

(1985) 07 GUJ CK 0018
In the Gujarat High Court

Amrutlal Keshavbhai Patel

APPELLANT

Vs

Ismail Ibrahim Badat and Others

RESPONDENT

Date of Decision : 03-07-1985

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 41A, 41A

Citation : (1986) 1 GLR 136

Hon'ble Judges : J.P. Desai, J

Bench : Single Bench

Judgement

J.P. Desai, J.—The facts leading to the filing of this First Appeal may be briefly stated as follows:

Amrutlal Keshavlal Patel, the appellant in this appeal executed a trust deed on 26-11-1979 in respect of land bearing Survey No. 1/1, Block No. 2, admeasuring 14 acres-6 gunthas at Village Boriach, Taluka Navsari. One Dargah of Gebansha Pir is situated in the eastern part of this land nearby the Highway. Hindus as well as Muslims of village Boriach and surrounding villages have faith in the said Dargah and many people visit the Dargah every year and a fair is also held every year. It was necessary to make repairs to the said Dargah and, therefore, the appellant Amrutlal dedicated 5 gunthas out of the aforesaid land of his ownership for the purpose of the said Dargah and created a trust by executing the deed on 26-11-1979. He filled in the prescribed form on 12-12-1979 for getting the trust registered as a Public Trust. Inquiry was held by the Assistant Charity Commissioner. The respondent Ismail Ibrahim Badat raised objections during the said inquiry. He opposed the registration of the trust as a public trust. He contended that the Dargah was situate for the last 400 to 500 years upon waste land and on account of the construction of the National Highway, he had shifted the Dargah from the original spot. He contended that he was the owner of this Dargah and with a view to harass him, the Trust was created by Amrutlal. He contended that Mujavarship of this Dargah was performed by his ancestors in the past and that he was then performing Mujavarship and doing all religious

ceremonies and was managing the affairs of the Dargah which was a private one. He contended that it was not a public trust. He thus opposed the registration of this Dargah as a public trust. The learned Assistant Charity Commissioner, after holding necessary inquiry held that the Dargah in question was a public trust and Amrutlal Keshavbhai Patel and two other persons were the trustees. He held that Ismail Ibrahim Badat was not the Mujavar. Being dissatisfied with the same, Ismail Ibrahim Badat filed an appeal being Appeal No. 30 of 1980 before the Joint Charity Commissioner, Baroda Division at Baroda. The learned Joint Charity Commissioner held that though it was established that Amrutlal had created a trust, he was not in a position to show what concern he had with the Dargah which authorised him to create a trust in respect of the said Dargah. While, on the other hand, Ismail Ibrahim Badat was claiming that the Dargah was his exclusive and private property and he was Mujavar of the said Dargah, but according to the Joint Charity Commissioner, he was not in a position to establish his rights. The learned Joint Charity Commissioner thought it proper to direct further inquiry by the Assistant Charity Commissioner and to decide certain questions elaborated by him in his judgment for arriving at the finding on the statutory question of the existence of a public trust and its trusteeship and objects thereof and hence he remanded the matter for fresh inquiry to the Assistant Charity Commissioner as observed by him at para 12 of his order. The learned Joint Charity Commissioner, for the reasons stated by him in para 15 of his judgment, also directed Ismail Ibrahim Badat to handover possession of the Dargah to Amrutlal and also directed Amrutlal to submit monthly accounts of income and expenditure to the Assistant Charity Commissioner at Surat. Ismail Ibrahim Badat being dissatisfied with the order passed by the Joint Charity Commissioner directing further inquiry and directing possession to be handed over to Amrutlal filed an application being Misc. Civil (Trust) Application No. 49 of 1983 u/s 72 of the Act in the District Court. Amrutlal filed cross-objections in the said application contending that the order regarding possession was quite proper, but the order regarding fresh inquiry was not proper and that the learned Joint Charity Commissioner should have confirmed the finding reached by the Assistant Charity Commissioner so far as the question of the Dargah being a public trust or not is concerned. The learned Assistant Judge who heard the application and cross-objections reached the conclusion that the learned Joint Charity Commissioner was right in directing a fresh inquiry, but his order directing Ismail Ibrahim to handover possession to Amrutlal cannot be supported. He, therefore, set aside the order passed by the learned Joint Charity Commissioner whereby he had directed possession of the Dargah to be handed over to Amrutlal. Being dissatisfied with the order passed by the learned Assistant Judge, Bulsar at Navsari, Amrutlal has filed this appeal before this Court.

