

(2008) 01 GUJ CK 0069

In the Gujarat High Court

Case No : Special Civil Application No. 11433 of 2007

Devkrushnadasji Guru Dharmadasji and Others

APPELLANT

Vs

The State of Gujarat and Others

RESPONDENT

Date of Decision : 24-01-2008

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 22, 22A, 3, 32, 33
Constitution of India, 1950 — Article 25, 26

Citation : (2008) 3 GLR 1981

Hon'ble Judges : Jayant Patel, J

Bench : Single Bench

Advocate : S.B. Vakil and N.D. Nanavati, for D.P. Kinariwala, for Petitioner Nos. 1 - 4, for the Appellant; Government Pleader for Respondent 1, Y.F. Mehta, for Respondent 1, Harin P. Raval, for Respondent 2, J.J. Yajnik, for Respondent 2 and R.A. Mishra, for Respondent 3, for the Respondent

Judgement

Jayant Patel, J.—The petitioners have preferred the petitioner for appropriate writ to quash and set aside the order dated 2.2.2007 passed by the Joint Charity Commissioner, Rajkot u/s 41A of the Bombay Public Trust Act (hereinafter referred to as "the Act") below Application No. 41/5/07. The petitioners have also prayed to issue appropriate writ of prohibition against the respondents from proceeding further upon the application filed by respondents No. 2, 3, and 4 u/s 41A of the Act.

2. Heard Mr. S.B. Vakil and Mr. N.D. Nanavati, learned Sr. Counsel with Mr. Kinariwala, learned Counsel for the petitioners, Mr. Y.F. Mehta, learned Counsel for the Charity Commissioner, who is titled as State of Gujarat, Mr. P.M. Thakkar, learned Sr. Counsel for respondent No. 2, Mr. K.S. Nanavati, learned Sr. Counsel for respondent No. 3 and Mr. Yagnik, learned Counsel for respondent No. 4.

3. It has been contended on behalf of the petitioners that the Charity Commissioner has no power u/s 41A of the Act to issue the interim directions, which are issued as per Annexure "SA". It is also submitted that the petitioner

No. 1 had submitted change report u/s 22 of the Act, whereby respondent No. 2 was removed as the Trustee and he also submitted another change report whereby petitioner Nos. 2, 3, and 4 are appointed as the Trustees and in response to the said change report, the objections are filed and the matter is yet to be inquired u/s 22A of the Act. Therefore, the direction, if any, can be given by the competent officer namely; The Assistant or the Deputy Charity Commissioner, who has to exercise the power u/s 22 read with Section 22A of the Act and not the Joint Charity Commissioner or the Charity Commissioner u/s 41A of the Act. It has been further submitted that when there is express power u/s 22 read with Section 22A of the Act for deciding the question as to whether the Trustees are rightly appointed or rightly removed, the power u/s 41A cannot be resorted to, which can be said as residuary power. In furtherance to the submission, Mr. Vakil contended that even if the powers u/s 41A of the Act are to be resorted to, then also such powers can be exercised only in cases, which are falling under Sections 32 to 41 of the Act and are not available in any other case and, therefore also, in his submission, the order can be said to be without authority or jurisdiction. In support of his submission, he relied upon the decision of this Court in case of *SSyedna Mohamed Burhanuddi the 52nd Dai-ul-Multaq and Head of the Dawoodi Bohra Community v. Charity Commissioner, Gujarat State, Ahmedabad and Ors.* reported in 1992(1) GLH 331 and he mainly emphasized upon the observations made by the Division Bench in the said decision at para 36, where the language used is *“The only purpose which, therefore, Section 41A serves is to empower the Charity Commissioner to issue directions in respect of matters falling u/s 32 to 41.”*

