

(1971) 11 BOM CK 0014
In the Bombay High Court
Case No : A.F.O. No. 8 of 1967

Keki Pestonji Jamadar and Another

APPELLANT

Vs

Kohodadad Merwan Irani and Others

RESPONDENT

Date of Decision : 22-11-1971

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 19, 79, 80

Citation : AIR 1973 Bom 130 : (1972) 74 BOMLR 198 : (1973) ILR (Bom) 80 : (1972) MhLj 427

Hon'ble Judges : Kotwal, C.J.;Deshmukh, J;Chandrachud, J

Bench : Full Bench

Advocate : R.T. Walawalkar, for the Appellant; N.A. Shah and K.J. Abhyankar, P.S. Sukhia, instructed by Vachna and Co., V.H. Gumaste, Government Pleader and S.C. Pratap, Asstt. Government Pleader, for the Respondent

Judgement

Chandrachud, J.—Claiming to be a joint owner of a land, one Rodabai Khodadad Merwan Irani filed Civil Suit No. 56 of 1958 against her brother Jamshedji and her sister Baimai for partition and separate possession of her one-third share. She withdrew that suit on 3rd August 1959 in pursuance of an agreement dated 19th July 1959, under which Jamshedji agreed to convey the property to the "Tarapur Parsee Zoroastrain Anjuman Trust" reserving a life interest to himself. Jamshedji did execute a deed of trust on 24th April 1960 but he created thereunder a life interest not only in favour of himself but also in favour of one Jerbai Irani. On the death of Jamshedji on 9th April 1962, the trustees took possession of the land. In the meanwhile, Baimai had died on 27th March 1960.

2. On 4th August 1962, Rodabai brought this suit (No. 131 of 1962) in the Court of the Civil Judge, Junior Division, Dahanu, Impleading thereto the Trustees (defendants 1 to 7), the heirs of Baimai (defendants 8 to 13) and the Charity Commissioner (defendant 14). By her suit, Rodabai asked for partition and separate possession of her one-half share in the suit property, the other half, according to her, being of the ownership of defendants 8 to 13. Her case is that

under the agreement dated, 19th July 1959, she and her sister were to get the property in equal shares on the death of their brother Jamshedji, unless he created a trust reserving no more than a life interest to himself and to himself only.

3. The Charity Commissioner filed his written statement in the suit on 21st November 1962 contending that the Civil Court had no jurisdiction to decide the questions raised in the suit as defendant 1 had filed an application u/s 18 of the Bombay Public Trusts Act, 1950 (herein called "the Act") and as the inquiry into that application was pending before the Assistant Charity Commissioner u/s 19 of that Act. The application u/s 18 was filed by defendant 1 on 1st November 1962 for registration of the Trust in the name of "Jamshed Baug Trust." By their written statement dated 12th December 1962 the trustees raised several other contentions with which we are not concerned here. On a motion made by the Charity Commissioner the suit was stayed, pending the decision of the inquiry u/s 19.

4. Rodabai was thereafter impleaded to that inquiry. She filed her objections in that proceeding, contending that the provisions of the trust deed executed by Jamshedji were in breach of the agreement of 19th July 1959 and therefore, the trust was invalid. She also contended that the Assistant Charity Commissioner had no jurisdiction to decide or deal with the questions raised by her and that those questions had to be decided in the suit which she had brought even before defendant 1 had made the application u/s 18. On the day of hearing, she filed an application stating that "the important question of title to the property is being litigated in a Court of competent jurisdiction", that "no useful purpose will be served by pursuing this application till the final decision in the suit" and therefore, she did not want to take further part in the proceedings. On Rodabai's death her legal representatives filed a note stating similarly that they did not desire to take part in the inquiry.

5. On 14th September 1963, the Assistant Charity Commissioner concluded the inquiry, holding that the trust existed, that it was a public trust and that the sole property included in the trust deed survey No. 112/2 of Boisar, District Thana - was the property of the trust. Rodabai's heirs took no notice of these findings.

6. Going back to Rodabai's suit from which this appeal arises, after her heirs were brought on the record of the suit, the trial Court dismissed the suit holding on a preliminary contention that it had no jurisdiction to decide or deal with the questions raised in the suit by reason of the bar arising u/s 80 of the Act. This decree was reversed by appeal by the learned Assistant Judge, Thana, who remanded the suit for hearing on the other issues. Against that order defendants 1 and 2 have filed this appeal. In view of certain judgments of this Court and in view of the importance of the questions involved in the appeal. Vimadlal, J., before whom the appeal came for hearing, has referred two questions for the decision of the Full Bench. We have modified those questions to read as follows :

(1) Is the question whether the author of the trust was the lawful owner of the property of which he has created the trust or had otherwise authority to create the particular trust, covered by Section 79 read with Section 80 of the Bombay Public Trusts Act, 1950?

(2) Can a person who has once appeared in the proceedings under the Bombay Public Trusts Act and has made his contentions therein on the above question, bring a suit in a Civil Court in respect of such a question? or,

(3) Has the Civil Court no jurisdiction to deal with or decide such a question by reason of Section 80 of the Act ?

7. The provisions of the Act may, for convenience, be considered under four heads: (1) Initiation of proceedings, (2) The Scope of Inquiry, (3) Remedies available to persons aggrieved by orders passed under the Act and (4) Ouster of jurisdiction of Civil Courts.