2. The learned advocate Mr. S.H. Sanjanwala who appeared on behalf of the appellant Amrutlal took me through the judgments of the learned joint Charity Commissioner as well as the learned Assistant Judge and urged that the learned

Assistant Judge could not have interfered with the order passed by the learned Joint Charity Commissioner directing possession to be banded over to Amrutlal. He urged that the learned Joint Charity Commissioner was competent to pass the order regarding possession u/s 41-A of the Bombay Public Trusts Act, 1950 (Hereafter referred to as the Act) and he having passed that order, it could not be challenged in an application u/s 72. In other words, Mr. Sanjanwala submitted that no application u/s 72 lay against an order passed u/s 41-A of the Act and, therefore, the appeal as regards that order was not competent. Looking to the provisions of Section 72 of the Act, it is clear that no application can lie to the District Court against an order passed u/s 41-A of the Act because Section 72 provides only for applications against orders passed under Sections 40, 41, 50-A, 70 or 70-A of the Act. Section 41-A does not find any place in Section 72. In view of this, the contention of Mr. Sanjanwala would have much force provided the order passed by the learned Joint Charity Commissioner can be said to be an order passed u/s 41-A of the Act. I have gone through the whole of the judgment of the learned Joint Charity Commissioner and I find no-where any reference to Section 41-A of the Act. Even Mr. Sanjanwala was not able to point out any reference to Section 41-A by the learned Joint Charity Commissioner. But even in absence of any reference to Section 41-A of the Act, if it can be shown that the order was passed u/s 41-A of the Act, then certainly it can be said that the order is one passed u/s 41-A of the Act, though not specifically referred to or styled as an order or direction under the said provision of the Act.

3. The learned Joint Charity Commissioner has discussed the question of giving directions regarding possession at para 15 of his judgment. The learned advocate Mr. Sanjanwala placed in my hands a letter addressed to his client by the Joint Charity Commissioner on 9-9-1980. It appears from this letter that an application for interim injunction was submitted by Ismail Ibrahim Badat along with the appeal and the following order was passed by the learned Joint Charity Commissioner on 8-9-1980 below that application:

Notice to the other side. The respondent in the meantime be directed to maintain status quo regarding possession of the trust property.

It also appears from the said letter that the final hearing of the application for injunction was fixed on 16-9-1980. The discussion at para 15 of the judgment of the learned Joint Charity Commissioner shows that the interim directions given on 8-9-1980 were confirmed and status quo was directed to be maintained. The learned Joint Charity Commissioner observed that it appeared from the discussion made by him in his judgment that the appellant Ismail could not establish any link between him and the Dargah in question and also could not show that he had taken the land on lease on which the Dargah was situate and therefore, he cannot be permitted to retain possession. If the learned Joint Charity Commissioner was inclined to take such a view, he could at the most, have vacated the interim order passed by him which he had confirmed on 16-9-1980. He could not do anything more so far as possession is concerned. He

could not direct that the appellant who was in possession should hand over possession to respondent No. 1 when the appellant had filed an appeal against the order of the Assistant Charity Commissioner. If he wanted to take any action u/s 41A of the Act, he should have taken necessary steps in that regard and passed an appropriate order after giving an opportunity to the appellant to have his say so far as possession is concerned, provided, of course, he was competent to pass such an order while hearing this appeal. Anyway, the order passed by the learned Joint Charity Commissioner cannot for a moment be said to be an order u/s 41A of the Act. I may also mention here that the learned Assistant Charity Commissioner held that this was a public trust. The learned Joint Charity Commissioner set aside the order passed by the learned Assistant Charity Commissioner and directed further inquiry by the learned Assistant Charity Commissioner. In view of this, the learned Joint Charity Commissioner could not have exercised any powers u/s 41A of the Act looking to the very wordings of Section 41A. Section 41A of the Act reads as follows:

(1) Subject to the provisions of this Act, the Charity Commissioner may, from time to time, issue directions to any trustee of a public trust or any person connected therewith to ensure that such trust is properly administered and the income thereof is properly accounted for or duly appropriated and applied to the objects and for the purposes of the trust.

