

(1995) 02 BOM CK 0025

In the Bombay High Court

Case No : Originating Summons No. 407 of 1993 in Suit No. 1760 of 1993

Homi P. Ranina and Others

APPELLANT

Vs

Eruch B. Desai and Others

RESPONDENT

Date of Decision : 22-02-1995

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 218, 221, 223, 238, 69
Civil Procedure Code, 1908 (CPC) — Section 129
Evidence Act, 1872 — Section 13

Citation : AIR 1996 Bom 141 : (1996) 2 BomCR 577

Hon'ble Judges : A.P. Shah, J

Bench : Single Bench

Advocate : K.S. Cooper and S.K. Cooper, K.D. Mehta and Mrs. Bhika Treasurywalla, instructed by M/s. Payne and Co, for the Appellant; Bomi R. Zaiwalla, Virendra Tulzapurkar and Ms. Farzana Madon, Atul Setalwad and Bomi Patel, instructed by . M/s. Payne and Co., instructed by . M/s. Zaiwalla and Co., instructed by . M/s. Wadia Ghandy and Co., instructed by . M/s. Desai Berjis and Chinoy, for the Respondent

Judgement

1. This is an action initiated by an originating summons in which the plaintiffs seek determination of the following questions:

(1) Whether the Trustees of Bombay Parsi Punchayet have any power under the present Scheme or otherwise to appoint/elect the President of the Bombay Parsi Panchayat

(2) Whether the Trustees of Bombay Parsi Punchayet have any power or authority to elect any Chairman of their meeting if the President of the Bombay Parsi Punchayet is present at the meeting by removing the President and appointing someone else in his place or otherwise?

(3) Whether the Trustees of the Bombay Parsi Punchayet have the power under the Scheme or otherwise to prevent the senior-most Trustee from assuming the office of the President without modification of the present Scheme?

(4) Whether the resolutions purported to be passed by the Defendants Nos. 2 to 5 at the meeting held on 30th March, 1993 are valid and/or proper and/or effective?

2. The plaintiffs Nos. 1 and 2 and the defendants Nos. 2 to 5 are the Trustees of the Funds and immovable properties of the Parsi Punchayet of Bombay. On March 25, 1993, the President of the Trust, Dr. Aspi Golwalla tendered his resignation. According to the plaintiffs, the President of the Board of Trustees has, by long usage and practice, been the seniormost Trustee and that the Trustees never had the power to appoint or elect the President of the Bombay Parsi Punchayet. Therefore, according to the plaintiffs, after the resignation of Dr. Golwalla, the office of the President automatically devolved upon the senior Trustee i.e. the defendant No. 1. However, at the meeting held on March 30, 1993, the defendant No. 3 proposed and the defendant No. 2 seconded that the defendant No. 4 should chair the meeting. The plaintiffs Nos. 1 and 2 and the defendant No. 1 then raised an objection that according to the provisions of the Scheme and by settled convention, the seniormost Trustee automatically became the President and by virtue of Rule 69 of the Scheme, he was the only person entitled to chair the meeting. Notwithstanding the objection raised by the plaintiffs Nos. 1 and 2 and defendant No. 1, a resolution came to be passed to appoint defendant No. 4 "as temporary Chairman to conduct the meeting till the President of the Bombay Parsi Punchayet is elected." Therefore, the defendant No. 3 proposed the following resolution, which was seconded by the defendant No. 2:

"Mr. E. B. Desai shall not continue as temporary Chairman of this Meeting and furthermore shall not occupy the office of the President of the Bombay Parsi Punchayet, and Mr. M. R. Shroff be and is hereby appointed as temporary Chairman to conduct the meeting."

This resolution was carried by majority. Thereafter, the defendant No. 2 proposed and the defendant No. 5 seconded the resolution "that Mr. J. N. Guzder (defendant No. 3) be and is hereby appointed as the President of the Bombay Parsi Punchayet for the term of his office as Trustee." The defendants Nos. 2 to 5 voted for the resolution. The plaintiffs Nos. 1 and 2 and defendant No. 1 objected to the legality and validity of the resolution and also voted against the same. The resolution was carried by majority of 4 : 3. Thus the defendant No. 3 came to be appointed as the President of the Trust.

