintainable as

it pertains to, the trust property and the remedy available under the Trust Act was not availed of and as stated earlier the relief claimed therein is

that the suit against him be dismissed meaning thereby that he proceeded on the footing that he as almost impleaded as a co-defendant. There is

thus enough substance in the contention raised by Shri Agarwal, the learned Counsel that by implication this can be equated as an application and

so the compliance of the requirement of the second part of section 56-B, sub-clause (2) can be presumed.

16. However, even otherwise on merits impleading of the Charity Commissioner is absolutely essential even assuming that by the said written

statement he was not formally by then impleaded. It is in that context worth referring to some of the interesting features which can obviously be

beyond controversy. Foremost, as stated earlier is the say of the Charity Commissioner himself specifically contending that it was a trust property.

The second is that the learned Judge himself felt the necessity to issue a notice to the Charity Commissioner u/s 56-B of the Act. Now it is with

interest to note that before this say was filed by the Charity Commissioner, a report was submitted to him by the Assistant Charity Commissioner

on July 9, 1980. It is specifically mentioned therein that the property in question which is the subject matter of the suit in question is established to

be a trust property and the detailed reasons in support thereof are incorporated in that report. It is only after the receipt of this report that the

Charity Commissioner filed his say or written statement reiterating that the property was a trust property. It is, therefore, this third feature which is

in favour of the petitioner's contention. The next item pertains to the previous litigation. Admittedly on prior occasion after a detailed enquiry and a

hot contest it was held and declared by the Charity Commissioner that the suit property, namely, Survey No. 64 was a trust property. Shri

Divekar, the learned Counsel, however controverted the correctness of this position and submits that there is no record to show that entire Survey

No. 64 was proclaimed to be trust property. Whatever that may be, the fact remains intact that an enquiry was held by the competent authority

wherein on merits after hearing the concerned parties a certain declaration was made which had direct nexus with Survey No. 64 being the trust

property which is evidenced by the further fact that in pursuance of the said declaration entries were accordingly made at the relevant time. The

point of interest to note further to the effect that on two prior occasions the 1st respondent therein made utmost efforts with all the vigour to

challenge that the declaration and the decision of the Charity Commissioner but miserably failed meaning thereby that his claim that it was his

private property toppled with the counter claim that it was a private trust property was upheld and, therefore, it must have a direct impact in favour

of the petitioner's claim.

17. Shri Divekar, the learned Counsel has raised the contention which has generated another controversy with reference to the entries about the

property being the trust property. Now it is pertinent to note that all the parties are in possession of the certified copies of the relevant entries

though the entries do not tally. The copies in possession of the petitioners and the learned Additional Government Pleader synchronized with each

other wherein it is mentioned that Survey No. 64 in the cantonment area in Ahmednagar city is the public trust property though the area described

is 2.76 acres. It is also styled as Bava Bengal Dargah. As against this, the entry in the certified copy in custody of the learned Counsel for the

respondents show Survey No. 64 being trust property but the area is restricted to 276 sq. ft. Shri Hegde, learned Additional Government Pleader

submits that some mistake has been cretin inasmuch as even the entry pertaining to the measure of the area cannot be correct as to whether it can

be read as hectares or sq. feet or sq. metres. Interestingly enough the survey number is identical and that it belongs to the Trust is also consistently

mentioned. In the face of this though it may not be possible to finally and effectively adjudicate upon this issue in these proceedings, however, as

rightly pointed out by the learned Additional Government Pleader, this would be an additional ground which requires an enquiry or further

investigation about the exact area which can be held to be trust property as the dispute appears to be pertaining to some portion of the said survey

number. This in turn creates a further necessity of impleading the Charity Commissioner as a necessary party inasmuch as if it is held on enquiry

that only a portion is the trust property then some consequences would follow with reference to the remaining property and whereas if the entire

property is held to be the trust property then the maintainability of the suit is liable to be affected adversely. It is, therefore, not desirable to express

any opinion in that behalf except observing that the enquiry is absolutely essential.

18. It is also a matter of record that in a Suit No. 43 of 1979 which was filed by the present respondent No. 1 and some others pertaining to the

same property, the Charity Commissioner was made a party and the Charity Commissioner had clearly stated that it is the trust property and the

suit was not maintainable. It is also interesting to note, as rightly submitted by Shri Agarwal, the learned Counsel, though respondent No. 2 claim to

be the owner, significantly he has not filed any affidavit, but the affidavit is filed through respondent No. 1, who appears to be the person active

throughout in the past and who had filed applications on prior occasions. This cannot be just accidental and its repercussions are deeper.

19. Shri Divekar, the learned Counsel no doubt submitted that in earlier suit a decree was passed wherein it was held that this very property is of a

private ownership of respondent No. 2. It was in fact a suit filed for partition and separate possession wherein it was held by the learned trial Judge

that excepting the portion admeasuring 276 sq. feet, the rest of the area of Survey No. 64 was of the private ownership meaning thereby that only

the area of 276 sq. feet was held to be the trust property and this decree came to be confirmed by the District Court. Despite this apparently

attractive feature it is a slippery ground in itself. In the first instance, the second appeal is still pending and the submission is made at the Bar that

some of the defendants have challenged the correctness of the finding that only 276 sq. feet is the trust property. Since the matter is pending it is

not desirable to go deeper into that. However, Shri Agarwal appears to be justified in submitting that the petitioners were not the party with the

Charity Commissioner and the more important feature is that even the Charity Commissioner was impleaded as a party and the effect and the

impact of the decree has, therefore, its own limitation. No further comments are necessary.

20. Having regard to all these features which unfortunately are ignored by the learned Extra Assistant Judge, in my opinion the order is liable to be

set aside even in the writ jurisdiction since there is an error apparent on the face of the record. All this apart, the merits fully justify the impleading

of the Charity Commissioner as co-defendant. I am also tempted to observe that no prejudice is likely to be caused to the plaintiffs in adopting this

course inasmuch as in the said suit after the framing of the necessary issues, the enquiry is bound, to be held about this nature of the property

wherein the plaintiffs would get full opportunity to ventilate all their grievances and claim about the property being of private ownership. The plaintiff

in his say in the trial Court has said that he would rather run the risk of getting the suit dismissed if the Charity Commissioner was found to be a

necessary party. However, it cannot be underestimated as it is well settled that the multiplication of litigation should be avoided as far as possible.

In my opinion the same can be done in the instant case conveniently if the Charity Commissioner is impleaded as the party. In fact as the position

stands the Charity Commissioner has been impleaded by the trial Court and the plaintiff has been directed to amend the plaint accordingly. Though

the Charity Commissioner has tendered his say at Ex. 64 and styled as written statement, still in the strict sense it cannot be treated as written

statement as it was before he was formally impleaded as a co-defendant. Technically, therefore, the Charity Commissioner would get a chance and

opportunity to file a written statement if he so desires or he can adopt the say which he had already filed. It is, thereafter that the learned trial Judge

shall frame the necessary issues and dispose of the suit on merits as expeditiously as possible under the circumstances.

21. In the result, the rule is made absolute. The impugned order recorded in Civil Revision Application No. 1 of 1981 by the learned Extra

Assistant Judge, Ahmednagar on October 23, 1981 is set aside whereas the order of the learned Civil Judge (Senior Division), Ahmednagar

recorded below Ex. 64 in Regular Civil Suit No. 830 of 1975 on January 13, 1981 impleading the Charity Commissioner as co-defendant is

restored. The learned trial Judge shall proceed with the said suit in accordance with that directions issued hereinabove. There would, however, be

no order as to costs of these proceedings.