4. He also contended that the aforesaid decision of the Division Bench has subsequently followed by this Court in case of *Navinchandra Jasani and Others Vs. Pravinchandra Jasani and Others*, and, therefore, he submitted that in a matter where the subject matter is concerning to the change of Trustees, it would fall outside the scope and ambit of Sections 32 to 41 of the Act and, therefore, the order can be said as without jurisdiction. It was also submitted that when the application u/s 41A of the Act was filed before the Charity Commissioner, the petitioners did raise preliminary objections regarding the maintainability of the application and it was required for the Charity Commissioner to decide the preliminary points and he ought not to have examined the other merits of the matter. In spite of the same, the other aspects of the case are examined and, therefore also, the order is bad in law. He also contended that the other side is mainly relying upon the another decision of Division Bench (Coram: Mr. Justice R.K. Abichandani (as he then was) and Mr. Justice D.H. Waghela) of this Court in case of *Navsari Taluka Halpati Shikshan Prachar Sangh v. Joint Charity Commissioner LPA No. 2 of 2004 in SCA No. 16051 of 2003*, but, in his submission, the Coordinate Bench of this Court namely the other Division Bench could not have taken a different view, unless reference was made to Larger Bench and he also contended that the observations made by the Division Bench in the later judgement in case of

Navsari Taluka Halpati (supra), more particularly at para 6 can be said as per incurium and, therefore, he submitted that this Court may not rely upon the later decision of the Division Bench of this Court in case of Navsari Taluka Halpati (supra). He submitted that as the order has been passed without jurisdiction, the same be quashed by this Court and appropriate writ of prohibition may be issued by this Court restraining the Charity Commissioner from proceeding with the proceedings u/s 41A of the Act.

5. Mr. Thakkar, learned Counsel appearing for respondent No. 2 by relying upon the Trust Deed contended that the petitioner No. 1 was the Managing Trustee, however, vide Resolution dated 17.11.2006 of the meeting, copy whereof is produced at page 46, in which the petitioner No. 1 was also present, in his place, as the Managing Trustee, Shri Balakrishnadas Swamy was appointed as the Managing Trustee and various businesses were transacted at the said meeting to ensure that the functioning of the Trust is transparent and is being made for the larger interest of the beneficiaries, including that of proper accounting of the income and expenditure, the constitution of the local committee for advice, etc. He submitted that based the said resolution change report was also submitted by the petitioner No. 1 under his signature, which is subsequently withdrawn by him without there being any authorization by the resolution of the other Trustees. He submitted that thereafter the petitioner No. 1 on his own, on 13.1.2007 based on the opinion of one Advocate Shri Thakkar, removed respondent No. 2 as the Trustees and on 17.1.2007, he on his own, appointed petitioners No. 2, 3, and 4 as the Trustees of the Trust and the change reports without authority were filed, which are objected by respondents. Mr. Thakkar submitted that the action of the petitioner No. 1 for removal of respondent No. 2 and to appoint petitioners No. 2, 3, and 4, can be said as not supported by any resolution of the Trustees, contrary to the Trust Deed and without there being any authority with him for such action. He also submitted that after the impugned order was passed ?? Annexure ?SA?? by the Joint Charity Commissioner on 13.3.2007 pending the proceedings the application was submitted for extension of the interim order passed earlier and below the said application the learned Counsel for the petitioners did not object for extension and based on such declaration, the Charity Commissioner passed the order of concluding the pleadings and hearing of Ex.1 and only then the interim order is continued till further orders. He, therefore, submitted that in view of the aforesaid conduct on the part of the petitioners in declaring before the Charity Commissioner no objection for extension, they would not be entitled to challenge the earlier order dated 2.2.2007 and in any case, would not be entitled to invoke the discretionary jurisdiction by this Court as they are estopped from assailing the order dated 2.2.2007 in view of the subsequent conduct on 3.3.2007 before the Jt. Charity Commissioner. Mr. Thakkar submitted that if the normal mode of removal is not followed or if the action is in contrary to the Trust Deed, there is power with the Charity Commissioner u/s 41A to issue directions. He submitted that such powers are read by the Division Bench Judgement of this Court in case of Navsari

Taluka Halpati (supra). He also relied upon the provisions of Section 69A read with Section 3 of the Act to show that there are powers of General Superintendent over the administration of the Trust and, therefore, in any case, the Charity Commissioner will have power to issue the directions. He also relied upon another decision of this Court (Coram: N.N. Mathur, J.) reported in 1997(1) GLH 16 and he pressed in service the observations made by this Court in the above referred judgement, at para 11, 12, and 13. Mr. Thakkar also relied upon another judgement of the Single Judge of this Court reported at 2005(9) GJH 613 and pressed in service, the observations made at para 30 of the said decision. He, therefore, submitted that the order cannot be said as without jurisdiction.

