

(1986) 04 BOM CK 0022

In the Bombay High Court

Case No : Appeal From Order No. 7 of 1981 and Civil Revision Application No. 151 of 1981

Charity Commissioner, Maharashtra State

APPELLANT

Vs

Shaikh Kasam Shaikh Hussain and Others

RESPONDENT

Date of Decision : 16-04-1986

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 41E(1), 41E(4), 41E(5), 41E(6), 41E(7)
Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 115

Citation : (1988) 1 BomCR 400

Hon'ble Judges : H.W. Dhabe, J

Bench : Single Bench

Advocate : C.G. Maokholkar, for the Appellant; S. Sirpurkar, for non-applicants 1, 2(1) to (4), (7) and (8), S.A. Jaiswal, for non-applicant No. 3, A.A. Desai, A.G.P. for non-applicant No. 4, for the Respondent

Final Decision : Allowed

Judgement

H.W. Dhabe, J.—The Appeal from Order No. 7 of 1981 and Civil Revision Application No. 151 of 1981 arise out of the same order passed by the learned District Judge, Buldana in the cases arising out of the proceedings under the Bombay Public Trusts Act, 1950 (for short, "the Act") and, therefore, can be conveniently disposed of by this common judgment.

2. Briefly, the facts are that there is a Sailani Shaha Baba Dargah (for short "Dargah") at Pimpalgaon Sarai, Tahsil Chikhli, District Buldana registered as a public trust under the provisions of the Act. There was a complaint made to the Charity-Commissioner by Sheikh Bashir and five others who are shown as respondents 1 to 6 in Miscellaneous Judicial case No. 8 of 1978 in respect of the offerings made to the tomb of Sailani Baba. According to them the respondents in appeal from Order No. 7 of 1981 who collected the offerings made at the Dargah particularly during the period of Urs did not account for the same and in fact they misappropriated the same. The Charity Commissioner investigated the

matter through his Inspector and thereafter by his order dated 2-3-1974 issued a temporary injunction u/s 41-E(1) of the Act restraining the respondents who were shown as Trustees of the Durgah from collecting the offerings. He also appointed Shri Mubeen A. Razzak Deshmukh, Advocate, Buldana as a receiver for collecting the offering made at the Dargah.

3. The learned Charity Commissioner then found that in spite of a order of injunction being issued against the respondents, the respondents were not obeying the same and had in fact obstructed the receiver appeared by him from collecting the offerings made at the Dargah. He, therefore, filed an application u/s 41-E(4) of the Act in the Court of the District Judge, Buldana for attachment of the property of the respondents and for detaining them in civil prison for disobedience of the order of temporary injunction passed by him. The said application was registered as Miscellaneous Application No. 7 of 1974 in the Court of the District Judge, Buldana.

4. It appears that when the aforesaid application was pending for decision by the District Judge subsequently also during the period of Urs 1978 an order of temporary injunction was again made against the respondents u/s 41-E(i) of the Act by the Charity Commissioner and against that order an appeal was preferred by the respondents in the Court of the District Judge, Buldana registered as Miscellaneous Judicial Case No. 8 of 1978. It would appear from the said case that the respondents 1 to 6 therein were the complainants who had moved the Charity Commissioner for taking suitable action against the respondents in the instant appeal. It further appears that both these cases viz. Miscellaneous Application No. 7 of 1974 filed by the Charity Commissioner and the appeal filed by the respondents u/s 41-E(5) registered as Misc. Judicial Case No. 8 of 1978 were consolidated by the learned District Judge, Buldana for common hearing and disposal.

5. After recording the evidence of the parties the learned District Judge held that the offering made at the Dargah were not the property but that the Mujawars i.e. the respondents had a right to received the offerings made at Dargah. Since the offering were held to be not trust property, that the learned District Judge held that the Charity Commissioner had no jurisdiction to take any action u/s 41-E(1) of the Act as regards the offerings made at the Dargah although be held the respondents obstructed the receiver from collecting the offerings made at the Urs on 7-3-1974 and 8-3-1974. He thus dismissed the Miscellaneous Application No. 7 of 1974 filed by the Charity Commissioner and allowed the Miscellaneous Judicial Case No. 8 of 1978, thus vacating the temporary injunction granted by the Charity Commissioner against them. Being aggrieved by the order in Miscellaneous Application No. 7 of 1974 the Charity Commissioner has preferred the Appeal from Order No. 7 of 1981 in this Court. The complainants who had moved the Charity Commissioner for temporary injunction against the respondents also challenged the order passed by the learned District Judge in Miscellaneous Judicial Case No. 8 of 1978 by filling the revision i.e. Civil Revision

Application No. 151 of 1981 in this Court. The whole of the order of the learned trial Court is thus challenged by the parties in this Court.

6. The principal contention which arises for consideration in these two cases is whether the offerings made at the Dargah are trust property. To appreciate the rival submissions in this regard it would be necessary to refer to the relevant facts and in particular the history of litigation which has taken place in regard to the Dargah. Sailani Shah or Sailani Miyan was regarded as a hold and saintly person during his own life time and was surrounded by a number of disciples and was visited by a number of people who used to pay homage to him. He died sometime in the year 1908. But before his death he expressed his wish that he should be buried in the field Survey No. 140/1 belonging to his disciple Mohammad Hussain. According to his wish a tomb was constructed in the said field Survey No. 140/1 where number of people used to visit his tomb and make their offerings. The Annual Urs during March-April every year were also held at the same place. It would appear from the order of the Collector dated 30-4-1958 that the annual attendance at the Urs was from 40,000 to one lakh. There was thus a considerable income through the offerings at the Dargah. The said Dargah was under the management of Mohammad Hussain who was the owner of the field Survey No. 140/1 and after his death under the management of his legal heirs and successors who styled themselves as Mujawars.