8. Initiation of proceedings : S. 18 (1) of the Act casts a duty on the trustee of every public trust to which the Act applies, to make an application for the registration of that trust. What constitutes a trust has not been defined in the Act, but Section 2(20) provides that words and expressions used but not defined in the Act and defined in the Indian Trusts Act, 1882 shall have the meaning assigned to them in that Act. Section 3 of the Indian Trusts Act defines a trust as "an obligation annexed to the ownership of property and arising out of confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another and of another and the owner." Section 2(13) of the Act defines a public trust to mean an express or constructive trust for either a public, religious or charitable purpose or both and includes a temple, a math and a wake etc., and a society formed either for a religious or charitable purpose for both and registered under the Societies Registration Act, 1860. Section 18 (2) requires that an application u/s 18 (1) must be made to the Deputy or Assistant Charity Commissioner of the particular region or sub-region. Sections 5 (2) and 5 (2-A) provide for the appointment of a Deputy Charity Commissioner and an Assistant Charity Commissioner and prescribe the qualifications necessary for appointment to these posts. Section 18 (4) provides that in the case of a public trust created before the Act was applied to it, the application must be made within three months from the date of the application of the Act, and in the case of a public trust created after the Act comes into force, within three months of its creation. Section 18 (5) provides that the application must contain "particulars", like the name of the trust, the names of the trustees, the mode of succession to the office of the trustee etc., and such other particulars which may be prescribed by the rules.

9. In exercise of the powers conferred by Section 84 of the Act, the State Government has framed "The Bombay Public Trusts Rules, 1951" (hereinafter called "the Rules"). Rule 6 provides that in addition to the particulars specified in S. 18 (5), the application for registration shall contain particulars regarding

documents creating the trust, objects of the trust, etc. Rule 7-A which was introduced for the first time on 28th December 1967 provides that on receipt of an application, the Deputy or Assistant Charity Commissioner shall cause a public notice to be given in a local newspaper and that a copy of such notice shall be affixed on the notice board as also on some conspicuous part of the property, calling upon all persons having interest, to submit their objections within thirty days. This rule has been substituted by a new rule with effect from 12th June 1970 but, in material respects, the new rule is identical with the old. Under Schedule B to the Act read with Section 79-D, an application for the registration of a public trust has to bear a Court-fee stamp of Rs. 2/-, Under R. 6 (5), the application is also required to be accompanied by a cash fee varying between Rs. 3/- and Rs. 25/- depending upon the value of the property belonging to the public trust.

10. Scope of the Inquiry : S. 19 (1) and (2) provide that on the receipt of an application u/s 18 or upon an application made by any person having interests in a public trust or on his own motion, the Deputy or Assistant Charity Commissioner shall make an inquiry in the prescribed manner for the purpose of ascertaining whether a trust exists and whether such trust is a public trust, and whether any property is property of such trust. Briefly, Section 2(10) defines "person having interest", as including persons who in the case of a temple are entitled to attend it or in the case of a math, the disciples of the math or in the case of a wake, persons who are entitled to receive a benefit from the wake or in the case of any other public trust, any beneficiary. Rule 7 which deals with the manner of inquiry provides that except as expressly provided in the rules, inquiries under the Act shall be held as far as possible in the Greater Bombay Region in accordance with the procedure prescribed for the trial of suits under the Presidency Small Cause Courts Act, 1882, and elsewhere under the Provincial Small Cause Courts Act, 1887. The rule further says that in any inquiry a party may appear in person or by his recognized agent or by a pleader duly appointed to act on his behalf, provided that if the Deputy or Assistant Charity Commissioner so directs such appearance shall be made by the party in person. Rule 11, which provides for the manner of recording evidence of witnesses, says that at any inquiry or other proceeding under the Act as the examination of each witness proceeds, the officer holding the inquiry or proceeding shall make a memorandum in English of the substance of what each witness deposes and if the officer is unable to make such a memorandum, he shall cause it to be made in writing from his dictation. Section 73 provides that in holding inquiries under the Act, the officer holding it shall have the same powers that are vested in Courts under the CPC in respect of proof of facts by affidavits, summoning and enforcing the attendance of any person and examining him on oath, compelling the production of documents and issuing of commissions. u/s 74, all inquiries under the Act are deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of the Indian Penal Code.

11. u/s 20, on completion of the inquiry u/s 19, the Deputy or Assistant Charity

Commissioner has to record his findings with reasons therefore as to the matters mentioned in Section 19. u/s 21 (1), the Deputy or Assistant Charity Commissioner has to make entries in the register kept u/s 17 in accordance with the findings recorded by him and u/s 21 (2) the entries so made shall, subject to the provisions of the Act and subject to any change recorded under the other provisions be "final and conclusive". Section 22 imposes an obligation on the trustees to report a change or a proposed change in the entries, to the Deputy or Assistant Charity Commissioner within a certain period. u/s 22-A, if at any time after the entries are made in the register u/s 21 or 22 it appears to the Deputy or Assistant Charity Commissioner that "any particular relating to any public trust, which was not the subject-matter of the inquiry u/s 19, or sub-section (3) of Section 22, as the case may be, has remained to be inquired into, further inquiry may be made in the prescribed manner and the entries may be changed accordingly. The provisions of Sections 19, 20, 21 and 22 are made applicable to the inquiries held u/s 22-A. u/s 26 any court of competent jurisdiction deciding any question relating to any public trust which by or under the provisions of the Act it is not expressly or impliedly barred from deciding, has to send a copy of its decision to the Charity Commissioner who has to make entries in the register kept u/s 17 so as to accord with such decision. Under Rule 8 when a public trust is enrolled in the Register of Public Trusts, a certificate in the prescribed form has to be issued to the trustees in token of the registration. u/s 21 no suit to enforce a right on behalf of a public trust which has not been registered under the Act can be heard or decided by any Court.