6. Mr. Thakkar, learned Counsel for the petitioners also contended that pending the petition the hearing before the Charity Commissioner below Ex.1 has proceeded and the petitioners have also participated in the said proceedings. However, in view of the oral direction of this Court, the Charity Commissioner has passed the order, but has put it in the sealed cover and, therefore, he submitted that in view of the subsequent change in the circumstances, this Court may consider the matter for declaring the petition as having become infructuous since the petitioners may have the remedy to challenge the final order and when this Court is to consider the matter, the view of the Charity Commissioner expressed finally below the main application may also be considered.

7. Mr. Nanavati, learned Counsel appearing for respondent No. 3, while supporting the submissions made on behalf respondent No. 2 contended that if this Court is considering that there is power with the Charity Commissioner to issue the directions, whether application is moved u/s 41A or the power is exercised by the Charity Commissioner u/s 41A or Section 69(a) would be irrelevant and it cannot be said that there is no power at all with the Charity Commissioner to issue such directions. He contended that the directions issued by the Charity Commissioner and the power conferred u/s 41A read with Section 69(a) be read, keeping in view the intention of the Legislature and the conferment of the general powers of Superintendence vested to the Charity Commissioner u/s 3 of the Act. He submitted that Section 41A can be segregated into two parts for exercise of the power by the Charity Commissioner; first part deals with the proper administration and the second part deals with the proper accounting of the income and its due appropriation for the purpose of the Trust and, therefore, he submitted that if the first part of Section 41A is considered, the Charity Commissioner has power to issue the directions for proper administration of the Trust, which would include the question of removal or induction of the Trustees and to meet with the interim situation arising therein, either u/s 22A or other situations which are not contemplated or foreseen in under the Act. He also submitted that the business transacted at the meeting on 17.11.2006 were essentially to see that there is proper functioning of the Trust and the income is accounted and the proper record is maintained under the Supervision of the Trustees and there is also local committee appointed but the

same was not acceptable to petitioner No. 1, subsequently the change report is withdrawn and the action is taken for removal and for induction of new Trustees. He, therefore, submitted that in such situation, the order cannot be said as without jurisdiction u/s 41A or the other provisions of the Act.

8. Mr. Yagnik, learned Counsel appearing for respondent No. 4 mainly supported the submissions made on behalf of the respondents No. 2 and 3 and he contended that there is power with the Charity Commissioner to issue interim directions. He contended that the direction issued by the Charity Commissioner u/s 41A(1) is binding under Sub-Section(2) of the said Section to all Trustees and, therefore, it is not open to the petitioners to challenge the said directions.

9. Mr. Mehta, learned Counsel appearing for the Charity Commissioner submitted that the preliminary point has been considered by the Charity Commissioner in the impugned order and directions have been issued for larger interest of the Trust. He also submitted that pending petition after hearing both the sides, the Charity Commissioner has also passed the order, but since the oral direction was issued not to pronounce the order and to put it in a sealed cover, the Charity Commissioner has acted accordingly and he submitted that the Charity Commissioner may be permitted to pronounce the order.

10. Mr. Vakil and Mr. N.D. Nanavati, learned Counsel appearing for the petitioners, in response to the submissions made on behalf of the respondents, further contended that the petition cannot be said as having become infructuous, more particularly because pending the petition hearing has proceeded, but there was oral directions issued by this Court not to pronounce the order and to put it in sealed cover. He also submitted that the no objection below application for extension would not operate as a bar to the petitioners, if there is no power with the Charity Commissioner under the law and in his submission, in any case, the reliefs prayed in para 8(C) being the writ of prohibition cannot be said as barred if there is no power with the Charity Commissioner to continue with the proceedings u/s 41A of the Act. He submitted that the equity cannot override the express provisions of law and, therefore, if there is no power with the Charity Commissioner u/s 41A of the Act, this Court may issue writ of prohibition. He also submitted that the later decision of the Division Bench of this Court in case of Navsari Taluka Halpati (supra) was in facts of the case that the Charity Commissioner had issued the directions for holding of the election of the Trustees and such fact situation cannot be said at par with the present case and, therefore, the observations made by the Division Bench in the judgement in the aforesaid case may not apply to the facts of the present case, whereas in his submission, the earlier decision of the Division Bench in case of "Syedna Mohamed Burhanuddi" (supra) would apply since it was a decision rendered by the Division Bench while examining the powers u/s 41A of the Act. However, he fairly submitted that as per the observations made by the Division Bench in case of "Syedna Mohamed Burhanuddi" (supra) the Division Bench has not read down the provisions of Section 41A of the Act. He also submitted that the judgement of