(2) It shall be the duty of every such trustee and person to comply with a direction issued to him under Sub-section (1).

4. It is pertinent to note that the Charity Commissioner is required to issue directions to any trustee of a public trust or any person connected therewith i.e. with the public trust. Section 41A thus presupposes that there is in existence a public trust. When the question whether this Dargah is a public trust is still not decided and is to be decided after further inquiry by the Assistant Charity Commissioner, the Charity Commissioner could not exercise powers u/s 41A. Sub-section (2) of Section 41A says that it shall be the duty of every such trustee and person to comply with a direction issued by the Charity Commissioner. This clearly shows that unless there is a public trust in existence no directions u/s 41A can be given by the Charity Commissioner. In view of this, it cannot be said that the learned Joint Charity Commissioner issued the directions regarding possession u/s 41A of the Act. I do not express any opinion whether power to issue directions u/s 41A includes even the power to direct the trustee or person concerned with the trust to handover possession of the property because Section 41A says that directions can be given to ensure that such trust is properly administered and the income thereof is properly accounted or duly appropriated and applied to the objects and for the purposes of the trust. Prima facie, it can be said that the Charity Commissioner can give directions to the trustee such as to maintain accounts and render accounts from time to time, etc. But it is doubtful whether u/s 41A of the Act any directions can be given to handover possession of the property. But anyway, I do not express any opinion so far as

this aspect is concerned as it is not necessary to do so in the present case.

5. The learned advocate Mr. Sanjanwala drew my attention to a decision of this Court reported in *Kanbi Manji Abji v. Velji Manji and Ors.* 21 G.L.R. 44 and urged that the learned Assistant Judge committed an error in setting aside the order passed by the learned Joint Charity Commissioner directing Ismail Ibrahim to handover possession to Amrutlal. The ratio of this decision of this Court is that directions given u/s 41A of the Act cannot be challenged in an application u/s 72 of the Act. There cannot be any quarrel with this proposition of law because Section 72 does not provide any application against an order or directions given u/s 41A. It appears from the facts of the case under report that while hearing a revision application certain directions were given by the Charity Commissioner u/s 41A of the Act. The said directions were ordered to be continued when final order was passed in revision. It was contended that when the revision application was disposed of and the directions were ordered to continue, they merged in the order passed in revision and therefore, that order can be challenged by an application u/s 72 of the Act. That contention was, in my humble opinion, with due respect, rightly rejected by the learned Single Judge who decided this matter. Simply because the directions were given that they should continue, it cannot be said that they formed part of the final order passed in revision. In the present case, no such directions were given at any time. It was on the contrary an application by the appellant before the learned Joint Charity Commissioner to maintain status quo and that request was granted. It cannot, therefore, be said that any such directions were given in the present case u/s 41A of the Act. I may also mention here that the facts of the case of *Manji Abji* (supra) show that there was no dispute about the existence of the public trust. The only dispute was whether certain properties were the properties of the public trust or not, which properties were not earlier notified as properties belonging to the public trust. There was thus no dispute about the existence of a public trust in that case. In view of this, the decision of this Court which Mr. Sanjanwala relied upon does not help him in this case because firstly, the dispute about the existence of a public trust still exists and is to be decided on fresh inquiry by the learned Assistant Charity Commissioner and secondly, because no directions were given at any time by the learned Joint Charity Commissioner u/s 41A of the Act regarding possession, which obviously the learned Joint Charity Commissioner could not have given.