12. Remedies available to persons aggrieved by orders passed under the Act: Section 70 provides, to the extent material, that an appeal may be filed to the Charity Commissioner against the finding or order of the Deputy or Assistant Charity Commissioner under Sections 20 and 22-A. Under sub-section (3) of Section 70 the Charity Commissioner has the power to direct the Deputy or Assistant Charity Commissioner to make further inquiry or to take such additional evidence as he may think necessary or he may himself take such additional evidence. u/s 70-A (1), in any of the cases mentioned in Section 70 the Charity Commissioner may call for and examine the record and proceedings of such case for the purpose of satisfying himself as to the correctness of any finding or order passed by the Deputy or Assistant Charity Commissioner. The Charity Commissioner can either cause a further inquiry to be made and direct that additional evidence be taken or he may take such additional evidence himself. u/s 70-A (2), the Charity Commissioner cannot exercise his revisional powers during the period of an appeal or in cases in which an order has been passed either in an appeal filed u/s 70 or 71 or on an application made u/s 72. Section 72 provides that any person aggrieved by the decision of the Charity Commissioner, inter alia, u/s 70 or 70-A or on the questions whether a trust exists and whether such trust is a public trust or whether any property is the property of such trust, may apply to the "Court" to set aside the said decision. Section 294) defines a "Court" to mean in the Greater Bombay the City Civil and

elsewhere, the District Court. u/s 72 (1-A), no party to an application u/s 72 (1) is entitled to produce additional evidence, except in the cases mentioned therein. u/s 72 (4) an appeal lies to the High Court against the decision of the Court as if such decision was a decree from which appeal ordinarily lies.

13. Ouster of jurisdiction of the Civil Courts : Section 79 (1) provides> "Any question whether or not a trust exists and such trust is a public trust or particular property is the property of such trust, shall be decided by the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal as provided by this Act." Under sub-section (2) of that section the decision of these authorities, unless set aside by the decision of the Court or the High Court, is "final and conclusive". u/s 80, "Save as expressly provided in this Act, no Civil Court shall have jurisdiction to decide or deal with any question which is by or under this Act to be decided or dealt with by any officer or authority under this Act, or in respect of which the decision or order of such officer or authority has been made final and conclusive." The word "or" occurring in the last clause of this section just before the words "in respect of which" has been deleted by Maharashtra Act XX of 1971.

14. Section 50 to which a reference may be usefully made under this head says that in any case where it is alleged that there is a breach of a public trust, or where the direction of the Court is deemed necessary for the administration of any public trust etc., the Charity Commissioner, or two or more persons obtained the consent in writing of the Charity Commissioner, may institute a suit for recovering possession of the property, removal of any trustee, the appointment of a new trustee, etc.

15. In the light of these provisions, the first question which we have to decide is whether the Civil Court has jurisdiction to decide or deal with the questions raised in Rodabai's suit in regard to her title to the suit property and in regard to the corresponding lack of power or title in Jamshedji to convey that property to the trust. In the language of Section 80, the answer to this question must depend upon whether by or under the Act these questions are to be decided or dealt with by any officer or authority under the Act and such decision is made final and conclusive by the Act. The relevant provision stated as conferring the requisite power being Section 79, the precise point for determination is whether the aforesaid questions arising in Rodabai's suit are to be decided or dealt with by the Deputy or Assistant Charity Commissioner on the inquiry u/s 19 and whether the decision of these questions is made final and conclusive by the Act. If yes, it would be incompetent to the Civil Court to decide or deal with those questions, because by Section 80 its jurisdiction that regard is expressly excluded. It must be stated that in order that the jurisdiction of the Civil Court to decide or deal with a question may be barred under S. 80, it is necessary both that by or under the Act the particular question has to be decided or dealt with by an officer or authority under the Act and the decision of such officer or authority has been made final and conclusive by the Act. The word "or" which

originally appeared in Section 80 before the last clause "in respect of which the decision of order has been made final and conclusive" had evidently crept in through oversight. It has been deleted by Maharashtra Act XX of 1971, probably, to make clear what was not sufficiently clear.

