

(2003) 07 GUJ CK 0061

In the Gujarat High Court

Case No : Special Civil Application No 86 of 2003

Kiritkumar Chimanlal Shelat

APPELLANT

Vs

Sharadkumar Fulabhai Patel

RESPONDENT

Date of Decision : 25-07-2003

Acts Referred:

Bombay Public Trusts (Gujarat) Rules, 1961 — Rule 36, 36(1), 36(3)
Bombay Public Trusts Act, 1950 — Section 26, 3, 3A, 3C, 41A
Constitution of India, 1950 — Article 226

Citation : (2004) 1 GLR 292

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : H.J. Nanavati, for the Appellant; M.I. Merchant, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The petitioner has filed this petition under Article 226 of the Constitution of India challenging the legality and validity of the order dtd. 29.11.2002 passed by the Learned Joint Charity Commissioner, Gujarat State, Ahmedabad in Misc. Judicial Application No. 05/2002, which was renumbered as Misc. Judicial Application No. 13/2002, on transfer of the proceedings from Baroda to Ahmedabad. The petitioner has challenged the said order on the ground that the Learned Joint Charity Commissioner has no jurisdiction or authority to hear and pass the impugned order in as much as the proceedings which were initiated by the respondent No.1 and are subject matter of transfer in this petition, have originally been instituted before the Joint Charity Commissioner, Baroda, which subsequently came to be transferred to the Charity Commissioner, Ahmedabad and the Charity Commissioner has, though there is no provision under the provisions of Bombay Public Trust Act, 1950 (hereinafter referred to as "The Act") to transfer the proceedings pending before him to another Charity Commissioner, by order dtd. 07.05.2002 transferred the judicial proceedings to the Joint Charity Commissioner, Ahmedabad in violation of the provisions contained in Section 69 of the Act read with Rule 36 of the Bombay

Public Trust (Gujarat) Rules, 1961, which only empowers the Charity Commissioner of the State to transfer the judicial proceedings from one Deputy or Assistant Charity Commissioner to another Deputy or Assistant Charity Commissioner, but he has no power to transfer the judicial proceedings or judicial proceedings of coordinate authority either pending before Charity Commissioner or pending before Joint Charity Commissioner. The petitioner has, therefore, sought for the declaration from this Court to the effect that the Joint Charity Commissioner, Ahmedabad has no power, authority or jurisdiction to hear and decide the Original Application No. 05/2002 as the Act does not empower the Charity Commissioner to transfer the judicial proceedings, without express authorization by Notification in the Official Gazette by the State Government. The petitioner has further sought for the declaration that direction No. 6 contained in the operative portion of the impugned order dtd. 29.11.2002 passed by the Joint Charity Commissioner, Ahmedabad is without any authority, jurisdiction or power as the same is neither prayed for by the respondent No.1 nor the Joint Charity Commissioner was called upon to decide the same. The petitioner has also challenged the impugned order on merits by contending that the Joint Charity Commissioner, Ahmedabad has exceeded his jurisdiction in deciding the issues which were subject matter of the proceedings before the Assistant Charity Commissioner, Nadiad and thereby have taken away the right of appeal from the parties against any adverse decision of the lower authority, as the Joint Charity Commissioner being an Appellate Authority, under any decision which may be taken by the Assistant Charity Commissioner, Nadiad.

2. The brief facts giving rise to the present petition are that the petitioner is one of the Trustees of the Trust, namely, Sharda Education Trust. The trust was established with an object to extend the educational facilities of secondary education in surrounding villages of Anand town. Prior to the registration of the school, the trustees were running primary and middle school. In the year 1999, there were five trustees of the Trust. However, the Managing Trustee, namely, Shri Chhotabhai Somabhai Patel expired on 19.04.2001 and another trustee, namely, Shri Chandulal Chunilal Trivedi expired on 30.03.2000 and, therefore, out of the remaining three trustees, two trustees, namely, the petitioner and one Shri Harshadkumar Chhotabhai Patel called for requisition meeting vide requisition dtd. 20.04.2001 and as per the agenda in the meeting which was scheduled to be held on 21.05.2001, the appointment of the Managing Trustee was to be made. The said requisition was not signed by the respondent No.1 who is also one of the trustees of the said trust. On receipt of the agenda of the meeting, the respondent No.1 filed Civil Suit in the court of Civil Judge (J.D.), Anand being Civil Suit No. 158/2001 inter alia challenging the holding of meeting on 21.05.2001 for appointment of Managing Trustee. In the said suit, Civil Court granted status quo so far as requisition meeting was concerned. The petitioner raised the question of jurisdiction in the said suit and that suit is still pending. The petitioner and another trustee by majority thereafter called for the meeting on 03.06.2001 for the appointment of new trustees. The respondent No.1