6. When it appears that the learned Joint Charity Commissioner did not and could act have given any directions u/s 41A of the Act directing the appellant before him to handover possession to Respondent No. 1, the learned Assistant Judge was entitled to consider whether any such directions could have been given by the learned Joint Charity Commissioner while allowing the appeal of the appellant and directing fresh inquiry. The learned Assistant Judge has considered this aspect and observed that while directing fresh inquiry the learned Joint Charity Commissioner was not competent enough to pass any such order as per the provisions of Section 41A or any other provisions of the Act. He has further

on observed that even assuming for the sake of argument that he was competent enough to pass an order for possession under any of the provisions of the Act, it would not be a proper order. With respect to the learned Assistant Judge, he appears to have lost sight of the fact that he could not have interfered with the order passed by the learned Joint Charity Commissioner while hearing an application u/s 72 of the Act if the learned Joint Charity Commissioner had passed the order u/s 41A provided, of course, the order could have been passed u/s 41A of the Act. It seems that pointed attention of the learned Assistant Judge was not drawn to the provisions, of Section 72 of the Act which permits applications only against certain orders but not the order or directions given u/s 41A of the Act. The discussion made by me earlier shows that this could not be an order or direction u/s 41A of the Act and, therefore, the learned Assistant Judge was justified in interfering with the order passed by the learned Joint Charity Commissioner so far as directing the appellant Ismail Ibrahim before him to handover possession to respondent No. 1 Amrutlal is concerned. The learned advocate Mr. Sanjanwala has not been able to satisfy me as to how the learned Assistant Judge can be said to have committed any error of fact or law in setting aside the said order passed by the learned Joint Charity Commissioner. It is only an order u/s 41A in fact and in law which could not be challenged in application u/s 72 of the Act. The order passed by the Joint Charity Commissioner directing possession to be handed over to Amrutlal cannot with any stretch of imagination be said to be directions u/s 41A of the Act and, therefore, liable to be set aside in an application u/s 72 of the Act. It is even surprising that while hearing an appeal, the learned Joint Charity Commissioner while partly allowing the appeal and directing fresh inquiry, directed the appellant before him to handover possession to respondent No. 1. It is true that according to the learned Joint Charity Commissioner, Ismail Ibrahim was not able to establish any link with the Dargah, but at the same time, even Amrutlal was also not in a position to establish any connection whatsoever with the Dargah according to the learned Joint Charity Commissioner. It is surprising that in these circumstances he directed possession to be handed over to Amrutlal. Such an order cannot be sustained for a moment.

7. The learned advocate Mr. Sanjanwala submitted that both the parties had made a grievance before the learned Assistant Judge that the order of remand was not proper. Looking to the reasons given by the learned Joint Charity Commissioner and the learned Assistant Judge, I am not inclined to interfere with the order passed by the learned Joint Charity Commissioner and confirmed by the learned Assistant Judge whereby fresh inquiry is ordered to be held by the learned Assistant Charity Commissioner. The learned advocate Mr. Sanjanwala has not been able to point out any error of fact or law committed by either the learned Joint Charity Commissioner or the learned Assistant Judge in reaching this conclusion. The learned advocate Mr. Sanjanwala, however, made a grievance with regard to the observation made by the learned Joint Charity Commissioner at para 13 of his judgment. It is not clear what the learned Joint

Charity Commissioner meant by observing that while remanding the matter, he did not intend to remand the matter exclusively for the present contesting parties who did not avail of the opportunities and did not establish their case, but he intended to remand the matter for general public or the section of the public who are interested in the said Dargah and who did not turn up at the initial inquiry because of lack of knowledge of the inquiry. If by these observations the learned Joint Charity Commissioner meant that the contesting parties before him were not entitled to take any part in the fresh inquiry or that they were not entitled to lead any evidence, then such direction should be set aside. When fresh inquiry is directed, then the contesting parties should have a right to take part in the fresh inquiry and also produce whatever evidence or material they want to during the inquiry over and above the material which may be gathered by the learned Assistant Charity Commissioner during the fresh inquiry. The learned Assistant Charity Commissioner who holds fresh inquiry should bear this in mind and give an opportunity even to the parties who were contesting before the learned Joint Charity Commissioner in appeal and complete the inquiry. I may mention here that in the final order passed by the learned Joint Charity Commissioner, he has not given any direction restricting the right of the contesting parties to appear in the fresh inquiry. But anyway, the parties who were contesting in appeal before the learned Joint Charity Commissioner will also be entitled to take part in the fresh inquiry and also adduce whatever evidence they want to during the said inquiry.

8. The discussion made above will go to show that there is no substance in this appeal and, therefore, it deserve to be dismissed. The appeal is, therefore, dismissed. The parties to bear their own costs of this appeal. The Civil Application is dismissed with no order as to costs as the First Appeal is also dismissed.