3. It is the case of the plaintiffs that by long usage, convention and custom, which is deemed to be incorporated in the Scheme, the senior most Trustee for the time being automatically assumes the office of the President, and in that view of the matter, it is beyond the competence of a majority of the Trustees or even all the Trustees to modify the Scheme or to change the aforesaid convention, custom and usage and thereby altered the Scheme by passing the aforesaid resolutions. The plaintiffs have relied upon the past practice and convention from 1931 to 1993. In para. 16(b) of the plaint, the plaintiffs have furnished the particulars of the appointments made in the past from 1931 to

1993 i.e. right from the appointment of Sir Cowasji Jehangir (1st Bart) on December 11, 1931 till the appointment of the last President Dr. Aspi Golwalla. It has been pointed out by the plaintiffs that there is no election for the President at any of the meetings. The plaintiffs have placed heavy reliance on the resolutions passed by the Punchayet from time to time in order to show the long standing usage and custom of appointing the seniormost Trustee as the President of the Trust.

4. In contesting the summons, the defendants Nos. 2 to 5 have raised various objections and the first and foremost of them is to the maintainability of the summons. It is contended by the defendants that the reliefs claimed/questions raised in the plaint and in the originating summons are outside the scope of Chapter XVII of the Rules and Forms of the High Court of Judicature at Bombay on the Original Side. It is contended that the plaintiffs are required to prove the alleged custom by adducing evidence and necessarily, therefore, the Court would be required to decide the complicated questions beyond the scope and summary nature of the originating summons. It is also contended that since the existence of the custom and usage is being disputed by some of the defendants, it is necessary for the plaintiffs to file a suit to establish their rights, as the scope of originating summons is extremely limited. It is also contended that the plaintiffs, by asking for determination of the question whether the Trustees of the said Punchayet have power under the Scheme to appoint/elect the President of the said Punchayet, are not only indirectly seeking to obtain judicial recognition of an alleged custom, but are also seeking enforcement of the alleged rights of an individual Trustee viz. defendant No. 1. It is also urged that the plaintiffs have not made out a case of any violation of the alleged rights of any of the plaintiffs or beneficiaries of the said Punchayet, nor has any relief for the proper management and functioning of the said Trust been sought and, therefore, the contest of the plaintiffs is only for the enforcement of the individual right and thus this Court should refrain from issuing any direction on the originating summons. The defendants Nos. 2 to 5 also denied the existence of the custom from the year 1931 as alleged by the plaintiffs. The defendants stated in the affidavit that the Presidents were always elected by majority and the fact that the said Presidents have incidentally also been the seniormost Trustees at the said time is a matter of coincidence. In any case, they contended that the alleged custom, which is prevalent only for a period of 46 years, is not a custom having the force of law. Reliance is also placed on the minutes of the meeting in which the previous President Dr. Golwalla is shown to have been elected in order to show that there was no convention of appointing the seniormost Trustee as the President. It is also contended that the custom pleaded by the plaintiffs is contrary to the democratic norms. It is said that such a custom would stultify effective functioning of the Trust, as the Trust needs a President, who is competent and qualified person as a President. Reference is also made to the prior history of the Parsi Punchayet in order to show that at no time in the past such practice was followed by the Punchayet though the Trust was founded

sometime in 1511. A strong reliance was also placed on Rule 70 of the Scheme in order to draw support to the plea that such decisions are required to be taken by majority.