this Court (Coram: N.N. Mathur, J.) would not apply to the facts of the present case and more particularly when there is express provisions under the Act of deciding the dispute for appointment or removal of Trustees u/s 22 of the Act. He submitted that Section 69(a) would have no applicability when the Charity Commissioner is exercising the power u/s 41A of the Act and in any case, the powers u/s 69(a) of the Act would also have no applicability when there is express provisions under the Act and, therefore, he submitted this Court may issue appropriate directions.

11. For the scope and ambit of power u/s 22 of the Act, Mr. Vakil relied upon the judgement of this Court in case of Shantilal Khimchand and Ors. v. Mulchand Dalichand and Ors. reported in 1962 GLR 117 and more particularly the observations made at page 121. It has been submitted on behalf of the petitioners by the learned Counsel that when there is express provisions u/s 22 of the Act, this Court may not expand the scope of Section 41A of the Act so as to enable the Charity Commissioner to exercise the power in all such matters, where the Trustees are appointed or removed. Therefore, it has been submitted that this Court may issue appropriate directions.

12. Section 41A of the Act for ready reference reads as under:

Section 41A.:

For Gujarat only - Power of Charity Commissioner to issue directions to Trustees and other persons

(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 purpose 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).

13. This Court had an occasion to consider the challenge made to Section 41A of the Act ("Syedna Mohamed Burhanuddi" (supra)) and after considering various provisions of the Act at para 36, the Division Bench of this Court observed as under:

36. A quick glance at these provisions to which all religious trusts are subject makes it clear beyond any doubt that the three matters which Section 41A provides for - (a) proper administration of a public trust, (b) proper accounting of its income, and (c) due appropriation and application of the income to the objects and for the purposes of the trust ?? are abbreviated expressions of those very matters which Sections 32 to 41 provide for. The only purpose which, therefore, Section 41A serves is to empower the Charity Commissioner to issue directions in respect of matters falling under Sections 32 to 41. It is, therefore, merely an enabling and ancillary provisions intended to make the implementation

and enforcement of the provisions of Sections 32 to 41 more effective. In our opinion, therefore, by enacting Section 41, the Legislature has not introduced any new principle which is not there elsewhere but has merely filled in an lacuna in the effective implementation of the provisions of the said Act. We are, therefore, unable to countenance an argument that though Sections 32 to 41 are valid, Section 41 is not. Even though Section 41A is intended to confer upon the Charity Commissioner only such an ancillary power, the Legislature has been careful enough to circumscribe the power of the Charity Commissioner by subjecting it to the provisions of the said Act. The impugned section, therefore, opens with the expression "Subject to the provisions of this Act". In our opinion, therefore, it does not impinge upon any fundamental right of a person or a religious denomination and it does not suffer from any constitutional infirmity. In that view of the matter, it is not necessary for us to read it down so as to exclude its application to religious trusts. The first contention, raised by Mr. Sen, therefore, fails and we reject it.