7. In the year 1939 it appears that some people and in particular the defendants in Civil Suit No. 36-A of 1939 formed a Pancha Committee and obtained possession of the Dargah which led to a litigation between them and the predecessors of the respondents. The predecessors of the respondents filed the aforesaid Regular Civil Suit No. 36-A of 1939 against the aforesaid defendants for possession of the tomb of Sailani Shah Baba and for declaration of their rights in respect of the performance of services at the tomb and of receiving the offerings made at the tomb throughout the year and at the time of annual Urs. The defendants therein resisted the said suit filed by the plaintiffs therein. The learned trial Court in the said suit by the judgement dated 8-1-1940 declared that the plaintiffs therein were the Mujawars of the tomb, that they were entitled to perform all the duties mentioned by them in para 3 of the plaint and that they were entitled to receive the offering made at the tomb at the time of the Urs, and throughout the year. The defendants in the said suit were directed by him to give possession of the tomb area to the plaintiffs. A copy of the said judgment is filed in this appeal by the respondents.

8. An appeal was preferred by the defendants in the said suit and in appeal the learned lower Appellate Court modified the decree passed by the learned trial Court. The decree for possession of the tomb to the plaintiffs in the said suit was maintained but with the declaration that the public at large and the Muslim community in particular shall have reasonable right of access to visit the tomb at all times to pay respect to the holy saint. The rest of the claim of the plaintiffs in the said suit was dismissed by the learned lower Appellate Court. The defendants

in the said suit, therefore, preferred a Second Appeal No. 522 of 1940 challenging the decree of possession of the tomb granted by the learned lower Appellate Court in favour of the plaintiffs therein. The plaintiffs also filed a cross objection claiming the right to receive the offerings made at the tomb.

9. The learned Single Judge of the then Nagpur High Court, Justice Vivian Bose, a legendary figure in the field of Administration of Justice, by his judgment dated 10-2-1943 held that whatever the plaintiff's title might be, they were, at any rate for the time being, the persons preferentially entitled to the possession and control of the tomb and were, therefore, entitled to a decree for possession against the defendants, who did not claim title to the property in themselves but merely a right to exclude the plaintiffs from possession. Accordingly, the appeal filed by the defendants against the decree granting possession of the tomb to the plaintiffs was dismissed. As regards the cross objection filed by the plaintiffs had claimed a declaration that they were the Mujawars of the tomb and were, therefore, entitled to receive the offerings. The learned Judge held that since as held by him the plaintiffs were preferentially entitled to possession and control of the tomb they would be entitled to receive the offerings also. He, however, made it clear that he was not deciding the question in what capacity the plaintiffs were entitled to receive the offerings and also the question whether any other persons would have similar or better rights in other circumstances. Accordingly, the cross objection was particular allowed with a clause directed to be inserted in the decree declaring that "the plaintiffs are entitled to receive such offerings as are made at the tomb (as distinct from any place outside it) being the persons at any rate for the present preferentially entitled to possession and control of the tomb. This is the first phase of litigation necessary to be noticed in this case.

10. The second phase of litigation which is not so much material started when the defendants in the aforesaid civil suit filed a suit for declaration that the plaintiffs therein have no right to receive the offerings which was dismissed on a preliminary ground that no permission of the Advocate General as required u/s 92 of the Code of Civil Procedure, 1908 (for short, "CPC") was obtained by them. Then started the third and the important phase of litigation in the instant case. It may be stated that until 1951 i.e. before the Madhya Pradesh Public Trusts Act 1951 (for short the MPT Act) came into force there was no legislation relating to public trusts applicable in this area. After the MPT Act came into force the Collector who was the Registrar of the public trusts under the said Act opened a case u/s 4 of the said Act for registered as Revenue Case No. 390/72-D/53-54 of Village Pimpalgaon Sarai, Tq. Chikhli. It appears from the order of the Collector in the said case that Sheikh Habib Sheikh Hussain who was one of the Mujawars made an application to the Collector for registration of the Dargah as a public trust although subsequently after the proceedings commenced before the Collector he resigned his stand and denied that the Dargah was a public trust. The defendants in the aforesaid civil suit had also moved the Collector for registration of the Dargah as a public trust.

11. After making necessary enquiry the learned Collector by his order dated 30-4-1958 held that the Dargah was a public trust within the meaning of the said expression as defined in section 2(4) of the MPT Act. He, however, observed that by registration of Dargah as a Public Trust the right of the original applicants as Mujawars would not be affected in any manner. He, therefore, also held that whatever rights were accepted by the law Courts in favour of the Mujawars the same would continue subject to the provisions of the Public Trusts Act and that these rights would include the right to the possession and control of the tomb and the right to receive the offerings made at the tomb. Sheikh Karim, Sheikh Husen, Sheikh Habib and Sheikh Kasim, the applicants before him, were entered in the register of the public trusts as the managing trustees of the Dargah.