5. Before I advert to the question of maintainability of the summons, it is necessary to refer briefly to the historical background of the Parsi Punchayet. It appears that the history of Parsi Punchayet can be traced as far back as 1672. At that time, the members were elected by the entire Anjuman. In 1787, the then Bombay Government appointed 6 priests and 6 lay persons from amongst 24 prominent persons suggested as managers of the funds and properties of the community. In 1818, the Anjuman added 6 more members bringing the total to 18. In 1823, some more members were appointed as Trustees or account holders of the funds of the Parsi Punchayet. The first major change in the formation of the Trust came in 1851 when a formal deed of Trust was declared during the times of Sir Jamsetjee Jeejeebhoy. It appears that further trust deeds were executed in 1851 and 1881 whereby power was conferred on the Trustees to appoint fresh Trustees.

6. In 1906, certain Parsi Zoroastrians filed Suit No. 689 of 1906 u/s 539 of the C.P.C. against the then trustees. The plaintiffs in the said suit sought a declaration that the defendants in that suit were not validly appointed as Trustees and further that the power of appointment of new Trustees purported to be conferred by the trust deeds were void and of no effect. The suit was decreed by two judgments dated November 27, 1908. The Court granted a declaration that the defendants were not validly appointed as Trustees and that the powers of appointment of new Trustees purported to be created or conferred by the trust deeds of 1851 and 1884 were void and of no effect. By its decree and order, the Court, however, appointed the defendants Nos. 2 to 5 in the said suit as Trustees for their respective lives of the said funds and immovable properties and vested the said funds and properties in them. The decree provided that the said trustees would hold the said funds and properties so vested in them upon the respective Trusts and for the respective objects, intents and purposes and with the powers contained in the deeds of 1851, 1871 and 1884, save and except the respective powers of appointment of new Trustees contained in the deeds. By its decree, the Court directed that a Scheme be framed for the appointment of Trustees and be brought before the Court for final settlement and sanction. By a further decree and order in Suit No. 458 of 1909, the Court declared that "all the properties movable and immovable of the Parsi Punchayet of Bombay should be vested in one body of Trustees and that the power of appointment of new Trustees should be vested in one and the same authority." The Scheme for the appointment of new Trustees was sanctioned by the Court on June 18, 1910. The Scheme provided for an Anjuman Committee comprising of elected and donor members, which would in turn elect Trustees.

7. The first elections were held in 1911 and three Trustees were appointed/elected on March 25, 1911. The Scheme has subsequently been amended by

various orders, the last being dated December 17, 1991. Till 1935, Trustees were elected for life. By an order dated February 7, 1935, it was provided that Trustees would hold office for 10 years but be eligible for re-election. By an order dated December 17, 1991, the term of office has been stipulated to be 7 years. It is necessary to bear in mind that there is no provision in the Scheme for election and/or appointment of the President. Clause 69 of the Scheme is the only clause, which makes a reference of the President of the Trust and the same reads as follows:

"69. The Trustees shall ordinarily and as far as practicable, hold their meetings at least twice in a month for the purpose of transacting the business connected with the administration of the Funds and Immovable Properties of the Parsi Punchayet of Bombay. Such meetings may be held at such times and places as the Trustees may think fit, and need not be held during the months of April and May if a majority of the Trustees are absent from Bombay. The President of the Board of Trustees or in his absence another Trustee elected out of those present shall preside at such meetings. At every meeting of the Trustees three Trustees shall form a quorum. The proceedings of the meetings of the Trustees shall be recorded in the Minutes which shall be maintained by the Secretary."

Though the abovementioned clause refers to and recognises the office of the President, it is silent about the manner of appointment of the President.

8. It is the case of the plaintiffs that during the years 1823 to 1857, the senior most Trustee always acted as the President during his lifetime. It has also been pointed out by the plaintiffs that from 1851, Sir Jamsetjee Jeejeebhoy acted as the President and till the decision of this Court in 1909 the Presidentship was normally with the members of Sir Jamsetjee Jeejeebhoy's family. But, nevertheless, there is no instance of election and/or appointment being made for the post of President. The practice of appointing the member of Sir Jamsetjee Jeejeebhoy's family was disapproved by Davar, J., although the learned Judge appears to have sanctioned the appointment of Sir Jamsetjee Jeejeebhoy (5th Bart) as the President. On the death of Sir Jamsetjee Jeejeebhoy (5th Bart) in 1931, Sir Cowasjee Jehangir (1st Bart), who was then the seniormost Trustee, was appointed as the President. During the period from 1931 to 1993, there were in all ten Presidents and it is not disputed before that no election took place at any time and all of them were the seniormost Trustees of the Trust.

