(2010) 03 BOM CK 0008

In the Bombay High Court

Case No : First Appeal No. 86 of 2009

Avinash Ganpatrao Shegaonkar and Others APPELLANT

Vs

Shri Jayawant @ Babasaheb Uttarwar, The Chairman and Others RESPONDENT

Date of Decision : 30-03-2010

Acts Referred:
Bombay Public Trusts Act, 1950 — Section 144, 41B, 41D, 41D(1), 41D(5)

Citation : (2010) 03 BOM CK 0008

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : A.S. Jaiswal, for the Appellant; A.M. Gordey, for Respondents Nos. 1, 3, 5 to 7, R.S. Dhote, for Respondent No. 2, S.K. Mishra and R.A. Wasnik, AGP, for the Respondent

Final Decision : Allowed

Judgement

C.L. Pangarkar, J.—This appeal is preferred by the appellants feeling aggrieved by the order passed by the Joint Charity Commissioner on an application u/s 47 of the Bombay Public Trust Act filed by the respondents.

2. The facts giving rise to this appeal are as follows There is a Trust known as ''Saibaba Seva Mandal, Nagpur''. There are disputes between the trustees since long. Applications for change are also pending. One Jayant Uttarwar, who is the exsecretary of the Trust, moved the application u/s 47 of the Bombay Public Trust Act, 1950. Said Jayant Uttarwar contends that he has been working along with the other trustees for last so many years and has developed the temple of the Trust to today''s status. He contends that he has devoted his entire life in the service of the Trust and has collected funds which were required for the construction of the temple. He submits that he is, therefore, the person having interest in the Trust. The Deputy Charity Commissioner had, on an application No. 6 of 1992, framed a scheme for the said Trust. The said order of the Deputy Charity Commissioner was challenged before the District Judge and the matter

was ultimately decided by the High Court in First Appeal No. 351 of 1998. The scheme was modified by the High Court by order dated 10th of September, 1998 and it was directed to enroll the members and to hold the elections. The Assistant Charity Commissioner was directed to hold the elections and to enroll the members. Shri J.R.Tungar, the Assistant Charity Commissioner, came to be appointed as an Election Officer. Elections were accordingly held on 29/11/1998 and Change report No. 1819 of 1998 was filed before the Deputy Charity Commissioner. The said change report was rejected on 7/8/2008. The Charity Commissioner found that the members were not enrolled as per the provisions of the scheme and were, therefore, election was not legal and valid. The order was challenged in appeal before the Joint Charity Commissioner. He confirmed the said order. It is not in dispute that the said order has also been confirmed by the District Judge and the matter is now pending in the High Court. While these proceedings were pending, elections were shown to be held on 28/12/2004. According to the applicant Shri Uttarwar, the term of that body also expired on 27/12/2008. The change report enquiry No. 894 of 2004 is, however, still pending. He contends that the said change report has become infructuous. According to him, therefore, today there is "no trustee situation". He submits that there is no legal management who can take care of the day to day affairs of the Trust. He submits that no Trust can be administered without the trustees and it has now become necessary to appoint new trustees. Accordingly, the said Jayant Uttarwar submitted an application u/s 47 suggesting the names of the persons to be appointed as trustees. Along with the said application, the biodatas were submitted. The said application was submitted on 22/1/2009. Affidavit was filed on 30/1/2009 before the Charity Commissioner by the applicant and on 2/2/2009 an order appointing the persons mentioned in the application u/s 47 of the Act as trustees was passed. Feeling aggrieved thereby, this appeal has been preferred by the appellants, who also claim to be the persons interested in the Trust.

3. I have heard the learned Counsel for the appellants as well as the respondents.

4. We have seen that an application u/s 47 was moved because the Change report No. 1819 of 1998 was rejected. It is not disputed that even an appeal u/s 72 before the District Judge has also been rejected. It is contended further that change report in respect of 2004 elections is still pending but the term is over on 27/12/2008. For this reason, it is alleged that the situation of there being no trustee has arisen.