12. After this order was passed by the Collector, the original applicants therein filed a Civil suit registered as Special Civil Suit No. 1 of 1959 claiming a declaration that the property in dispute in respect of which registration was ordered by the Registrar, i.e. the Collector, in his order dated 30-4-1958 was a private property of their ownership and as such was not liable to be registered as a public trust u/s 4 of the MPT Act. The Charity Commissioner and others particularly those who appeared before the Collector in the proceedings for registration of the Dargah as a public trust were made parties to the said suit. The learned trial Court dismissed the said suit against which a first appeal registered as First Appeal No. 60 of 1961 was preferred by the plaintiffs in this Court. A Division Bench of this Court consisting of Patel and Wagle, JJ., by their judgement dated 6-4-1965 dismissed the appeal.

13. The next phase of litigation to be noticed then is about the registration of the Dargah as a public trust under the provisions of the Act when it was extended and made applicable to the Vidarbha Region of the State of Maharashtra. The proceedings for registration of the Dargah as a public trust were opened u/s 28(1) of the Act according to which all public trusts registered under the provisions of the MPT Act were deemed to have been registered as public trusts under the Act from the date on which it was made applicable to the Vidarbha Region. However, a further enquiry thereafter was provided for u/s 28 of the Act to be made by the Deputy Charity Commissioner or the Assistant Charity Commissioner, after giving notice to the trustees and the interested persons. The findings of the Deputy Charity Commissioner or the Assistant Charity Commissioner were made appealable to the Charity Commissioner u/s 28(2) and subject to the decision in appeal the said findings and the entries made pursuant to them in the register of the public trusts kept u/s 17 were final and conclusive. The Assistant Charity Commissioner, Akola Region, Akola who made enquiry u/s 28 of the Act in above case passed on order on 17-3-1972 for registration of the Dargah as a public trust under the Act and for making necessary entries in the register of the public trusts accordance with the findings given by him. Accordingly the entries were made in the register of the public trusts about the income of the trust, its managing trustees and its property etc.

14. After registration of the trust as a public trust under the Act as stated above it appears that the complaints were made to the Charity Commissioner, particularly at the time of the Urs in respect of collection of offerings and their misappropriation for their personal use the trustees or the Mujawars. It is out of two such complaints made in 1974 and 1978 that the proceedings in the instant cases hereinbefore referred to have arisen.

15. The learned Counsel for the respondents has urged before me that the instant appeal from order is not maintainable because no appeal is provided under the Act against the order of the learned trial Court passed u/s 41-E(4) of the Act. According to the learned Counsel for the respondents an appeal against the order of the Court is provided to the High Court only u/s 72(4) of the Act and, therefore, no other case an appeal can lie to the High Court against any other order passed by the Court under the Act. Although it is not correct to say that the appeal to the High Court is provided under the Act only u/s 72(4) of the Act, it is clear that the appeal contemplated u/s 72(4) is different and is provided for in regard to the orders passed by the Court in respect of the applications filed before it u/s 72(1) of the Act. However, the question still remains whether an appeal lies to the High Court against an order passed by the Court u/s 41-E(4) of the Act.

15-A. The learned Counsel for the respondents/non applicants has also raised an objection to the maintainability of the Civil Revision Application No. 151 of 1981 on the ground that no revision is provided under the Act against the order passed by the Court in an appeal u/s 41-E(5) of the Act. His further contention is that even assuming that an appeal from order is maintainable since the revision is not maintainable the order passed by the learned trial Court in the instant case holding that the offerings were not the trust property, operates as res judicata between the parties in the instant Appeal from Order.

16. In considering the above contentions raised on behalf of the respondents it is necessary to see some of the relevant provisions of the Act having bearing upon the said question. It is not in dispute in the instant case that an application which is the subject matter of the Appeal from Order is made by the Charity Commissioner u/s 41-E(4) of the Act. Section 41-E(1) provides that when it is brought to the notice of the Charity Commissioner through his report or by an application by at least two persons having interest supported by an affidavit that any trust property is in danger of being wasted, damaged or improperly alienated by any trustee or any other person, or that the trustee or such other person threatens, or intends to remove or dispose of that property, the Charity Commissioner may by order grant a temporary injunction or make such other order for the purpose of staying and preventing wasting or damaging. Alienation, sale, removal or disposal of such property on such terms as he may deem fit.

17. Sub-section (4) of section 41-E of the Act provides that if the temporary injunction granted by the Charity Commissioner is disobeyed by the person against whom it is issued the Charity Commissioner may apply to the Court for

attachment of the property of the person guilty of such disobedience and also for detaining him in jail. It may be noticed that the expression "Court" is defined in section 2(4) to mean, the City Civil Court so far as the Greater Bombay is concerned and elsewhere the District Court. An application under sub-section (4) of section 41E would therefore, lie to the District Court. Sub-section (6) of section 41-E then provides that the order of the District Court attaching the property of the person guilty of disobedience of an order of injunction or of detaining such person in Civil prison would be a decree appealable to the High Court. Thus under sub-section (6) of section 41-E an appeal against the order passed by the District Court u/s 41-E(4) of the Act would lie only if the property of the person guilty of disobedience of the order of temporary injunction is directed to be attached or only if he is directed to be detained in civil prison. There is no provision in section 41-E for an appeal against the order rejecting the application of the Charity Commissioner for attachment of property and for detaining the person concerned in civil prison.