9. Turning then to the question as to the nature and scope of the originating summons under Chapter XVII, it is seen that Chapter XVII of the Original Side Rules lays down elaborate procedure in respect of certain categories of matters specified therein. Rule 238 of Chapter XVII, which is particularly relevant in this case, reads as follows:

"238. Who may apply for the issue of originating summons and in respect of what matters-- The executors or administrators of a deceased person or any of them and the trustees under any deed or instrument or any of them, and any

person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative, or as beneficiary under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may apply for the issue of an Originating Summons returnable before the Judge in Chambers for such relief of the nature or kind following as may by the summons be specified and circumstances of the case may require, (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters:--

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or legal representative, or beneficiary;
- (b) the ascertainment of any class of creditors, devisees, legatees, heirs, legal representatives, beneficiaries or others;
- (c) the furnishing of any particular accounts by the executors, administrators or trustees and the vouching (when necessary) of such accounts;
- (d) the payment into Court of any moneys in the hands of the executors, administrators or trustees;
- (e) directing the executors, administrators or trustees to do or abstain from doing any particular act in their character as such executors, administrators or trustees;
- (f) the approval of any sale, purchase, compromise or other transaction;
- (g) the determination of any question arising in the administration of the estate or trust."

The procedure rests solely on rules made by this Court under the Letters Patent and Section 129 of the C.P.C. These rules generally follow the English procedure, which is enacted in the Rules and Orders of the Supreme Court. These limit the procedure to the determination of questions of construction of deeds and wills, of questions arising in the administration of an estate or Trust and of questions arising out of requisitions and objections made between vendor and vendee of land. As far as English procedure is concerned, it is seen that it does not apply where questions of fact are in dispute. However, it is now well settled that rules do not forbid question of fact being determined in an originating summons. In that context, judgment delivered by Pratt, J. in *Vithaldas Cursonadas Vs. Dulsukhbhai Vadilal*, is extremely relevant. In considering the rules, it has been observed by Pratt, J.:

"It is contended that these authorities do not apply as the Bombay Rules are wider. There is some force in this contention for our rules go further than the English rules and allow a partner to take put an originating summons and the procedure approximates more nearly to that of a regular suit for the, rules contemplate pleadings. A plaint is required by Rule 218 and a written statement is permitted by Rule 221.

The rules do not forbid questions of fact being determined in an originating summons and I am not prepared to hold that this form of action is always inappropriate whenever there is a question of fact in dispute.

But I think it clear that an originating summons is not the proper procedure where the disputed facts, are of such complexity as to involve a considerable amount of oral evidence. There is no machinery for discovery and inspection and Rule 223 indicates that the action should be confined to matters which are capable of decision in a summary way."

10. I am in respectful agreement with the view taken by Pratt, J. The object appears to be to decide the matters mentioned in R. 238 by providing an effective and inexpensive remedy. Clause (g) of the said Rule clearly empowers the Court to determine any question arising in the administration of the estate or Trust. The only question that is raised by the plaintiffs in this originating summons relates to the mode of appointment of the President. The facts are almost admitted on both sides. In my opinion, unless it is shown that the disputed facts are of such complexity as to involve a considerable amount of oral evidence, the jurisdiction to decide the question of the mode of appointment of the President, application of Rule 238 cannot be excluded on the basis of a bald plea that the facts are disputed.