16. For deciding whether S. 80 is attracted in a given case, one must consider what, in substance and not merely in form, is the nature of the claim made in the suit and the real relief sought therein. If in order to afford that relief it is necessary for the Court to decide or deal with a question which by or under the Act is to be decided or dealt with by an officer or authority appointed under the Act, the Civil Court's jurisdiction in that behalf is ousted. Such questions must be left to the sole and exclusive decision of the authorities specified in the Act, whether they are questions of fact or of law and whether they are simple or complicated. It is true that ouster of jurisdiction of Civil Courts is not to be readily inferred and the normal rule is the one contained in Section 9 of the CPC the Civil Courts have jurisdiction to try all suits of a civil nature. But this rule is subject to the exception contained in that section itself and the exception is that the cognizance of certain suits by Civil Courts may be expressly or impliedly barred. Section 80 contains an express provision of ouster and though its dual conditions must be satisfied strictly before the decision of a question can be barred from the cognizance of a normal jurisdiction, it would be wrong to import into that provision any extraneous or collateral considerations, as for example whether the question involved is simple or complicated. If law provides that a question must be decided by a particular authority to the exclusion of the Civil Courts, that authority cannot throw up its hands in despair and refuse to decide the question on the ground that it involves consideration of intricate problems. Nor, indeed, can the Civil Court displace the jurisdiction of that authority by arrogating to itself the sole power to decide complicated questions. Once the normal presumption arising u/s 9 of the CPC is overborne, there is no scope for limiting the jurisdiction of an exclusive forum to simple and straightforward questions. What must therefore be considered here is whether the two conditions of Section 80 are satisfied.

17. Turning to that consideration, let us first see what questions are to be decided or dealt with by the Deputy or Assistant Charity Commissioner in respect of which the decision is final and conclusive. u/s 19 (1) and (2), the Deputy or Assistant Charity Commissioner has to make an inquiry for the purpose of ascertaining "whether a trust exists and whether such trust is a public trust" and "whether any property is the property of such trust." u/s 21 (2) the entries which the authorities have to make, after the decision is recorded u/s 20 in the inquiry held u/s 19, are final and conclusive. Section 79 (1) provides expressly that the question whether or not a trust exists and such trust is a public trust or particular property is the property of such trust shall be decided by the Deputy or Assistant Charity Commissioner and such decision shall be final and conclusive.

18. The provision of Section 79 are too clear to admit of doubt or difficulty as

regards the description of questions which the Deputy or Assistant Charity Commissioner has to decide or deal with under the Act and in respect of which the decision is final and conclusive. The next step, however, is fraught with difficulty and that step is to determine the scope and ambit of these questions. The first of the three questions which the Deputy or Assistant Charity Commissioner has to decide is "whether or not a trust exists". We find it impossible to accept the contention of the contesting respondents that all that is required to be decided under this head is whether in fact a trust is made and is in existence. The mere production of a deed of trust would in most cases suffice to furnish an answer to this question, if that be the true import of that question. In our opinion, what the authorities have to decide while dealing with the first question is whether the trust is valid and lawful and can therefore be said to exist. A deed of trust is normally enough proof of the existence of a trust. But the deed may itself disclose that the author of the trust is incompetent to contract, being, for example, a minor or that the object of the trust is unlawful. In such cases, it seems unreasonable to support that the authorities charged with the duty of conducting inquiries into public trusts could still come to the conclusion that the "trust exist". Such trusts can have no existence in the eye of law and it cannot be that a quasi-judicial authority, like the Deputy or Assistant Charity Commissioner, could find that a trust created by a person incompetent to contract, or a trust created for an unlawful purpose "exists". Sections 10 to 13 of the Act contain provisions regarding "validity of certain public trusts" and regard must also be had to those provisions in determining whether a trust is valid so that it can be held to exist.

19. The second question which the authorities have to decide u/s 79 is whether "such trust is a public trust". The ambit of this inquiry is indicated by the definition of public trust in Section 2 (13). The authorities have therefore to satisfy themselves whether a trust which is otherwise lawful and valid satisfies the requirement of that provision. For determining that question regard must also be had to the provisions of Section 9 of the Act which provides as to what purposes are included in the expression "charitable purpose."

20. The third question relegated to the decision of the Deputy or Assistant Charity Commissioner is whether the "particular property is the property of such trust". This clause is couched in words of doubtful import leading to the expression of divergent views as regards its scope. Learned Counsel for the appellant contents for the view that as the question whether the particular property is the property of the trust cannot be answered without deciding whether the author of the trust had the right or title to the property conveyed to the trust, the authorities must decide this latter question and, indeed, it is their function and duty to decide it. It is urged that questions of title to the particular property are thus required to be decided in inquiries u/s 19 and the jurisdiction of the Civil Court to decide those questions is barred u/s 80. The contesting respondents contend for the rival view that the question whether the author of the trust had title to the property conveyed to the trust is outside the scope of

the inquiry u/s 19 and therefore, the jurisdiction of the Civil Courts to decide or deal with that question is not barred. The learned Government Pleader has pointed out the merits and demerits of both the views but he has given good reasons why the contention of the Respondents should be accepted in preference to that of the appellant. Having considered the matter in all the aspects presented before us, we are of the opinion that the respondents are right in their contention. The purpose of the Act, the procedure prescribed in inquiries u/s 19, the absence of any remedy under the Act to those who were not parties to the inquiry u/s 19 but whose anterior or superior title would be concluded by the decided in that inquiry and the general scheme of the Act, all tend to show that questions of title to the trust property are outside the scope of the inquiry u/s 19.