18. It is, however, urged on behalf of the Charity Commissioner that section 76 of the Act provides that save insofar as they may be inconsistent with anything contained in the Act, the provisions of the C.P.C. shall apply to all the proceedings before the Court under the Act. The submission therefore, on behalf of the Charity Commissioner is that when an application filed by him u/s 41-E(4) of the Act dismissed by the Court an appeal against order would lie under Order XLIII, Rule 1(r) of the C.P.C. since the C.P.C. is made applicable by section 76 of the Act.

19. In considering the question whether the appeal can lie under the provisions of the C.P.C. it may be seen that under Order XXXIX, Rule 2-A C.P.C. after it was amended in 1976 a power granted to the Court u/s 41-E(4) of the Act is conferred upon the Civil Court in case of breach of an order of temporary injunction passed under Order XXXIX, Rule 1 or Rule 2 of the C.P.C. It may also be seen that prior to the amendment in 1976 similar provision applicable to the breach of an order of temporarily injunction under Order XXXIX, Rule 21(1) was contained in sub-rule (3) and (4) of Order XXXIX, Rule 2 of the C.P.C. Against the orders passed under Order XXXIX, Rule 2A, C.P.C. or previously sub-rules (3) and (4) prior to amendment, an appeal would lie under Order XLIII, Rule 1(r) of the C.P.C. The said provision would that cover an order by which an application for attachment or detention in civil prison is rejected by the Court.

20. It is, however, urged on behalf of the Contesting respondents that when u/s 41E(6) an appeal is expressly provided for against the order directing attachment of the property or detaining the person concerned in civil prison it should be inferred that no appeal in case of an rejecting the application for attachment of the property or for detaining the person concerned in civil prison is intended to be provided for in the statute. In support of the said submission the long age of section 76 which provides that the C.P.C. would apply except insofar as the provisions therein may be inconsistent with anything contained in this Act is

pressed into service. The submission is that when at express provision providing for an appeal only against the order directing the attachment of property or detaining the persons concerned in civil prison is made in section 41-E(6), it would mean that the statute does not intend to provide an appeal against the order rejecting the application for attachment of property or detaining the person concerned in civil prison and, therefore, the above provision of section 41-E(6) would be inconsistent with any appeal contemplated under Order XLIII, Rule 1(r) in regard to the rejection of the application for attachment or detention in civil prison. In trying to meet the above submission, it is urged on behalf of the Charity Commissioner that the nature of appeal provided for u/s 41-E(6) of the Act is different from the nature of appeal contemplated under Order XLIII, Rule 1(r), C.P.C. The submission is that the order of the Court attaching the property of the persons concerned or detaining him in civil prison is treated as a decree and as such it is made appealable to the High Court while the order rejecting the application for attachment or detention in civil prison would mean merely an order and not a decree.

21. The question, therefore, that arises for consideration in the context of the above submission is whether there is any substantial difference in regard to an appeal from the decree and an appeal against the order insofar as the order passed u/s 41-E(4) of the Act is concerned. It is urged on behalf of the Charity Commissioner that if it is an appeal against a decree on the High Court an appeal would lie under the Letters Patent to the Division Bench of the High Court whereas no such appeal would lie if it is merely an appeal against order, which contention stands supported by the decision of this Court in the case of Obedur Rehman and Another Vs. Ahmedali Bharucha and Others, which in turn has relied upon the decision of the Supreme Court in Shah Babulal Kimji v. Jayaben D. Kania, AIR 1981 S.C. 1784. No other substantial difference is, however, pointed out by the learned Counsel for the Charity Commissioner as far as the appeal against the decree and the appeal against the order is concerned.

22. In my view, the above distinction about the availability or otherwise of the remedy of an appeal under Letters Patent is far fetched and cannot by any stretch of imagination be said to be present in the mind of the Legislature while enacting section 41-E(6) and section 76 of the Act. The question has, therefore, necessarily to be considered in the light of the fact that an appeal is provided only against the order directing attachment of property or detention of the person concerned in civil prison. If it was intended that there should be an appeal against the order rejecting the application for attachment of property or detention of such person in civil prison nothing prevented the Legislature in providing that an appeal would lie against the order passed u/s 41-E(4) of the Act which then include an appeal against an order rejecting the application u/s 41-E(4) also. Section 41-E(6) which does not provide for an appeal against the order dismissing the application for attachment would thus be inconsistent with the provisions of the C.P.C. which provides for such appeal under Order XLIII, Rule 1(r), C.P.C. Moreover, it appears that the Legislature has made elaborate

provisions the Act providing for a right to appeal wherever it has considered it necessary. The submission on behalf of the Charity Commissioner that an appeal would lie against an order dismissing the application for attachment of the property or detaining the person in civil prison under Order XLIII, Rule 1(r), C.P.C. cannot, therefore, be accepted.