14. It is hardly required to be stated that the observations made by the Court in its judgement are to be read in facts of that case and cannot be read in piece meal, but are to be read keeping in view the other observations too. The first contention, raised before the Division Bench in the aforesaid decision, was that Section 41A is ultra vires Articles 25 and 26 and it was also alternatively contended that it be read down so as to hold that it has no application to the Public Trust of the religious denominations. The aforesaid aspect is apparent on the last four lines of para 20 of the above referred decision of the Division Bench. Therefore, while examining the contents of Section 41A of the Act vis-a-vis the provisions of Article 25 and 26 of the Constitution of India, the aforesaid observations are made and second aspect is that the Court also considered the question as to whether the provisions of Section 41A should be read down or not. This Court in the aforesaid decision in view of the observations made, which are reproduced herein above, expressly negated the contentions that Section 41A of the Act violates Article 25 and 26 of the Constitution of India to apply to the Trust of a religious domination and it also negated the contention that Section 41A should be read down. Therefore, the consequential effect is that Section 41A of the Act exists on the statute book as it was and this Court itself has bifurcated Section 41A into three parts; (a) for proper administration of a Public Trust; (b) for proper accounting of the income and (c) for due appropriation and application of the income to the objects and for the purposes of the Trust. Therefore, the subsequent observations, which are pressed in service by the learned Counsel for the petitioners can be said as for touching to proper accounting of the income and its due appropriation and application of the income to the objects and purpose of the Trust.

15. Therefore, such observations cannot be read as for curtailing the scope u/s 41A and more particularly, the above referred part (a) as sought to be canvassed. The aforesaid is supported by the subsequent order of the Division Bench of this Court in the case of Navsari Taluka Halpati(Supra) in which, at para

7, it was observed by the Division Bench as under:

The power of the Charity Commissioner to issue directions to ensure that the trust is properly administered is by its very nature a wide power. Administration of a trust would mean administration by a body which under the trust deed is required to administer the same. When the trust deed provides for a periodical election of the trustees for the purpose of administration of the trust and if the body is not constituted as required by the terms of the trust deed, the Charity Commissioner would have powers to give directions for holding the election as contemplated by the trust deed which will have a direct impact on the aspect of administration of the trust, because, in absence of a properly elected body as required by the trust deed, a proper administration of the trust cannot be ensured. The direction requiring an election to be held as per the terms of the trust deed would, therefore, fall within the powers of the Charity Commissioner to ensure proper administration of the trust. The administration of the trust would include various aspects which would fall under the provisions of the Act and in absence of a properly constituted administrative body, the affairs of the trust can hardly be conducted in furtherance of its objects. It is, therefore, clear that the directions to hold elections of the trustees in consonance with the terms of the trust deed would clearly fall within the ambit of Section 41A of the Act.

16. Therefore, it cannot be said that the later decision of the Division Bench in the case of Navsari Taluka Halpati(Supra) is taking a different view than the view taken by the earlier Judgement of this Court in the case of Syedna Mohamed Burhanuddin (Supra).

17. The reliance placed upon the decision of this Court in the case of Navinchandra Jasani & Ors. (Supra) by the learned Counsel for the petitioner is also ill-founded inasmuch as, in the said case, the facts before the Court was that certain persons applied for becoming the member of the Trust on the ground that they were originally native of Veraval who were required to stay outside Veraval for professional purposes and such membership was denied by the Trust and therefore, the powers were invoked u/s 41A to treat the members who were denied membership at par with the other persons who were members of the Trust and to restrain the trustees from using the properties of the Trust as beneficiaries and to direct the Trust to admit them as members. In the said case, until the person is admitted as member, no right would flow even as per the Trust Deed and therefore, in context to the fact situation of the said case, it was observed by this Court inter alia at para 6 that -

The question of right to be admitted as members of the Trust is an independent right which a person may be claiming upon the terms and conditions of the Trust against the Trustees of the Trust. In assertion of such right, an inquiry is required to be held for the purpose of establishing the case to whether the applicants who are the ascertaining the right, are covered by the eligibility criteria of becoming the members or not.

18. It was observed by the Court that such process would require adjudication of the facts and therefore, as the process of adjudication is not envisaged u/s 41A of the Act, it was observed by this Court that the order is outside the scope of Section 41A of the Act. No such fact situation arises in the present case and as observed earlier, by picking up certain sentences or the observations in part, it can hardly be said that a particular proposition is laid down or a binding precedent is there to hold the field. Therefore, the said decision is of no help to the petitioner.