21. The short title of the Act shows that it is "An Act to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Bombay". The preamble of the Act is in the same terms. The statement of Objects and Reasons shows that the then Government of Bombay had appointed a Committee under the Chairmanship of the late Mr. Justice Tendolkar "to investigate into the question of the administration and management of trusts and endowments in the Province of Bombay for public purposes". Under the terms of reference, the Committee was directed to investigate into the question of the administration of public, religious and charitable trusts for the benefit of the Hindu and Jain Communities with special reference to the prevailing abuses in the administration of such trusts, measures necessary for removing such abuses, steps to be taken for an effective supervision, regulation and control of the administration and management of such trusts etc. The recommendations of the Committee were accepted by and large, and were embodied in the Act which has been made applicable to religious and charitable trusts created for the benefit of all communities. It is thus clear that the dominant purpose of the Act, is to regulate the administration of public trusts and not to settled disputed titles to the property alleged to belong to the trust. Towards that end the Act contains copious provisions in regard to "Accounts and Audit" (Chapter V), Control over Public Trusts (Chapter VI), Functions and Powers of Charity Commissioner (Chapter VII) and regarding the Public Trust Administration Fund (Chapter VIII).

22. The procedure prescribed by the Act for the conduct of inquiries u/s 19 is wholly unsuited to a proper and effective adjudication of disputed titles to the trust property. u/s 19 the Deputy or Assistant Charity Commissioner has to conduct an inquiry "in the prescribed manner". Rule 7 which deals with the manner of inquiries provides that the procedure prescribed for the trial of the suits under the Presidency Small Cause Courts Act, 1882 or the Provincial Small Cause Courts Act, 1887, as the case may be, would apply to the proceedings u/s 19. u/s 19 (d) (e), (f) and (g) of the Presidency Small Cause Courts Act, 1882 and under Item 4 of the Second Schedule of the Provincial Small Cause Courts to decide questions of title to immovable property is expressly excluded and the procedure devised for trials under those Acts is consequently far too summary

for a proper adjudication of such titles. The provision in Rule 7 that a party to an inquiry can appear through an agent and the power of the Tribunal to exclude lawyers from the inquiries reveal to some extent the narrow nature of the inquiry envisaged by Section 19.

23. Rule 11 provides that the officer holding the inquiry may only make a memorandum of the substance of what each witness deposes. It is unthinkable that questions of title could be permitted to be decided by a Tribunal finally and conclusively without any obligation to record the evidence fully. It is matter of common experience that subtle shades of evidence are often missed in a memorandum containing merely the substance of the evidence.

24. Even perhaps of greater importance than these rules is the provision contained in Rule 7-A. It provides, to the extent material, that on receipt of an application, the Deputy or Assistant Charity Commissioner shall cause a public notice to be given calling upon all persons having interest, to submit their objections. It is significant that until this rule was introduced on 28th December 1967, there was no provision whatsoever in the Act or the Rules for giving any notice, public or individual to any person before the commencement of the inquiry u/s 19. The Act was passed on 14th August 1950 and was made applicable to public trusts on 21st January 1952. For over 15 years, inquiries u/s 19 could be and were in fact conducted without issuing any notice to any one whatsoever. It seems to us plain that such inquiries could not possibly conclude disputed titles. The introduction of Rule 7-A makes no difference to that position, because it provides for a public notice only that too, "calling upon all persons having interest", to submit their objections. State briefly, Section 2 (1) of the Act says that "person having interest includes" in the case of a temple, persons who are entitled (for example) to attend it, in the case of a math (for example) the disciples of the math, in the case of a wake, persons who are entitled to receive benefits from the wake etc., in the case of a society registered under the Societies Registration Act, 1860, a member of the society and in the case of any other public trust, any beneficiary. The word "includes" which was substituted in Section 2 (1) for the word "means" by Bombay Act XXVIII of 1953 may show that the definition is not exhaustive but the inclusion of a particular class of persons only in the definition affords a strong indication of the scope of the inquiry u/s 19. WE are also not unmindful that the definition in Section 2 (1) is for the purpose of the Act but normally, similar expressions used in the Act and the Rules must bear the same meaning. Section 2 (10) shows that the Deputy or Assistant Charity Commissioner is expected and required to decide questions raised at the instance of persons who are interested in the trust. It is no part of their function u/s 19 to decide claims which are adverse to the trust and which are made in assertion of titles which are hostile to the trust. Such titles cannot be held concluded in violation of the principles of natural justice.

25. Neither the Act nor the Rules contemplate that persons who claim adversely to the trust or who dispute the right or title of the author of the trust to the trust

property must be heard in the inquiry u/s 19. In fact, Section 19 and R. 7-A (1) only reckon applications under S. 18 which are to be made by trustees and applications by "any person having interest in a public trust". Surely, persons in the position of Rodabai and Baimai are not persons "having interest in a public trust". They are interested in the assertion of their own private title to the property and in disputing the right of Jamshedji to convey that property to the trust. We might mention that in Abdul Karim Khan and Others Vs. Municipal Committee, Raipur, , the Supreme Court held that contested questions of title did not fall within the scope of inquiry which the "Registrar" is authorised to hold under S. 5 of the Madhya Pradesh Public Trust Act, 1951. We cannot, however, draw on that decision as the provisions of the M. P. Act were different in material respects.