23. Although it is held that the instant appeal against order is not maintainable, it would not be the end of the matter. The learned Counsel for the Charity Commissioner has filed a pursis dated 15-4-1986 that if the instant Appeal from Order is not maintainable it should be treated as a Civil Revision u/s 115 of the C.P.C. The question therefore, is whether the instant appeal can be treated as a revision u/s 115 of the C.P.C., because according to the respondents no revision lies against the order of the Court in appeal u/s 41-E(5) which is also an objection raised by him to the maintainability of the connected Civil Revision Application No. 151 of 1981.

24. It is clear from the provisions of section 41-E(4) of the Act that the application for attachment of property of the person concerned or he detention in civil prison for disobedience or breach of temporary injunction lies before the Court. The word "Court" is defined in section 2(4) of the Act to mean, in the Greater Bombay, the City Civil Court and elsewhere the District Court. The expression "District Court" is not defined in the Act and the same will have to be therefore understood in the sense in which it is defined in section 7 of the Bombay Civil Courts Act, 1869. The District Court means the principal Court of original Civil jurisdiction in the district within the meaning of the C.P.C. It is thus the ordinary Civil Court of the land before which the proceedings u/s 41E(4) of the Act lie. It is therefore clear that the authority created under the Act is not an executive officer, or a mere persona designate but is an ordinary Civil Court discharging judicial functions to which the provisions of the C.P.C. are made applicable by section 76 of the Act. It is, therefore, a Court subordinate to the High Court within the meaning of section 115 of the C.P.C. and would therefore, be subject to its revisional jurisdiction. I am supported in this view by the catena of decisions of that Court, some of which are *Sholapur Municipality v. Tuljaram*, (1931)55 Bom. 544, *Surate Borough Municipality v. Hamiduddin*, (1912)XIV Bom.L.R. 94 and *Puruashottam v. Madhu*, (1938) XL Bom. LR. 387 . However, the question is no more in doubt in view of the decision of the Supreme in the case of *Chhagan Lal Vs. The Municipal Corporation, Indore*, The instant Appeal from Order No. 7 of 1981 is therefore directed to be treated as a revision u/s 115 of the C.P.C.

25. I may now consider the question whether a revision filed against the impugned order of the learned trial Court i.e. C.R.A. No. 151 of 1981 is maintainable or not. It may be seen that against an order of the learned Charity Commissioner passed under subsection (1) of section 41-E of the Act granting temporally injunction or making such other order relating thereto as he may deem fit an appeal is provided u/s 41-E of the Act to the Court. It is under this

provision that an appeal was filed by the non-applicants in Civil Revision Application No. 151 of 1981 against the order of the Charity Commissioner granting temporary injunction u/s 41-E(1) of the Act. However, relying upon subsection (7) of section 41-E of the Act what is urged is that the order of the learned Charity Commissioner would subject to any order of the Court in appeal be final. The submission, therefore, is that where an appeal is preferred against the order of the Charity Commissioner the order in appeal passed by the Court would be final and no revision would lie against its order u/s 115 of the C.P.C. The learned Counsel for the non-applicants has relied upon the following decisions in support of his contention that the word "final" would exclude a revision, *Vishesh Kumar Vs. Shanti Prasad*, and *Hiralal v. Parasramrao*, AIR 1942 Nag. 5.

26. As regards the judgment of the Supreme Court in the case cited supra it may be seen that the question therein was whether a revision would lie u/s 115 of the C.P.C. against the order passed by the District Judge in the revisional jurisdiction conferred upon him u/s 25 of the Provincial Small Causes Courts Act, 1887 as amended by the State of Uttar Pradesh. It is clear from para 17 of the said judgment that in view of section 7 of the C.P.C. excluding the application of sections 96 to 107 and section 115 of the C.P.C. to the Court of Small Causes, and in view of section 25 of the said Act making a specific provision for revisional jurisdiction conferred the power upon the District Judge with a view to relieve the High Court from the burden of its revisional jurisdiction as held in the said para it was held that no further revision would lie u/s 115 of the C.P.C. against the order in revision passed by the District Judge u/s 25 of the said Act.

27. The aforesaid decision in my view is altogether a different one and the view taken therein is based upon the specific provisions of the Provincial Small Causes Courts Act as amended in the State of Uttar Pradesh. In the instant case no revision is provided against the orders passed by the Court under the provisions of the Act. On the contrary the provisions of the CPC except insofar as they are inconsistent with the provisions of the Act are made applicable to the proceedings before the Court. The Scheme of the Act would show that a revision against the order of the District Court in appeal u/s 115 of the C.P.C. is not intended to be barred. The use of the expression "final" in section 41-E(7) of the Act would only show that there would be no further appeal in the matter but that would not mean that no revision would lie against the order passed in appeal u/s 41-E(5) of the Act. This is clear from the judgment of the Supreme Court in the case of *Chhagan Lal Vs. The Municipal Corporation, Indore*, cited supra in which the revision u/s 115 of the C.P.C. against the order of the District Court which was final was held maintainable.