19. It is true that in the later decision of the Division Bench of this Court in the case of Navsari Taluka Halpati(Supra), it was a case for ordering of election of the Trustees as per the Trust Deed by the Charity Commissioner in exercise of the powers u/s 41A of the Act, but for examining the scope and ambit of Section 41A of the Act, as observed earlier, the Division Bench of this Court in the later Judgement in the case of Navsari Taluka Halpati(Supra), after considering the earlier decision of the Division Bench of this Court in the case of Syedna Mohamed Burhanuddin (Supra), has supplemented the view for the scope and ambit of Section 41A of the Act. The observations made by the another Division Bench of this Court in the later decision can be made applicable for giving effect to first part of Section 41A, i.e. as that of proper administration of the Trust. Therefore, this Court cannot accept the contention of Mr. Vakil that the later decision of the Division Bench of this Court in the case of Navsari Taluka Halpati(Supra) since is taking a contrary view to the earlier decision of the Division Bench of this Court without their being any reference to any larger Bench be ignored or by held as per incurrium. Such question may arise if there is conflict of two views of two coordinate Bench of this Court. As observed earlier, there is no conflict but the later decision of the Division Bench is supplementing the view which earlier the Division Bench in the case of Syedna Mohamed Burhanuddin (Supra) did observe for part (a) of Section 41A i.e. for proper administration of the Trust. Therefore, the contention is misconceived and cannot be accepted.

20. In view of the aforesaid observations, it can be said that u/s 41A of the Act, the Charity Commissioner has power to issue the directions to any trust, trustee or public trust or any person connected therewith to ensure that such trust is properly administered.

21. There cannot be any dispute to the proposition that when there is express power provided under statute for dealing with a particular situation, the general power or the residuary power cannot be made applicable. Section 22 of the Act read with Section 22A of the Act does provide for the submission of the change report and holding of inquiry. Therefore, in a given case, if the matter falls u/s 22 read with Section 22A of the Act, it cannot be the subject matter of issuing directions u/s 41A of the Act. However, it is by now well settled that if the action is wholly without jurisdiction or beyond the scope and ambit of the power, the matter would fall outside the applicability of such provision. Therefore, merely

because the change report is filed or is objected, would not be a sufficient ground to oust the jurisdiction u/s 41A of the Act by the Charity Commissioner. However, if the action of submitting change report or a change is in purported exercise of power for bringing about the change, then in that case, it would be a case to be considered u/s 22 of the Act read with Section 22A of the Act. But, if the action of bringing about the change and thereby, consequently filing the change report is dehors the Trust Deed or wholly without jurisdiction on the part of any of the Trustees, it would be improper to construe that the matter would not fall in the domain of proper administration of the Trust u/s 41A of the Act, but would only fall u/s 22 read with Section 22A of the Act.

22. Applying the aforesaid principles, if the facts of the present case are considered, it appears that the Trust Deed is admitted by both sides and with regard to the existence of the Trust Deed and any terms incorporated therein, there is no dispute. The power as per the Trust Deed was retained by the settler of the Trust, viz. Shastri Dharmajivandasji, to function as main trustee and also managing trustee with five gentlemen having faith in the Swaminarayan Sampraday. He also retained the power to add or reduce the number of trustees and to fill-up the vacancy. It is also an admitted position that during the lifetime of Shastri Dharmajivandasji, the settler of the Trust, petitioner No. 1 was appointed as trustee but neither as managing trustee nor as the main trustee. It is also an admitted position that after the death of Shastri Dharmajivandasji all the remaining Trustees by majority, have appointed the petitioner No. 1 as the managing trustee vide resolution of the year 1988. It is also an admitted position that the petitioner No. 1 has continued throughout as the managing trustee since 1988 together with the other trustees. It prima facie appears that the dispute arose after resolution dated 17.11.2006. It is true that as per the respondent Nos. 2 to 4, as per the said resolution, the petitioner No. 1 is substituted as Managing Trustee by Swami Balkrishnadasji. However, as the petitioner No. 1 has not admitted the said resolution, no discussion is required, but even if the position is considered as that of prior to resolution dated 17.11.2006, at the most, the petitioner No. 1 can be said as managing trustee exercising the power as per the Trust Deed. Prima facie it appears that when the petitioner No. 1 is not the settler of the Trust and when the Trust itself is a Public Charitable Trust formed with the laudable purpose of espousing the principles of Swaminarayan Sampraday, it cannot be said that such Trust can be treated at par with the private Trust nor can it be said that the Trust is not governed by the provisions of the Act. As such, with a view to regulate the the religious and charitable Public Trust, the Act has been enacted. The Trust Deed on its face value prima facie has not provided for any power of removal nor there is any express provision made in the Trust Deed for removal. Therefore, the action of removal of respondent No. 2 by the petitioner No. 1 can prima facie be said as wholly without power and authority under the Trust Deed. Further, the very appointment of the petitioner No. 1 as the Managing Trustee was by majority of the trustees as was in the year 1988. Even if the general principles are made applicable with power to appoint