11. In the light of the legal position as succinctly laid down by Pratt, J. in *Vithaldas Cursonadas Vs. Dulsukhbhai Vadilal*, , it is seen that only question, which has been posed for determination of this Court, pertains to the mode of appointment of the President i.e. whether it should be by way of appointment of the seniormost Trustee or by way of election can be conveniently decided in an originating summons. On a plain reading of the plaint and the affidavits filed by the parties, I find that there is hardly any dispute about the factual position. However, the question is basically one of drawing inferences from the admitted facts. Though it has been contended by the defendants Nos. 2 to 5 that considerable amount of oral evidence is necessary to decide the question of the custom and/or usage, it is not shown to me how the oral evidence will be relevant in the facts of the present case, when it is not disputed that in the past, without any exception, the seniormost Trustee has acted as the President. The question as to whether this past practice of nearly 46 years should be regarded as custom or usage, in my opinion, can be decided in the present originating summons and appropriate directions can be issued in order to ensure the smooth and proper functioning of the Trust.

12. At the outset, I may mention that it is a common case that during the period from 1931 till 1993, without exception, all the Presidents, who have occupied, were the seniormost Trustees. Even though there is some controversy raised about the practice of the appointment of President during the period from 1823 to 1857, I do not see any reason to doubt the plaintiffs' version that even during those times, the seniormost Trustee always acted as the President during his lifetime. The learned counsel for the defendants Nos. 2 to 5 has strenuously

contended that it is rather a matter of coincidence that all past Presidents during the year 1931 to 1977 were the seniormost Trustees. It is also contended by the learned counsel that 46-year period is too short for recording a custom or usage. I am afraid that though the period of length of practice is relevant in establishing the custom, it is not proper to reject the case of custom simply on the ground that it is not for a sufficient long period. In *Gokal Chand v. Parvin Kumari* AIR 1952 SC 231, the Supreme Court laid down the general principles, which are required to be kept in view in dealing with questions of customary law. Fazl Ali, J., speaking for the Bench, laid down seven principles and particularly principle number three will be material in the present case, which reads as follows (at p. 234 of AIR):

"(3) A custom, in order to be binding must derive its force from the fact that by long usage it has been obtained the force of law, but the English rule that "a custom in order that it may be legal and binding must have been used long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality."

A reference may also be made to another judgment of the Supreme Court in *Harihar Prasad Singh and Others Vs. Balmiki Prasad Singh and Others*, , wherein the Supreme Court observed as follows :

"The specific family custom pleaded in a particular case should be proved. The initial onus lies on the plaintiffs to prove the special custom. It must be proved that the custom has been acted upon in practice for such a long period and with such invariability, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family."

13. In my opinion, the material produced on record is required to be examined in the light of the principles laid down by me Supreme Court. As already indicated, it has been demonstrated by the plaintiffs that in the past, only seniormost Trustee has acted as the President. There is not even a single instance of election to the post of the President. It is true that at the time of appointment of Dr. Golwalla on December 8, 1981, the resolution passed by the Trustees says that "Dr. Aspi F. Golwalla be and is hereby appointed President of the Bombay Parsi Punchayet" indicating that it is the Trustees, who have got power to make such appointment. But, having regard to the past practice, in my opinion, this resolution is nothing more than the merely recording the event of the appointment of seniormost Trustee Dr. Golwalla taking over as the President of the Bombay Parsi Punchayet. In my opinion, during this period, a healthy practice has been followed by the Parsi Punchayet in appointing the seniormost Trustee as the President and avoiding election and groupies and factionalism inevitably arising from elections. It is important to bear in mind that there is no provision in the Scheme for holding election of or appointing the President. The

manner and mode of the appointment of the President is not prescribed in the Trust. Further even the tenure of the President is not prescribed. If the contention of the defendants Nos. 2 to 5 is to be upheld that the appointment is to be made by adopting democratic method, it would mean that the President can be change at any meeting depending upon the trend of the majority. In my opinion, the reliance placed upon Rule 70 is equally misconceived. Rule 70 provides that all decisions should be taken by majority, but that applies not to the appointment of the President and the Trustees, otherwise it would mean that the President can be changed in any ordinary meeting depending upon the majority of a particular group.