28. As regards the decisions of the then Nagpur High Court in the case of *Hiralal v. Parasramrao*, AIR 1942 Nag 5 relied upon on behalf of the non-applicants it may be seen that there was an express provision that no application for revision would lie against "such order which expression was construed to mean the order

of the District Court. It was, therefore, held in the said decision that a revision was not maintainable u/s 20 of the C.P.C. Berar Relief of Indebtedness Act 1939. A perusal of the said decision would, however, show that the meaning of the expression "shall be final" is not construed therein and the view taken therein was based upon the aforesaid express provisions in the section itself. The above case is, therefore, of no assistance to the non-applicants in the instant case. It may, however, be seen that in the subsequent decision in the instant case of *Shrinivas Laxman Rao v. Supdt., Government Printing Press, Nagpur*, AIR 1945 Nag 94 the said High Court itself held that the using the word "final" in such provisions precludes any further appeal but not a revision. The same view is taken by the Madras High Court in the case of *Arumugham v. Jawaher Mills*, AIR 1956 Mad. 79 and by the Calcutta High Court in the case of *Jogendra Nath Chatterjee and Sons Vs. Chandreswar Singh*, . The objection to the maintainability of the instant revision is therefore, rejected. Since the revision is maintainable the contention about the impugned order in the revisional proceedings operating as *res judicata* in the Appeal from order against the order of Charity Commissioner would not, therefore, also survive for consideration.

29. Turning to the merits of the case, as already pointed out the basic question is whether the offerings made at the Dargah are the property of the public trust or are the property of the respondents. The said question needs to be decided in the light of the orders which are already passed by the competent courts and which are referred to above. The said question is not *res integra* in the proceedings u/s 41-E of the Act. It is, therefore, necessary to consider whether in the light of the orders passed in the prior proceedings it is held that the offerings are the property belonging to the public trust. In order to appreciate the rival submissions a few facts which are not in dispute may be noticed. It is not in dispute that Survey No. 140/1 belonged to the predecessors-in-title of the non-applicants. It is further not in dispute that there is a Tomb of Sailani Shah Baba upon the said land. It may also be seen that even according to the non-applicants when the deceased Saint Sailani Baba Shah was alive he was living upon the said land and during his life time was also visited by a number of people. After his death his tomb was constructed in Survey No. 140/1 sometime in the year 1908. A number of people always used to visit the Tomb and there were also annual Urs at the said spot during March-April every year. The predecessor of the non-applicants who constructed the Tomb claimed to be the disciple of the said Sailani Baba Shah and after his death a *Mujawar*. According to the non-applicants they and their predecessors were *Mujawars* of the Tomb as they were rendering certain services for the upkeep and maintenance of the Tomb. As *Mujawars*, they were entitled to and were receiving the offerings made by the people visiting the Tomb. That is how the claim of entitlement to the offerings to the tomb in the field Survey No. 140/1 is made by the non-applicants.

30. When some persons who formed a Panch Committee dispossessed the predecessors of the non-applicants of their possession of the Tomb area i.e. field

Survey No. 140/1 and when they also threatened their right to collect the offerings at the Tomb they filed the Civil Suit No. 36 of 1939 referred to above for possession of the field Survey No. 140/1 i.e. the place where their predecessor had constructed the Tomb and for declaration of their right to receive the offerings and to render services at the tomb. Although in the trial Court the suit of the non-applicants was decreed, in appeal although the decree for possession was maintained with certain restrictions the claim about declaration that the non-applicants were the Mujawars of the Tomb and were entitled to receive the offerings was not granted by the lower Appellate Court. In the second appeal filed by the defendants in the said suit in the Nagpur High Court there was a cross objection filed by the plaintiffs in the said suit i.e. the predecessors of the non-applicants in the instant revision for declaration that they were Mujawars and that they were entitled to receive the offerings at the said Tomb. In the second appeal the then Nagpur High Court held that it was not necessary for it to decide whether the plaintiffs in the said suit were Mujawars of the Tomb and were, therefore, entitled in that capacity to receive the offerings. However, since the plaintiffs were entitled to the possession of the suit property a declaration was granted that the plaintiffs in the said suit would be entitled to receive the offerings as are made at the Tomb being the persons at any rate who were entitled to possession and control of the Tomb. It is, therefore, clear that the question whether the plaintiffs in the said suit were Mujawars and, therefore, in the capacity were entitled to receive the offering was not decided in the said second appeal. There is, therefore, no merit in the contention on behalf of the non-applicants that under the said judgment they were entitled to offerings in their capacity as Mujawars.

31. However, the question whether the non-applicants are entitled to offerings as Mujawar and whether the offerings are trust property is considered by the Collector in his capacity as a Registrar of Public Trusts when the proceedings were initiated originally by one of the non-applicants himself (by Sk. Kasam) for registration of the Dargah as public trust, although, later on, the said non-applicants claiming himself to be a Mujawar changed his stand and claimed that the Dargah was not a public trust and should not therefore be registered as a public trust, under the provisions of the MPT Act. The said proceedings for the registration of the public trust were decided by the Collector by his order dated 30-4-1958. After referring to the order passed in the second appeal by the then Nagpur High Court referred to above and after considering the submissions of the parties the learned Collector held that the Dargah was a public trust within the meaning of section 2(4) of the MPT Act. In para 9 of his order he held that whatever rights of the non-applicants were accepted by the law courts they would continue subject to the provisions of the Public Trust Act and the said rights would include the right of the possession of the Tomb and the right to receive the offerings made at the Tomb, which rights, it may be seen, are preserved according to the judgment in the aforesaid second appeal. The Collector by his aforesaid order dated 30-4-1958 directed that the Dargah should

be registered as a public trust u/s 4 of the MPT Act and the names of the applicants therein should be entered as managing trustees of the Dargah.