includes power to remove, then also, such power prima facie can be read with the composite bodies of all trustees by majority and cannot be read in isolation with managing trustee alone. So will be the situation in the case of appointment of new trustees by the composite body of all trustees with the majority decision. It is neither the case of the petitioner nor pleaded that the removal of the trustee of respondent No. 2 is by majority of the trustees or addition of the Trustee viz. petitioner Nos. 2 to 4 is by the majority decision of the Trustees. However, the case of the petitioner No. 1 prima facie appears to be that since he was appointed in place of settler of the Trust Shastri Dharmajivandasji, he enjoys all powers as was being held by the settler of the Trust Shastri Dharmajivandasji and therefore, he has power to remove any trustees and to appoint any trustees without their being any resolution of the remaining trustees or a composite body of the trustees by majority or otherwise. Prima facie, if such powers are read with the managing trustee in a public charitable trust, who is admittedly not a settler of the Trust, but appointed by the remaining trustees (other than the settler of the trust after the death of the settler of the Trust), it can go to the extent of usurping the power of Trust to the fullest extent by reducing the number of trustees to one, i.e. himself only and none else. Consequently, the property of the trust would 100% fall in full control of only one person, i.e. the managing trustee and none else. Such an interpretation of the power read with managing trustee would not only be absurd, but would result into frustrating the basic purpose of maintaining a charitable trust which is to receive corpus from the various donors and to make use for larger interest and objects of the Trust. Therefore, such power as sought to be canvassed on behalf of the petitioner with the managing trustee as that of the removal and of addition of the trustees, prima facie can be said not only dehors the Trust Deed and entries made in the P.T.R at the time of registration of the Trust, but would also result into nullifying the genesis of a Charitable Trust. It is hardly required to be stated that a Charitable Trust cannot be said as a private property of the Trustees and the Trustees of such Trust hold the Trust and are in fiduciary capacity and in any case, it cannot be equated with a private trust. In case of charitable trust, it is the duty of the trustee to see that they continue to discharge their fiduciary capacity with all obligations as per the purposes and objects of the Act for utilisation of the property and to see that the administration is in accordance with the Trust subject to the control as per the provisions of the Act. Therefore, it prima facie appears that the action of removal of the Trustee viz. respondent No. 2 and addition of the Trustees, i.e. petitioners Nos. 2 to 4 is wholly without authority and power and reading of such power would frustrate the very basis of maintaining a charitable trust for the larger and laudable purpose for which it is so established by the settler of the trust and its continuation thereafter.

23. Therefore, under such circumstances, it cannot be said that when the action is wholly without authority for maintaining the proper administration of the Trust, the only recourse available is Section 22 read with Section 22A of the Act and not by invoking of the power u/s 41A of the Act as that of the Charity Commissioner.

The reliance placed upon the decision of this Court in the case of Shantilal Khimchand & Ors.(Supra) is ill-found inasmuch as this Court, in the said decision had no occasion to consider the case for exercise of the power u/s 41A, vis-a-vis the powers u/s 22 of the Act nor it was a case before the Division Bench in the aforesaid decision that if the action of bringing about a change is wholly without jurisdiction, whether power u/s 41A can be invoked for proper administration of the trust or not. Therefore, such decision is of no help to the petitioner.