however did not remain present in the said meeting. In the said meeting, six new trustees were appointed. Thereafter, another meeting was called for on 16.06.2001 and out of nine trustees, except the respondent No.1, all other eight trustees remained present in the meeting and vide Resolution No.2 passed in the said meeting, it was unanimously resolved that the petitioner was appointed as Managing Trustee of the Trust. Necessary Change Report was submitted before the Assistant Charity Commissioner, Nadiad on 14.08.2001 and another Change Report making appointment of the new trustees was also submitted to the Assistant Charity Commissioner, Nadiad. Thereafter, respondent No.1 filed an application on 27.02.2002 u/s 41A of the Act after a period of six months before the Joint Charity Commissioner, Baroda inter alia praying for various relief including the relief that the petitioner be restrained from acting as Managing Trustee of the trust and he may be declared as an administrative trustee of the trust.

3. At the relevant time, one Mr. Amrish Upadhyay was the Joint Charity Commissioner, Baroda and since he was previously an employee of the school run by the trust, he could not take up the matter and hence, he addressed a letter to the incharge Charity Commissioner to transfer the said matter to some other authorities. Thereafter, he being incharge Charity Commissioner passed an order on 07.05.2002 transferring the Misc. Judicial Application No. 5/2002 pending before the Joint Charity Commissioner, Baroda to the Joint Charity Commissioner, Ahmedabad. After the transfer of the said proceeding to the Joint Charity Commissioner, Ahmedabad, an application was moved by one another trustee to be impleaded as party respondent and while rejecting the said application, the Joint Charity Commissioner, Ahmedabad vide his order dtd. 18.05.2002 held that looking to the provisions of Section 69 and provisions of rule 36, the Charity Commissioner of Gujarat State has not been conferred with the power to transfer judicial proceedings from one Joint Charity Commissioner to another Joint Charity Commissioner.

4. On the basis of the observations made in the said order, the petitioner filed Special Civil Application No. 5922/2002 before this Court challenging the order dtd. 07.05.2002 transferring the judicial proceedings from one Joint Charity Commissioner to another Joint Charity Commissioner. The said petition came for hearing on 06.08.2002 and this Court (Coram :- Jayant Patel, J.) has passed an order on the basis of the consensus arrived at between the parties, directing the Joint Charity Commissioner, Ahmedabad to decide the transfer application on merits, keeping the issue of authority of the Charity Commissioner to transfer judicial proceedings open to challenge.

5. The matter was thereafter heard by the Joint Charity Commissioner, Ahmedabad and the order was passed on 29.11.2002 giving in all six directions. Being aggrieved by the said order, the present petition is filed before this Court.

6. Mr. H.J. Nanavati, learned advocate appearing for the petitioner challenged the interim order mainly on two grounds i.e. on the ground of jurisdiction as well as