31-A It is thus clear from para 3 of the aforesaid order of the Collector that the rights which are granted in the second appeal to the non-applicants would continue subject to the provisions of the Public Trusts Act. In other words it would mean that the right to receive the offerings granted in the second appeal as well as the right to control and management of the Tomb would be subject to the provisions of the MPT Act. What the effect of this restriction is, I may consider a little later.

32. At this stage, I may refer to the judgment in First Appeal No. 60 of 1961 rendered on 6-4-1965 by the Division Bench of this Court. As already stated after the Dargah was registered as a public trust as per the aforesaid order of the Collector a suit was filed by the non-applicants for a declaration that the Dargah which was registered as a public trust by the collector was not liable to be registered as a public trust u/s 4 of the MPT Act. The said Civil Suit being dismissed the non-applicants preferred the first appeal in this Court which also was dismissed. However, what is urged on behalf of the non-applicants on the basis of the judgment in the first appeal is that their right to receive the offerings and that the offerings were their private property was accepted by this Court in the First Appeal. In my view, a perusal of the said judgment would show that no such right in regard to offerings at the Tomb is adjudicated in the said case much less accepted. It may be seen that the civil suit filed by the non-applicants as would appear from para 5 of the said judgment was only in respect of the question whether the trust was liable to be registered as a public trust u/s 4 of the MPT Act or not which is alone considered by this Court in the First Appeal. In fact the contesting defendants sought to raise a contention in the said case that the plaintiffs therein were not entitled to receive the offerings which contention was not allowed to be raised because no suit was filed by them challenging that part of the order by which the Collector allowed the plaintiffs therein to receive the offerings.

33. Thus in my view it would be clear that the principal order upon which the decision on the question whether the offerings are a trust property or a private property depends is the order of the Collector passed u/s 4 of the MPT Act. It is however necessary to see that after the Bombay Public Trusts Act, 1950 was extended to the Vidarbha Region replacing the MPT Act, an enquiry was made by the Assistant Charity Commissioner, Akola as provided u/s 28 of the Act in regard to the instant trust which was already registered under the MPT Act. He thereafter passed an order on 17-3-1972. The learned Assistant Commissioner had framed in his order necessary points for determination. Two relevant questions from the point of view of this case are covered by the points Nos. 7 and 10 framed by him which relate to the gross annual income and expenditure of the trust and the sources of its income. After holding that the Dargah was a public trust relying upon the judgment of this Court in First Appeal No. 60 of

1961 referred to above, the learned Assistant Charity Commissioner rendered his findings in terms of the order passed by the Collector under the MPT Act. In accordance with his findings the relevant entries were then made in the register of public trusts which is required to be maintained in the form prescribed under the Act and which are final and conclusive u/s 28(3) of the Act subject to nay appeal if preferred as provided under the Act.

34. A perusal of the entries in the register of the public trusts shows that the names of the non-applicants Mujawars are entered therein as managing trustees the trust. The object of the trust is shown as maintenance and upkeep of the Tomb. The mode of succession is shown as hereditary. The movable property shown is column No. 8 is tin patre while the immovable property shown in column No. 12 is the Tomb of Sailani Sheikh Baba, and the field Survey No. 140/1 with the site and the land on which it stands. In Column No. 16 the income received from the property in column No. 8 and 12 is shown as Rs. 600/-. As stated above the column No. 12 relates to the immovable property i.e. the Tomb of Sailani Shah Baba and Column No. 8 relates to the movable property i.e. the tin patres. It is clear that there would be no regular income from tin patres. The annual income shown in column No. 16 would, therefore, relate to the income which is received from the Tomb. It cannot be disputed that the only income received from the Tomb was of the offerings which were made at the Tomb. After therefore reading the entries made in the register of the public trusts in the light of the order passed by the Assistant Charity Commissioner under the Act and also the order of the Collector under the MPT Act it would be clear that although the right of the non-applicants to receive the offerings is maintained none the less the offerings are treated as property of the trust, and not the private property of the trust, and not the private property of the Mujawars. A perusal of para 9 referred to above of the Collector order under the MPT Act has amply made clear that the rights of the non-applicants would be subject to the provisions of the Public Trusts Act which would clearly mean that although the non-applicants may receive the offerings, the offerings would be the trust property and would be subject to the control under the Public Trusts Act.

35. It may be seen that section 79 provides that the questions whether a particular trust is a public trust and whether a particular property is a property of the public trust have to be decided by the competent authorities under the Act whose decisions are final and conclusive as even a suit in that regard is barred u/s 80 of the Act. It would have, therefore, to be held on the basis of the entries in the register of the public trusts that the offerings made at the Tomb are trust property. Although in para 9 of the order of the Collector dated 30-4-1958 on the basis of which the entries are made in the register of the public trusts it is stated that the rights of the non-applicants as Mujawars are not affected in any manner, it is clear from the said para that their rights are subject to the provisions of the Public Trusts Act, which would mean that the authorities under the Public Trusts Act would have control and supervision over the exercise of those rights by the non-applicants and that they would have to exercise the said rights in

accordance with the provisions of the Public Trusts Act.