5. The change report No. 1819 of 1998 is mainly rejected on the ground that the members were improperly enrolled. Shri Jaiswal, the learned Counsel for the appellants, contended that this Court can independently considered here if rejection of membership of new persons is proper or not. He submits that if the scheme is read carefully and the action taken by the then Assistant Charity Commissioner is seen, it could not be said that all members were improperly enrolled. In this regard, we will have to look into the scheme itself. The scheme

contemplates four kinds of members (1) founder, (2) patron 3) life, and (4) ordinary. The scheme says, for being a patron member one has to contribute more than or above Rs. 1,00,000/, for life member more than or above Rs. 10,000/, for ordinary member more than or above Rs. 1000/. The membership of the new persons seems to be rejected because they did not contribute anything more than Rs. 1,00,000/, Rs. 10,000/and Rs. 1,000/while paying their contribution i.e. they contributed exactly Rs. 1,00,000/, 10,000/and Rs. 1000/ and nothing over and above that. It is for this reason, the membership is rejected. The argument is, even if a patron may have contributed Rs. 1,00,000/ only, his application in that category may not be considered but the same ought to have been considered on the category of either life member or an ordinary member. I do not propose to deal with the argument and it''s worth, since the very question has been decided in the change report enquiry. It is stated that against the order of District Judge, an appeal is filed in the High court. That question will be finally decided in that appeal before the High court. For the present, the fact remains that the change report stands rejected on that count.

6. The contention that needs consideration is whether the order appointing new trustees calls for interference. Shri Jaiswal assails the order on the ground that the principles of natural justice are not followed and no enquiry as such is conducted by the Joint Charity Commissioner before passing the order. He submits that the Joint Charity Commissioner has taken the contents of the application and the affidavit as a gospel truth and has made the appointments. Shri Gordey and Shri Mishra, learned Counsel for the respondents, on the other hand contend that if Section 47 is read, it would be clear that what is necessary is subjective satisfaction of the Charity Commissioner. They submit that the Charity Commissioner is the custodian of the Trust and must be assumed to be acting in the best interest of the Trust. They also submit that if the Charity Commissioner was satisfied with the material i.e. the contents of the application and the biodata placed before him, he cannot be said to have acted without jurisdiction at all. It was also submitted that the appellants do not even say that any of these persons is facing any criminal prosecution or has ill reputation. They submit that the order, therefore, does not call for any interference.

7. In order to appreciate the argument, it would be necessary to go through Section 47 and 41D of the Bombay Public Trust Act, 1950. Both sections are reproduced below.

47. Power of Charity Commissioner to appoint, suspend, remove or discharge trustees and to vest property to new trustees

(1) Any person interested in a public trust may apply to the Charity Commissioner for the appointment of a new trustee, where there is not trustee for such trust or the trust cannot be administered until the vacancy is filled, or for the suspension, removal or discharge of a trustee, when a trustee of such trust,

(a) disclaims or dies;

(b) is for a continuous period of six months absent from India without the leave of the Charity Commissioner or the Deputy or Assistant Charity Commissioner or the officer authorised by the State Government in this behalf;

(c) leaves India for the purpose of residing abroad;

(d) is declared as insolvent;

(e) desires to be discharged from the trust;

(f) refuses to act as a trustee ;

(g) becomes in the opinion of the Charity Commissioner unfit or physically incapable to act in the trust or accepts a position which is inconsistent with the position as trustee;

(h) in any of the cases mentioned in Chapter III, is not available to administer the trust; or

(i) is convicted of an offence punishable under this Act or an offence involving moral turpitude.

(2) The Charity Commissioner may, after hearing the parties and making such enquiry as he may deem fit, by order appoint any person as a trustee or may also remove or discharge any trustee for any of the reasons specified in Sub-section (1).

(3) In appointing a trustee under Sub-section (2), the Charity Commissioner shall have regard

(a) to the wishes of the author of that trust;

(b) to the wishes of the persons, if any, empowered to appoint a new trustee;

(c) to the question whether the appointment will promote or impede the execution of the trust ;

(d) to the interest of the public or the section of the public who have interest in the trust; and

(e) to the custom and usage of the trust.

(4) It shall be lawful for the Charity Commissioner upon making any order appointing a new trustee under Sub-section (2) either by the same or by any subsequent order to direct that any property subject to the trust shall vest in the person so appointed and thereupon it shall so vest.

(5) The order of the Charity Commissioner under Sub-section (2) shall be deemed to be the decree of the Court and an appeal shall lie therefrom to the High Court.