26. It is urged on behalf of the appellant that if this be the true nature of the inquiry u/s 19, the decision of it was needless to provide for an array of remedies against the Deputy or Assistant Charity Commissioner. Section 70 provides for an appeal to the Charity Commissioner, Section 70-A confers revisional powers on the Charity Commissioner, Section 72 provides that an application can be filed to the Court against the decision of the Charity Commissioner and under sub-section (4) of that section an appeal lies to the High Court against the decision of the Court. The fact that the Legislature has expressly provided for these remedies against the decisions rendered u/s 19 is undoubtedly relevant, because summary decisions are seldom accorded the privilege of being taken that high. But we are of the opinion that this circumstance is not sufficient by itself to extend the scope of the inquiry u/s 19 so as to bring within its sweep contested questions as regards the title to the trust property.

27. An speaking of remedies, what is truly important is that the Act provides no remedy to a person whose title is deemed to have been concluded by the order of the Deputy or Assistant Charity Commissioner, without affording to him an opportunity of being heard. The argument is that the decision that a particular property belongs to the trust involves the determination that it belongs to no one else and therefore, after the Deputy or Assistant Charity Commissioner records a decision in the inquiry, the Civil Court has no jurisdiction, in view of Section 80, to decide any question regarding title to the particular property. It is legitimate to inquire: if Section 80 bars the suit, does the Act provide a remedy to the aggrieved person, as a self-contained Code should provide?

28. Counsel for the appellant contends that Section 22-A provides such a remedy. But that, in our opinion is reading far too much in that section. It provides that if at any time after the entries are made in the register it appears to the Deputy or Assistant Commissioner that "any particular relating to any public trust, which was not the subject-matter of the inquiry u/s 19 has remained to be inquired into", a further inquiry may be made in the prescribed manner. The pre-condition of this section is that a particular relating to a public trust must have remained to be inquired into. This must mean that an

particular which could have been inquired into by the Deputy or Assistant Charity Commissioner has remained to be inquired into. That takes one back to Section 19 which speaks of a trustee's application u/s 18, or an application by a "person having interest in a public trust". Rule 7-A (1) uses similar language and 7-A (1) (b) says that "all persons having interest" to submit their objections shall be called upon to do so by a copy of the public notice affixed on the board of the Deputy or Assistant Charity Commissioner. If the Act and the Rules thus contemplate in terms that the inquiry must be limited to the contentions of persons interested in the trust, there is no place in that inquiry for a person who wants to set up a title which is hostile to the trust. Such a claim is not a "particular relating to" the public trust, nor can it be said that it "has remained to be inquired into".

29. Section 18 (5) and Rule 6 prescribe the "particulars" which the application u/s 18 (1) must contain. These provisions show that what has to be disclosed in the application is matters in which the trust is interested, matters which are necessary to know for the purpose of registration of the trust, so that its affairs can properly be regulated and administered. Section 18 (5) provides that the application shall by way of particulars set out the name of the trust, the names and addresses of the trustees, the mode of succession to the office of the trustee, the list of property belonging to the trust, etc. Rule 6 provides that in addition to these particulars, the application shall also contain particulars regarding documents creating the trust, objects of the trust, sources of its income, encumbrances on the trust property and particulars as to title deeds pertaining to the trust property. All these are matters pertaining to the trust property in which the trust and the trustees are interested. Facts pertaining to the history of title to the trust property do not find a place in these provisions, because they do not constitute particulars in the sense in which that word is used in Section 18 (5) and Rule 6. The use of the expression "another particulars" in Section 19 (viii) does not throw much light on this question, because what is mentioned in the preceding clauses of Section 19 is partly what is to be ascertained in the inquiry and every one of the preceding seven clauses cannot necessarily be deemed to be a "particular".

30. A learned Single Judge of the Gujarat High Court - the late Mr. Justice M. R. Mody - has held in *Ishwarlal Nanlal v. Ghanchi Chimanlal R.*, ILR (1963) Guj 767 that decisions given under the Bombay Public Trusts Act have the effect of a judgment in rem and that Section 22-A of the Act casts an obligation on the Deputy or Assistant Charity Commissioner to hold a further inquiry if the claim of any third party is left out of consideration in a previous inquiry u/s 19. With respect, we are unable to agree with this view. The inadequate procedure prescribed for inquiries u/s 19, the absence of any provision for the issuance of a notice to those whose interests are likely to be affected by a decision rendered in that inquiry and the dominant purpose of the Act that public trusts should be compulsorily registrable so that they can be more effectively regulated and administered show that contests regarding titles of third parties have no place in

the scheme of the Act. With respect, we also see no support for the proposition that decisions given u/s 19 are judgments in rem. Section 41 of the Evidence Act does not accord that pride of place to such summary decisions. Mody J., it must be stated, has not considered the whole scheme of the Act. He says "I would have had to consider the whole scheme of the Act had I not been fortunate enough to find a judgment of our own Court reported in Kuberbhai Shivdas v. Mahant Purshottamdas Kalyandas, (161) 2 Guj LR 564." That is a judgment of Shelat, J. which involved different considerations altogether. There, the learned Judge was concerned to determine whether in view of Section 20, the Civil Court had jurisdiction to decide a suit by which plaintiffs asked for a declaration that certain properties belonged to the public trust for a change in the mode of succession to the office of the trustee, for removal of one of the defendants as a trustee, for appointment of new trustees and for settlement of a scheme. Plaintiffs participated in the inquiry u/s 19 and went in appeal to the Charity Commissioner against the decision of the Assistant Charity Commissioner. Thereafter they filed suit for obtaining the reliefs mentioned above. Shelat, J., held that a complete code is provided by the Act for dealing with matters set out in Sections 18 and 19 and that the provisions of Section 80 bar the jurisdiction of Civil Courts in the two categories of matters, namely, (1) those questions left under the Act to be decided by the Deputy or Assistant Charity Commissioner under Sections 18 and 19, and (2) those which the Act has made final and conclusive u/s 79 (1) and Section 21 (2) of the Act. The question whether titles of third parties can be adjudicated upon in an inquiry u/s 19 was not before the learned Judge.