36. It is necessary at this stage to consider what the exact content of the right of the non-applicants as Mujawars is in respect of the offerings to the Tomb. It is the case often non-applicants themselves based upon the previous Civil Suit No. 36-A of 1939 that they are Mujawars of the Tomb and hence are entitled to render services to the Tomb and to receive the offerings made at the Tomb. It is clear from the aforesaid civil suit that the services which they are required to render according to them are several and include lighting arrangements at the Dargah at night, keeping the building clean, management of the Urs and/or procession taken out at the time of the Urs and staying at the Dargah.

37. To appreciate the submission about the rights of Mujawars I may refer to the concept of a Mujawar under the Mohomedan Law. A Mutawali under the Mohomedan law is a person who manages the mosque or the shrine and a Mujawar is an inferior servant who manages or renders service at the Tomb or a shrine. It is clear from para 202 of principles of Mohomedan Law by Mulla (11th Edn.) by M. Hidayatullah that the Mutawali has no right in the property belonging to the wakf because all rights of property pass out of the waking and vest in the Almighty the moment a wakf is created. He is not even a trustee in the technical sense but is merely a superintendent or a manager. Similarly a Mujawar also, therefore, cannot be said to be a trustee and in his case also the Tomb area cannot vest in him as an owner but he has only to render certain services at the Tomb area i.e. about the upkeep and maintenance of the Dargah for which he may receive certain payment from the trust. He is not the owner of the offerings at the Dargah which belong to the Dargah or the trust itself.

38. The rights and duties of the Mujawars have been fully considered by Tyabji, J., in the case of Mohamed Oosman & others v. Essak Saleem Ahomed, ILR (1938) Bom. 184. The view taken in the above case is as follows. A Mujawar is a servant of a Mohamedan Shrine or Mosque. The claim of a Mujawar to act as an intermediary or as an intercessors between God and man is opposed to Islamic teaching. The Medan Law. Even if such office is known to the law where there is no clear proof of long user, there can be no claim to it by hereditary succession. Mujawars have ordinarily no claim to offerings made at to offerings made at Dargah. These offerings are to be dealt with but the trustees, in accordance with the scheme for the upkeep of the Dargah, or the provisions of the waqfnama. After the expenses necessary for the upkeep of the Dargah are provided form the surplus income may be applied for general religious or charitable objects. In the case of Abdul Aziz v. Mohamed Ibrahim, AIR 1941 Bom. 238, Divatia, J., also held that Mujawar is a servant at the Tomb for doing service at the Tomb and the property of the Tomb does not vest in him.

39. It is, therefore, clear that the offerings to the Tomb even though received by the non-applicants as Mujawars cannot be held to be their private property but must be held to be the property of the public trust. They are, therefore, entitled to spend the amount for the upkeep and maintenance of the Tomb and for all

purpose connected with the Tomb such as Urs etc. and may claim reasonable amount for services rendered by them. They would, however, be liable to account for the income from the offerings and if there is any surplus, it can be utilised for certain other religious and charitable purposes. They would, therefore, be subject to the provisions of the Act. It may be seen, however, in the instant case that the offerings which are a trust property would be received by the non-applicants not because they are Mujawars but because they are managing trustees of the public trust as recorded in the Register of public trusts. They would, however, be subject to the obligations and liabilities of a trustee under the Act and would thus be subject to the provisions therein. This is what is meant by the learned Collector in para 9 of his order dated 30-4-1958 when he directed that the rights of the Mujawars would be subject to the provisions of the public Trusts Act. Really speaking in the instant case the above order of the Collector is the mainstay of the arguments on both the sides and in fact clinches the issue against the non-applicants. The finding recorded by the learned trial Court that the offerings at the Tomb are not the trust property, is therefore, liable to be reversed.

40. Once it is held that the offerings at the Tomb are the trust property the learned Charity Commissioner had power to issue temporary injunction against the non-applicants if he found that the non-applicants as trustees did not keep any account and did not submit them to the Charity Commissioner as required by the provisions of the Act. In this view of the matter the Civil Revision Application No. 151 of 1981 deserves to be allowed and the impugned order therein under deserves to be set aside.

41. As regards the Appeal from Order (treated as revision) No. 7 of 1981, the subject matter of which is the application made by the Charity Commissioner for attachment of the property of the non-applicants and for detaining them in civil prison on the ground that they have breached the temporary injunction issued by him u/s 41-E(1) of the Act it would appear that except holding that the receiver was obstructed by the Mujawar Sheikh Kasam there is no fully-fledged enquiringly by the learned trial Court perhaps in view of his finding that the offerings were not the trust property. In the first instance the finding will have to be rendered by the learned trial Court whether all the non-applicants have disobeyed or breached the temporary injunction. If so whether their property should be attached and whether any or all of them should be detained in civil prison. Incidentally it may become necessary for him to determine the list if any, caused to the trust on account of the conduct of the non-applicants and to pass suitable orders in that regard. It is, therefore, necessary to remand this case for a fresh decision on merits by the learned trial Court.

42. In the result, the civil Revision Application No. 151 of 1981 allowed. The order of the learned trial Court setting aside the temporary injunction granted by the Charity Commissioner is set aside and that of the Charity Commissioner granting temporary injunction is restored. The Appeal from Order No. 7 of 1981

(treated as revision) is allowed. The impugned order of the learned trial Court therein is set aside and the proceedings in the said case are remanded to him for fresh decision by him according to law. However, in both these cases, there would be no order as to costs.