41D. Suspension, removal and dismissal of trustees

(1) The Charity Commissioner may, either on application of a trustee or any person interested in the trust, or on receipt of a report u/s 41B or suo motu may suspend, remove or dismiss any trustee of a public trust, if he,-

(a) makes persistent default in the submission of accounts report or return;

(b) willfully disobeys any lawful orders issued by the Charity Commissioner under the provisions of this Act or rules made thereunder by the State Government;

(c) continuously neglects his duty or commits any malfeasance or misfeasance, or breach of trust in respect of the trust;

(d) misappropriates or deals improperly with the properties of the trust of which he is a trustee; or

(e) accepts any position in relation to the trust which is inconsistent with the position as a trustee;

(f) If convicted of an offence involving moral turpitude.

(2) When the Charity Commissioner proposes to take action under Sub-section (1), he shall frame charges against the trustee or the person against whom action is proposed to be taken and give him an opportunity of meeting such charges of testing the evidence adduced against him and of adducing evidence in his favour. The order of suspension, removal or dismissal shall state the charges framed against the trustee, his explanation and the finding on each charge, with the reasons therefor.

(3) pending disposal of the charges framed against a trustee the Charity Commissioner may place the trustee under suspension.

(4) Where the Charity Commissioner has made an order suspending, removing or dismissing any trustee and such trustee is the sole trustee or where there are more than one trustee and the remaining trustees, according to the instrument of trust, cannot function or administer the trust without the vacancy being filled, then in that case the Charity Commissioner shall appoint a fit person to discharge the duties and perform the function of the trust, and such person shall hold office only until a trustee is duly appointed according to the provisions of the instrument of trust.

(5) A trustee, aggrieved by an order made under Sub-section (1), may, within ninety days from the date of communication of the order of suspension, removal or dismissal, apply to the Court against such order.

(6) An appeal shall lie to the High Court against the decision of the Court under Sub-section (5) as if such decision was a decree from which an appeal ordinarily lies.

(7) The order of the Charity Commissioner shall, subject to any order of the

Court or the appeal, be final.

8. One has to first make the distinction between the fit person and the trustee appointed u/s 47 of the Act. The occasion to appoint a fit person arises where the Charity Commissioner suspends trustee or trustees and there is no person who can take care of the Trust and administer it. A fit person, in fact, for all purposes has to act as a trustee. He can, however, work or hold office until a new trustee is appointed. Thus, Section 41D takes care of the trust only as a stop gap arrangement. But when a person is sought to be appointed u/s 47, such an appointment in no case can be temporary or by way of only stop gap arrangement. The wording of Section 47 is clear enough. An application u/s 47 has been moved in this case on the ground that there is no trustee to administer the Trust since change reports are rejected. Therefore, new trustees are sought to be appointed. These trustees, therefore, can continue until elections are held and new persons are elected and appointed as trustees. Basically, this becomes an appointment of a person as a trustee as such and not as a fit person. Therefore, more care and caution is required to be taken by the Charity Commissioner while making appointments u/s 47.

9. Shri Gordey and Shri Mishra, the learned Counsel for the respondents, contended that the Charity Commissioner was satisfied about the fitness of respondents and there is nothing adverse against them. They submitted that an enquiry was made by the Charity Commissioner and then the order is passed. It is clear from the Section itself that before appointment is made an enquiry is required to be made. The word enquiry is not defined in the Act. However, word enquiry has been defined best in Ramnath Ayer''s Law Lexicon as ''search for knowledge, investigating a question.'' To me, the enquiry is something short of trial. Therefore, wherever an enquiry as required by law is to be held, the law expects the authority to do some kind of investigation and the consideration of material before it. Shri Mishra contended that the Charity Commissioner had considered the application and biodata before him and he was not required to consider more than that. The submission cannot be accepted. The enquiry can never be so informal and it has, in fact, to be formal. The question is whether the Charity Commissioner was bound to consider the contents of the application and bio data alone or something more was expected of him while taking the decision. I find that the Charity Commissioner is expected to do something more than that. He is not supposed to accept as gospel truth what is stated in the application. It would also be necessary of him to enquire with few persons interested in Trust or even devotees. Ultimately, the Trust is to be run for benefit of the public. Therefore, consultation with a few would be mandatory. In the instant case, what has happened is that; one person filed an application. He suggested certain names and the Charity Commissioner accepted the suggestion and made an appointment within a week''s time. Shri Gordey had submitted that there is no provision to give any public notice or notices to anybody in Section 47. There is no specific provision in the said Section but then section certainly contemplates an enquiry and enquiry, as stated earlier, is nothing but an