31. Mody, J., has also down on the judgment of Shelat, J., for determining the scope of Section 22-A. But all that was said in Kuberbhai's case. (1961) 2 Guj LR 564 is that the word "particular" mentioned in Section 22A would mean any information or detail as to a trust which has not been considered in a previous inquiry u/s 19. This observation would not justify the conclusion to which Mody, J., came that a claim of a third party to the trust property can be inquired into u/s 22-A if it was not previously considered in the inquiry held u/s 19.

32. The appellant contends that quite apart from Section 22-A, Section 70-A provides an adequate remedy to a third party whose title is affected by the decision of the Deputy or Assistant Charity Commissioner. This submission also lacks substance. Revisional powers are always discretionary and the power conferred by Section 70-A on the Charity Commissioner is no exception to that rule. Besides, a third party may find himself in a quandary if a party to the proceeding under S. 19 has filed party to the proceeding under S. 19 has filed an appeal u/s 70 or an application under S. 72 and orders have been passed in those proceedings. Sub-section (2) (b) of Section 70-A provides that in such cases the Charity Commissioner cannot exercise his revisional powers.

33. The contention that a tribunal of exclusive jurisdiction also possesses the right to decide questions which are incidental to the determination of the main

question does not carry the matter any further. The question as regards the title of a third party to the trust property is not by any means a question incidental to the determination of the main question whether the particular property is the property of the public trust.

34. Counsel for the appellant has drawn our attention to decisions under the Administration of Evacuee Property Act, 1950, one of which is reported in *Custodian of Evacuee Property Punjab and Others Vs. Jafran Begum*, . The parallel of decisions under that Act is, in our opinion, not opposite. Section 2(f) of that Act defines "evacuee property" to mean any property of an evacuee whether held by him as owner or as a trustee or as a beneficiary or as a tenant or in any other capacity and includes any property which has been obtained by any person from an evacuee after 14th August, 1947. Section 7 of that Act empowers the Custodian to give notice, where he is of opinion that certain property is evacuee property, to the person interested and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property. Section 28 of that Act provides that every order made by the Custodian and certain other officers shall be final and Section 46, with which the Supreme Court, was particularly concerned, provides that no civil or revenue Court, save as otherwise expressly provided in that Act, would have jurisdiction to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not in evacuee property or in respect of any matter which the Custodian-General or that Custodian is empowered by or under that Act to determine. On a consideration of these provisions and the entire scheme of the Act, the Supreme Court held that the Act was a complete code in itself in the matter of dealing with evacuee property. Wanchoo, C. J., who spoke for the Court, refers to an earlier decision of the Supreme Court in *Ram Gopal Reddy Vs. Additional Custodian Evacuee Property, Hyderabad*, in which it was held that the Evacuee Act "provides a complete machinery for a person interested in any property to put forward his claim before the authorities competent to deal with the question and to go in appeal or in revision if the person interested feels aggrieved. Having provided this complete machinery for adjudication of all claims with respect to evacuee property, the Act by Section 46, bars the jurisdiction of civil or revenue Courts to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property." We have pointed out that the Act is not a self-contained Code and provides no remedy to third parties whose titles would be concluded by the decision u/s 19.

35. That may serve to explain the intendment of Section 26 under which any Court of competent jurisdiction deciding any question relating to any public trust, which by or under the provisions of the Act it is not expressly or impliedly barred from deciding, has to send copy of such decision to the Charity Commissioner and the Charity Commissioner has to cause the entries in the registrar to be made or amended in accordance with such decision. If a civil Court upholds the title of a third party to the property, which u/s 19 has been found to belong to

the trust, the record of the Charity Commissioner has to be amended so as to accord with that decision. In the instant case, therefore, the decision of Civil Court in Rodabai's suit will have priority over the decision recorded in the inquiry u/s 19.

36. It remains now to consider the decisions of this Court which have led to this reference. In *Taraben Baldevdas v. Charity Commr.*, (1995) 57 BomLR 1069 the petitioner had filed a suit in a Civil Court against the respondents for declaration that she was the owner of a certain sum of money lying in deposit with the respondents and that no one else had any right, title or interest in that sum. A preliminary issue was raised whether the suit was barred by Section 80 of the Act. During the pendency of the suit, respondents submitted an application to the Deputy Charity Commissioner for determining whether the sum lying in deposit with them constituted a trust and whether the trust was a public trust within the meaning of the Act. The petitioner raised a preliminary contention that the Deputy Charity Commissioner had no jurisdiction to entertain the application as the question relating to the existence of the trust was involved in the suit. That contention having been rejected, the petitioner applied u/s 10 of the Civil Procedure Code, for stay of the proceedings before the Deputy Charity Commissioner. A division bench of this Court (Bavdekar and J. C. Shah, JJ.) held that as the Civil Court had no jurisdiction to decide the question whether the sum in the hands of the respondents was the property of the public trust, the application before the Deputy Charity Commissioner could not be stayed.