24. The scope of judicial scrutiny for issuance of a writ of prohibition or a writ of certiorari is by now well settled. It is only in case where this Court finds that the action is wholly without jurisdiction or that the authority who has initiated the proceedings has no power or competence to initiate the proceedings, the writ of certiorari or the writ of prohibition, as the case may be, may be issued by this Court. If the observations made hereinabove are considered, it cannot be said that the impugned order dated 02.02.2007 is wholly without jurisdiction or competence by the Charity Commissioner nor can it be said that there is no power, competence or authority with the Charity Commissioner to entertain and proceed with the proceedings u/s 41A of the Act.

25. Further, if the impugned order is considered, it appears that the Charity Commissioner for exercising of the power prima facie has not accepted the contention on the aspects of maintainability and has issued directions by way of interim measure until finalisation of the Exh.1. Therefore, when there is power with the Charity Commissioner to entertain and application and to issue final directions u/s 41A of the Act, the interim order passed therein cannot be said as without jurisdiction or without any competence or authority as sought to be canvassed on behalf of the petitioners.

26. It may also be recorded that since it is a case concerning to the functioning of a religious trust, which has its schools etc., at various places as contended by the learned Counsel for the both the sides, this Court during the course of hearing did suggest for finding out a via media to see that the functioning of the trust continues as per the democratic principles, i.e. the majority of the members may continue to make use of its fund and the other resources for the objects of the Trust for which it is formed. In response to the said suggestion, the learned Counsel for the petitioner Mr. Kinariwala upon instructions of his client, submitted that if the position is restored prior to 17.11.2006 of the trustees, the petitioner No. 1 is agreeable, but the condition precedent is that the petitioners Nos. 2,3, and 4 are also inducted as the new trustees. Whereas on behalf of the respondent Nos. 2, 3 & 4, it has been submitted that the respondents are agreeable for restoration of the condition prior to 17.11.2006, but the decision of induction of petitioners Nos. 2, 3, & 4, as the trustees can only be taken by Body of the Trustees in majority and not by the petitioner No. 1 alone. Under these circumstances, as the parties are not in agreement for resolving the dispute for all time to come, the matter is considered on merits.

27. In view of the above, I find that no case is made out for interference and

therefore, the petition is rejected.

28. However, it is observed that as the matter is considered by the Charity Commissioner and one course available to the petitioner was to not press the present petition and to challenge the final order, if any, available after hearing both the sides, as such order is passed by the Charity Commissioner but in view of oral direction pending the petition is kept in sealed cover. However, the learned Counsel appearing for the petitioners did not opt for taking such recourse, though specifically was made available to him/them and insistence was made by the learned Counsel appearing for the petitioners that if the final order is allowed to be pronounced, it may result into rendering the petition infructuous and therefore, this Court may examine the contention raised in the present petition. Hence, considered and observed hereinabove. Therefore, it is further clarified that the observations made by this Court in the present order shall be considered as to conclude the view that the order cannot be said to be without any jurisdiction, competence or authority on the part of the Charity Commissioner u/s 41A of the Act nor the case is made out for interference to the proceedings u/s 41A of the Act, being wholly without authority and competence by issuance of writ of prohibition. So far as the other aspects of the case are concerned, the rights and contentions of both the sides shall remain open and shall not get concluded.

29. Since it has been reported that the Charity Commissioner has passed an order, but is in the sealed cover, in view of the pendency of the present proceedings and the oral directions issued by this Court, as the petition is dismissed today, the lawful consequences shall follow, but suffice it to observe that the interim oral direction, if any, shall stand vacated.

30. It is also observed that the present order shall not operate as a bar to the petitioners to challenge the final order, if any, passed by the Charity commissioner below Exh.1, as may be permissible in law.

31. Mr. Kinariwala, learned Counsel for the petitioners after pronouncement of the order submitted that the oral interim direction be continued for sometime prohibiting the Charity Commissioner from pronouncing the order, which is kept by him in the sealed cover.

32. Mr. K.S. Nanavati for Respondent No. 3 objects such request and he submitted that there was no order in writing and now as the order is in the sealed cover, the Charity Commissioner be put to the liberty of passing the order, more particularly when the petition is rejected.

33. Considering the facts and circumstances, it appears that as this Court has not found that the impugned order or the initiation of the proceedings is without authority or competence with the Charity Commissioner, it would not be a case to continue with the oral interim direction, more particularly when the petition is dismissed. Hence, the request of Mr. Kinariwala is declined.