on the ground of merit. Mr. Nanavati has submitted that the impugned order passed by the Joint Charity Commissioner, Ahmedabad was based on the transfer of judicial proceedings made by incharge Charity Commissioner, Gujarat State in exercise of his powers conferred u/s 69 of the Act read with Rule 36 of the Rules. He has further submitted that it was only with a view to expedite the adjudication of the dispute, this Court, on the basis of the consensus arrived at between the parties, directed the Joint Charity Commissioner to hear the matter keeping open the issue of jurisdiction and authority of the incharge Charity Commissioner to order transfer of judicial proceedings from one Joint Charity Commissioner to another Joint Charity Commissioner in exercise of power u/s 69 of the Act read with Rule 36 of the Rules. Mr. Nanavati has invited the Court's attention in this connection, to Chapter II of the Act which deals with the instruction concerning the affairs in the public trust in State. Section 3 of the Act provides that the State Government may, by Notification in the Official Gazette, appoint an Officer to be called Charity Commissioner, who shall exercise such powers and shall perform such duties and functions as are conferred by and / or under provisions of the Act and shall, subject to such general or special orders, the State Government may pass for administration and carrying out the provisions of the Act. Section 3A which came to be inserted by Bombay Act No. 6/60 and has continued in the Gujarat Act deals with the powers and authorities of the Joint Charity Commissioner. As far as Joint Charity Commissioner is concerned, he is subject to the control of the Charity Commissioner. However, as far as judicial powers are concerned, he is not subject to the control of the Charity Commissioner. Section 69 deals with duties, functions and powers of the Charity Commissioner and 69 (1) (a) says that the powers regarding general superintendence of the administration and carrying out the purposes of this Act u/s 3 are exercised by the Charity Commissioner and Sub-Section (c) says that power to determine which of the Deputy or Assistant Charity Commissioner shall proceed with an inquiry relating to the registration of any public trust u/s 26 is also exercised by the Charity Commissioner. Rule 36 of the Rules discusses about additional duties and powers of the Charity Commissioner and Sub-Rule 3 talks about the power at any stage to transfer any proceedings pending before a Deputy or Assistant Charity Commissioner to another Deputy or Assistant Charity Commissioner for disposal. On the basis of this statutory provisions, Mr. Nanavati has submitted that the cumulative reading of Section 69 and Rule 36 makes it very clear that though the Charity Commissioner and Joint Charity Commissioner are having some duties and functions to be performed and though the Joint Charity Commissioner is under the administrative control of the Charity Commissioner, the Charity Commissioner has not been conferred with the power either under the Provisions of the Act or Rules to transfer the judicial proceedings pending before the Joint Charity Commissioner to another Joint Charity Commissioner because the only judicial power which have been conferred under Rule 36 (1) and (3) is to call for any record and proceedings from subordinate officers, namely, Deputy Charity Commissioner or Assistant Charity Commissioner and to transfer the proceedings pending before the Deputy Charity

Commissioner or Assistant Charity Commissioner to another Deputy Charity Commissioner or Assistant Charity Commissioner, as the case may be, but Rule does not confer powers on the Charity Commissioner to transfer the proceedings pending before the Joint Charity Commissioner, which is a coordinate forum, from one Joint Charity Commissioner to another Joint Charity Commissioner. Mr. Nanavati has, therefore, submitted that the impugned order passed by the Joint Charity Commissioner, Ahmedabad lacks the inherent jurisdiction to hear and decide the dispute which has been referred and transferred to him for adjudication by incharge Charity Commissioner, as the Government has not issued any Notification conferring such powers on the Charity Commissioner.

7. Mr. H.J. Nanavati has further submitted that the Joint Charity Commissioner, in the impugned order, has decided the issues which are yet to be adjudicated by its subordinate authorities, namely, the Assistant Charity Commissioner, Nadiad by making observation in that connection. He has further submitted that while arriving at the conclusion on the issues pending before him, the Joint Charity Commissioner has also decided the issue of Change Report of induction of new trustees as well as appointment of a Managing Trustee, which is pending before the Assistant Charity Commissioner, Nadiad for its decision as to whether the names of newly appointed trustees and / or Managing Trustees are to be entered in the P.T.R. or not. This issue has been decided by the impugned order which takes away the right of the petitioner of an Appeal because the observation which is in the form of conclusion of the issues by the subordinate officer and thus, the Joint Charity Commissioner has exceeded the jurisdiction by deciding issues which he was not called upon to decide.