investigation and may be short of a trial. Such enquiry is with a view that the Charity Commissioner takes a decision after verifying the correctness of the allegations made in the application, suitability of persons and if any other suitable persons are available. The Charity Commissioner has to bear in mind the provisions of Sub-section 3 of Section 47 also while holding an enquiry. Sub-section 3 speaks of things which the Charity Commissioner is supposed to take into account while making an enquiry. Clause (d) of Sub-section 3 would make it clear that the Charity Commissioner is supposed to consult the persons interested and also the public interested. The fact that the Charity Commissioner is to consider the interest of the public, who have interest in the Trust, shows that the consultation with such persons is absolutely necessary and this provision, to my mind, suggests that a public notice must be issued. The interest of the public can be protected only if a notice is issued and public is informed of such application having been made and such vacancies having arisen. The submission of Shri Mishra that the appellants should have come forward voluntarily before the Charity Commissioner and should have contested the application cannot be accepted. In fact, the expectation of Shri Mishra that the appellants should have voluntarily come forward cannot be accepted also, because the appellants were not in the knowledge of such application having been filed before the Charity Commissioner. How does he then expect the appellants to appear before the Charity Commissioner and contest the application ?. In fact, as pointed, the application was decided within a week''s time and with great haste, leaving no scope for the appellants to participate. In fact, the respondent - Uttarwar should have fairly asked the Charity Commissioner, to issue notice to the present appellants and the public since the present appellants also have been fighting with him in the court of law since 1998. Even the Charity Commissioner knows that there are two factions. Inspite of this he chooses not to issue notice to any other party. If any enquiry has to be held, it would be incumbent to hear both the factions. Inspite of the knowledge, as stated earlier, the Charity Commissioner failed to issue any notice to the appellants or to the public in general. Such a notice could have been displayed in the temple itself. Had the Charity Commissioner given a notice or displayed it in the temple, a wider choice would have been available to him for selection of trustees and the information about all others which may have and could have been suppressed. The result of not issuing notice is that all others are deprived of being considered for the appointment as trustees. The Charity Commissioner was not bound to consider the names as mentioned in the application alone. If this kind of procedure is followed, then perhaps the Charity Commissioner will be left with no choice but to appoint only those whose names are to be found in the application. This certainly is not contemplated.

10. There is yet another reason why proper enquiry and investigation is necessary in the matter under this Section. This, to my mind, is clear from the provisions of Sub-section 5 of Section 47. Sub-section 5 says that an order passed on the enquiry shall be deemed to be a decree and an appeal shall lie

against such an order. Use of word decree is very significant. Decree is defined in CPC as follows:

" Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

11. Thus, a decree finally determines the rights between two rival parties. Therefore, in the enquiry, parties are required to be heard and then the rights of those parties are required to be determined. I have no manner of doubt that enquiry should in such cases be conducted only after noticing rival factions and the public interested, else such an enquiry would merely be a farce.

12. The question as to whether present respondents were fit to be appointed nor not need not be gone into and I do not express any opinion over that. I find that the order of the Charity Commissioner suffers from illegality since he did not conduct any enquiry as such and passed the impugned order. I would, therefore, set aside the order and remit the enquiry u/s 47 back to the Charity Commissioner and direct the Charity Commissioner to issue notices to the appellants and to display the notice in the temple itself inviting any objections to the application and even permitting others to apply for being appointed as trustees ,if they so choose. He shall then hold a fresh enuiry and decide the application afresh. In the meantime, the Charity Commissioner may consider appointing fit persons to administer the Trust. The appeal is allowed. The order passed by the Charity Commissioner is set aside. There shall be no order as to costs.

Shri Mishra appearing for respondent No. 4 submits that the present body is continued by order dated 1/4/2009. He submits that the respondent wants to challenge the order before the Supreme Court. In the circumstances, he makes a request that the present body may be allowed to continue for a period of six weeks. The prayer is granted. The order directing the appointment of fit person shall come into effect after expiry of six weeks.