37. Shah, J., who delivered the judgment of the Bench examined the scheme of the Act and observed; "Now, jurisdiction of such amplitude having been conferred under the Act upon the Deputy or Assistant Charity Commissioner or the Charity Commissioner to decide questions set out in Section 19, and jurisdiction of the Civil Courts having been simultaneously excluded, it would be difficult to hold that the civil court has jurisdiction to decide the same questions over again in a civil suit." It was urged that if that be the true view of the matter, the title of a person may be lost by a conclusive determination even though he has had no opportunity of being heard. This contention was expressly left open, as it was unnecessary to decide it. The decision therefore is not an authority for the proposition that titles of third parties can be held concluded by the decision recorded in the inquiry u/s 19. The decision however proceeds on the basis that a contest on title is within the purview of that inquiry and to that extent the decision, with very great respect, is not correct. A provision of ouster like the one contained in Section 80 does not depend for its application upon whether the person who raises the particular question in the suit was or was not a party to the proceeding before the tribunal in which the exclusive jurisdiction to decide that question is vested. the decision whether the trial of a question is barred u/s 80 depends on whether that question is to be decided by the Deputy or Assistant Charity Commissioner. If the question is outside the pale of the inquiry envisaged by Section 19, the Civil Courts would have jurisdiction to decide or deal with the question. Evidently, the various considerations which have been presented before

us were not placed before the learned Judges who decided Taraben's Case.

38. The decision of Chitale, J. in *Shri Adinath Tirthankar Jain Mandir and Others Vs. Shantappa Dada Madnaik and Others*, , that "a person who was not a party to the proceedings under the Bombay Public Trusts Act, 1950, but finds that his property is registered as trust property pursuant to the said proceedings, is not precluded under Sections 79 and 80 of the Act from filing a suit for declaration of his title to such property in a Civil Court", is with respect correct, but we must add that the same result would follow whether the person who raises the question regarding his title to the property was or was not a party to the proceedings u/s 19. The question of ouster u/s 80 has to be decided by applying an objective test : Is the particular question one which by or under the Act is to be decided or dealt with the Deputy or Assistant Charity Commissioner and is his decision made final and conclusive by the Act?

39. In First Appeal No. 353 of 1960 decided on 19-11-1962 (Bom), Patel and K. K. Desai, JJ., were dealing with a matter in which the 1st appellant had made an application under S. 18 of the Act for registration of a trust. The inquiry into that application related to the question whether a certain land belonged to a public trust. Against the decision that the land was the property of the trust, respondents 1 and 2 filed an appeal to the Charity Commissioner and thereafter an application to the District Court u/s 72 of the Act. The learned District Judge set aside the decision of the Deputy Charity Commissioner and directed that respondents 1 and 2 should be allowed to file their written statement and lead evidence in support of their contentions. Their case was that the title to the property was vested in them. After referring to the decision in *Taraben Baldevdas Parikh Vs. Charity Commissioner, Greater Bombay Region and Others*, , Patel, J., observes :

"..... It is difficult, however, to assert that the Charity Commissioners have got exclusive jurisdiction where titles of third parties may be involved. While requiring them to decide statutory issues, if facility were to be attached to certain matters, we would be permitting them indirectly to decide very complicated and important questions of fact of heredity and legitimate as well, which, in all probability, in view of the wording of Section 19, may not have been intended. Even apart from this, the procedure, prescribed is also a summary procedure, which is highly unsuited to any inquiry about the titles of third persons"

These observations are really obiter, because ultimately the learned Judges dismissed the appeal with a direction that the Assistant Charity Commissioner should decide the issues framed by the learned District Judge. The use of expressions "in all probability" and "may not have been intended" also shown that the particular question was not considered and decided. We would, however, like to add that if a tribunal has exclusive jurisdiction to decide a question, it is irrelevant that the question is of a complicated nature. AS held by Gatne, J., Mrs. Jankibai Prahladrai Brijlal Seksaria Vs. Kashinath Raghunath Kelkar and Others, ,

if a question falls within the exclusive jurisdiction of the Deputy or Assistant Charity Commissioner, it is not open to him to refer the parties to the civil Court on the ground that the question is complicated.

40. For these reasons, our answer to the first question is in the negative.

41. As regards questions 2 and 3, we are of the opinion that for determining whether the bar u/s 80 of the Act arises, it is irrelevant whether the person who wants to raise the particular question u/s 19. The fact that such a person was a party to those proceedings may, perhaps, raise a bar analogous to that of res judicata but we are not concerned with that question and would prefer not to express any opinion thereon. The Civil Court would, however, have the jurisdiction to decide the points mentioned in question No.1, in the sense that Section 80 cannot operate as a bar to that jurisdiction.

42. The papers may be sent back to the learned Single Judge for disposal of the appeal.

43. Reference answered accordingly.