8. Mr. M.I. Merchant, learned advocate appearing for the respondent No.1 on the other hand submitted that the petitioner is not permitted to raise the dispute regarding jurisdiction of the Joint Charity Commissioner, Ahmedabad in the present proceedings as that has already been given up in earlier writ petition. The Joint Charity Commissioner, Ahmedabad has heard and decided the matter pursuant to the order passed by this Court on 06.08.2002. He has specifically invited the court's attention to para 4 of the said judgment wherein it was observed by this Court that when it was put by the Court to the learned counsel of both sides as to whether they would agree for hearing before any other Joint Charity Commissioner i.e. Joint Charity Commissioner other than Mr. Upadhyay and it must be recorded that both have clearly agreed for proceeding for hearing before another Joint Charity Commissioner than Mr. Upadhyay, if this court passes the order for the same. In view of the said concession given by both sides, namely, the petitioner as well as the respondent No.1, the Court held that it is not necessary for this Court at this stage to examine the larger questions raised by Mr. Nanavati regarding the power of the Charity Commissioner to transfer the matter from one Joint Charity Commissioner to another and such question was kept open. Mr. Merchant has submitted that once having agreed before this Court with regard to the hearing of the matter by another Joint Charity Commissioner, it is not open for the petitioner to raise the same dispute

once again in the present proceedings. He has further submitted that the observations made by this Court to the effect that the issue is kept open, does not mean that the same issue can be reagitated in the present proceedings. The said observation is only in the context that the Court has not expressed any opinion so far as that issue is concerned and it can be decided in any other appropriate case and that since it was an adinvtum order on this issue, the same cannot have any binding effect so far as other cases are concerned. He has further submitted that after passing of the impugned order, there have been certain developments with regard to other Revision Applications pending before the learned Joint Charity Commissioner, Ahmedabad. As stated earlier, the appointment of some of the trustees of the trust in question was challenged by filing various Revision Applications before the learned Joint Charity Commissioner, Ahmedabad and one of such Revision Applications being Revision Application No. 17/1996 was with regard to the appointment of the petitioner as one of the trustees of the trust. The other application along with the said Revision Application was decided by the Deuty Charity Commissioner at Ahmedabad by its judgment and order dtd. 20.01.2003 whereby the appointment of the petitioner as one of the trustees of the trust is set aside, while the appointment of the respondent No.1 as one of the trustees of the trust is confirmed. Mr. Merchant has further submitted that the petitioner and others have preferred Civil Misc. Appeal before the District Court, Nadiad under the provisions of Section 72(1) of the Bombay Public Trusts Act, 1950 being Civil Misc. Appeal No. 34/2003 and others. However, District Court, Nadiad has not granted any stay against the implementation and operation of the order passed by the Learned Joint Charity Commissioner on 20.01.2003. Pursuant to the said order, the name of the petitioner is deleted from the P.T.R. as one of the trustees of the trust. Mr. Merchant has, therefore, submitted that in view of the subsequent development, nothing survived in the petition and hence, present petition is required to be dismissed with cost.

9. I have heard learned advocates appearing for the respective parties at length and I have considered their respective submissions. I have also gone through the impugned order and I have also taken into consideration the earlier proceedings as well as the orders passed therein. I have also given my anxious thoughts to the relevant statutory provisions. The entire petition is based on two main grounds i.e. jurisdiction and merit. As far as the jurisdiction of the Joint Charity Commissioner, Ahmedabad is concerned, I am of the view that he has assumed the jurisdiction pursuant to the order passed by this Court in S.C.A. No. 5922/2002. It is true that this Court has passed an order on the basis of the consent given by both the parties and it was specifically recorded in the impugned order. The only dispute between the parties is that the said concession was given at that interim stage only. However, as per the petitioner's case, the same can be agitated by the petitioner when the final order passed by the Joint Charity Commissioner, Ahmedabad is challenged before this Court in the present proceedings. I do not agree with the said submission made by learned advocate