14. The learned counsel for the defendants brought to my notice certain decisions to show that all decisions in a Charitable Trust are required to be taken by the majority of the Trustees. There cannot be a dispute about the principle that the Board of Trustee is required to take decision by majority, but that cannot supersede or override an established practice for such a long period of appointing seniormost Trustee as the President. Even if the Scheme is not specific and makes no such provision about certain matters and such matters are taken care by practice or usage and the parties are acting in accordance with the long-standing usage, it will not be open for the parties to change the established practice without first getting the Scheme amended in accordance with the provisions of the Scheme. In *Sakharam y. Ganu* AIR 1921 Bom 299, the Division Bench of this Court observed as follows :

".....In the present case we have a scheme settled by the District Court. True it is that the scheme is not detailed and makes no specific provision for the allocation of this fund. But the duty of managing the temple funds, which would include the offerings placed before the deity is laid on the members of the Devasthan Committee, who are required to administer the same in accordance with the long established usage of the institution..."

15. Apart from any other consideration, the most important factor, which is required to be taken into consideration in determining the questions raised in this summons is the smooth and proper functioning of the Trust. It is true that normally a democratic practice must be followed in the Trusts and other Institutions in taking all major decisions. But that does not mean that it is necessary to appoint President only by decision of majority or by holding an election. The Gujarat High Court in First Appeal No. 268 of 1964 with First Appeal No. 563 of 1964 and First Appeal No. 269 of 1964 with First Appeal No. 564 of 1964 decided on October 6, 1972, had an occasion to consider this aspect while considering the question under the Bombay Public Trust Act. Though the observations are made in a different context, I feel that they have got relevance in the present matter also. In that case, clause 7 of the Scheme was excluded by the trial Court on the ground that normally committee should be elected. While dealing with this aspect, the Gujarat High Court observed:

"We first turn to the consideration of Clause 7. The learned trial Judge has

observed that such committees are ordinarily elected. We are not able to agree with him in that view of his. Apart from other things, election brings in politics, produces factionalism and groupies and often lends to lobbying. It is capable of introducing corrupt practices also. Therefore, the introduction of the principle of election for the appointment of the Managing Committee of a religious institution is, in our opinion, not a good and healthy principle. The Charity Commissioner indeed should have the power to appoint the Committee but he should do so in consultation with the Mahant."

The Privy Council had an occasion to deal with a similar situation in *Md. Ismail v. Ahmed Moolla* AIR 1916 PC 132. Ameer Ali, J., speaking for the Bench observed :

"In appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder so far as they can be ascertained, but also the past history of the institution and the way in which the management has been carried as heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management and, if necessary, the appointment of trustees in future."

Thus the past history of the institution and the way in which the management has been carried as here to before, in conjunction with other existing conditions that may have grown up since its foundation are extremely relevant consideration for deciding the questions raised in this originating summons.

16. In my opinion, the plaintiffs have succeeded in establishing a custom and/or usage of appointing the senior most Trustee as the president of the Parsi Panchayat. In the circumstances, the questions raised in the originating summons are determined in the following manner:

Question No. 1 :-- The Trustees of Bombay Parsi Panchayat have no power under the present Scheme to appoint/elect the President of the Bombay Parsi Panchayat.

Question No. 3 :-- The Trustees of the Bombay Parsi Panchayat have no power under the Scheme to prevent the seniormost Trustee from assuming the office of the President without modification of the present Scheme.

Question No. 4:-- The resolutions purported to be passed by the defendants Nos. 2 to 5 at the meeting held on March 30, 1993 are invalid, improper and ineffective.

In view of the determination of questions Nos. 1, 3 and 4, it is not necessary to determine question No. 2. Originating Summons is disposed of accordingly with no order as to costs.

On the oral request made by the learned counsel for the defendants Nos. 2 to 5, operation of this order is stayed till March 29, 1995.

Certified copy expedited.

17. Summons disposed of accordingly