Mr. Nanavati on behalf of the petitioner. The true import and meaning of the words " such question is kept open " is that though the Court was called upon to decide the issue regarding jurisdiction in the said petition, since the parties have agreed to the proposal that the matter may be heard and decided by any other Joint Charity Commissioner other than Mr. Upadhyay, the Court has not expressed any opinion on that issue of jurisdiction. However, it does not mean that the said issue is still open so far as the parties to the said proceedings are concerned. It is no longer *res integra* so far as the petitioner and respondent are concerned. Even the principle of *resjudicata* or *estoppel* may also come in the way of the petitioner to raise this dispute once again in the present petition. The Court's observation that such question is kept open means this cannot be cited as a precedent in other matters and the Court can go into this aspect of jurisdiction if it is raised before it in any other case. As far as the petitioner and the respondent are concerned, the issue has become final and conclusive and it cannot be raised in the present proceedings. Since the Joint Charity Commissioner, Ahmedabad has decided the matter pursuant to the order passed by this Court in S.C.A. No. 5922/2002, it cannot be said that the Joint Charity Commissioner, Ahmedabad has no power or authority or jurisdiction to decide the said matter. Since this Court has taken the view that Joint Charity Commissioner has decided the matter pursuant to the order passed by this Court, this Court has not gone into the question of jurisdiction as canvassed on the basis of Section 69 of the Act read with Rule 36 of the Rules, as it is not necessary to go into that aspect merely for academic point of view.

10. As far as the merit of the matter is concerned, the contention of Mr. Nanavati that by virtue of the impugned order, the petitioner's right to appeal against the order to be passed by the Assistant Charity Commissioner, Nadiad in the pending matters is frustrated, I am of the view that there is no substance in such submission as the Joint Charity Commissioner, Ahmedabad while passing the impugned order, at more than one place has observed that the finding recorded in the said order is merely a *prima facie* finding and in no way it binds the Assistant Charity Commissioner, Nadiad while deciding the pending matters before him finally. On page 150 of the petition, it is specifically stated in the order that he is of the *prima facie* view while deciding the disputed application that the appointment of the petitioner as Managing Trustee was made by unauthorized board of trustees. It is also mentioned on page 151 of the petition that for continuation as Managing Trustee, the petitioner ought to have sought the direction u/s 56A of the Act and till such direction is obtained by the competent authority, the appointment of the petitioner on the post of Managing Trustee does not *prima facie* seem to be legal and it was also made clear that since it was a *prima facie* finding, it would not come in the way of the petitioner for deciding pending application for Change Report and even while taking any decision by the Assistant Charity Commissioner in the application for Change Report, the observations made by the Joint Charity Commissioner while deciding the application u/s 41A of the Act, would not be binding on him. It is also stated

in page 155 of the petition that the petitioner and the respondent No.1 can jointly work for the trust with each other's cooperation till the disposal of Revision Application or disposal of scheme proceedings or issue regarding appointment of trustees as directed by Charity Commissioner or till the order is obtained by the competent authority on any application of the petitioner filed against the order seeking direction u/s 56A of the Act from the competent Court. This itself speaks volume about the order regarding prima facie finding and not any final or conclusive finding. Even otherwise, as stated by Mr. M.I. Merchant and also in view of the order passed by the Joint Charity Commissioner, Ahmedabad in Revision Application No. 17/1996 on 20.01.2003 a copy of which is annexed along with Affidavit-in-Reply filed on behalf of respondent No.1 on 18.07.2003, the appointment of the petitioner as one of the trustees of the trust is set aside while the appointment of the respondent No.1 as one of the trustees of the trust is confirmed. Since the petitioner's appointment as trustee itself is cancelled, there is no question of his continuation as the Managing Trustee of the trust unless and until, this order passed by the Joint Charity Commissioner, Ahmedabad on 20.01.2003 is reversed by the District Court in Civil Misc. Appeal No. 34/2003. The petitioner can neither work as trustee nor as Managing Trustee. The challenge made in the present petition against the impugned order cannot therefore be upheld in view of this subsequent development.

11. Having regard to the facts and circumstances of the case and after taking into consideration the over all view of the matter and in light of the order passed in earlier proceedings as well as in subsequent proceedings, I am of the view that there is neither any substance nor any merit in the present petition and hence, the petition deserves to be dismissed and accordingly, it is dismissed. Notice discharged. No order as to costs.