
(1941) 08 BOM CK 0002

In the Bombay High Court

Case No : Civil Revision Application No. 8 of 1941

Laxman Raghunath Gokhale

APPELLANT

Vs

Mahadev Heramb Dev

RESPONDENT

Date of Decision : 20-08-1941

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : (1942) 44 BOMLR 11

Hon'ble Judges : Sen, J; John Beaumont, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.—This is an application in revision against an order made by the learned District Judge of Poona, refusing to execute an order, which he had made, for payment of certain costs on the ground that the order was not an executable one.

2. The question arises in relation to a scheme for regulating a charitable institution known as Chinchwad Sansthan, and I must confess that the question involved seems to me to show that matters have got into a very considerable state of confusion.

3. A scheme was framed in the year 1895 for the management of the affairs of the Sansthan, and the material clauses are set out in Lambodar v. Dharanidhar (1925) 28 Bom. L.R. 64. The management of the institution was to be vested in three trustees, and the District Judge of Poona was to nominate one of them. In Clause (4) it is provided:-

The said trustees shall hold office for life, but it shall be competent to the District Judge of his own motion or upon the application or representation of any person interested in the said Devasthan to remove from the management any trustee who may be found to be unfit or incompetent for the management of the Sansthan or negligent in the discharge of his duties.

4. Then under Clause (5), upon the death, resignation or removal of a" trustee, the District Judge shall proceed to appoint another person in his place.

5. Now, the first question which arises is whether the District Judge, acting under Clause (4) of the scheme, is to be regarded as acting in a judicial capacity, or is to be treated as persona designata. I think the reference to "the District Judge of Poona" means "the District Judge for the time being". But the question is whether the District Judge for the time being is. to exercise his powers as persona designata or judicially. On the wording of Clause (4) I cannot entertain any doubt that the powers are given to the Judge as persona designata, because he may act upon his own motion, and it is no part of the duties of a Judge acting judicially to look into the affairs of a charitable institution, and take action on his own motion. He would have to be approached in some form of proceedings for the administration of the scheme. As I read Clause (4), it does not oust the jurisdiction of the Court to remove trustees for proper reasons, but it gives the District Judge as persona designata power to remove, a power which could be exercised more quickly and cheaply than by an application to the Court. But if the Judge is acting, not as a Judge, but as persona designata, there can be no appeal, or application in revision, against his order. Nor does any power seem to be given to him, under that clause to make any order as to costs.

6. Now, what happened was that the affairs of this Sansthan got into difficulties, and in 1932 Mr. Dhurandhar, the then District Judge of Poona, submitted certain proposals for amendment of the scheme to the High Court, but the High Court thought that persons interested in the Devasthan should make an application; so such applications were made. Meanwhile, in 1933 Mr. Nanavati, the then District Judge of Poona, considered that things were not going on properly, and accordingly he went into the matters of the trust, and made an order, in the first instance, suspending the trustees, and appointing a receiver, which he purported to do under Order XL, Rule 1, of the Civil Procedure Code, and subsequently dismissed two of the trustees, one of whom being the present opponent, and in so doing he said:-

For the present I make no order as to costs of this inquiry. If any order had to be made, I think a lump sum should be fixed as against trustee No. 2 who has contributed to make the inquiry needlessly protracted, to be paid to trustee No. 3, who has been harassed by false allegations.

7. That reference to costs and his appointment of a receiver rather suggest that the learned Judge considered that he was acting in a judicial capacity, and not as persona designata.

8. Then there was an application in revision to this Court, and the case is reported in Mahadev Heramb Dev Vs. Govindrao Krishnarao Kale, . The Court considered whether the learned Judge was acting as a Judge or as persona designata, and referred to earlier decisions. There were three appeals, one in 1895, another in 1897 and another in 1918, against orders of the District Judge

refusing to take action under Clause (4), and all those appeals were dismissed. Certainly this Court seems to have entertained the appeals, which it could not do, if the Judge was not acting judicially, but no appeal was allowed. Then in *Lambodar v. Dharanidhar* above noticed in *Mahadev v. Govindrao*, a bench of this Court, consisting of Sir Norman Macleod and Mr. Justice Madgavkar, dismissed certain appeals and applications in revision in the matter of this trust on the ground that the District Judge, acting under Clause (4), was acting as *persona designata*. That is a direct authority on the point, which is binding upon this Court, though, no doubt, the learned Chief Justice in giving judgment did not refer to the earlier cases. After noting these cases the Court in *Mahadev v. Govindrao* did entertain the applications, but I gather that one matter before the Court was an application to amend the scheme, and clearly there would be jurisdiction to entertain that. Mr. Justice Broomfield stated that the matter (i.e. of the character in which the District Judge had made his order) could not be said to be free from uncertainty, and therefore the Court had not declined to hear arguments on the merits, and then he notices that it was necessary in any case to do so in order to clear the ground for the applications for the amendment of the scheme. But I think both the learned Judges came to the conclusion that the District Judge, acting under Clause (4), could not appoint a receiver under the Civil Procedure Code. At any rate, Mr. Justice Tyabji is quite clear on the point that all that the District Judge could do was to appoint somebody in the nature of a receiver to take charge of property. Mr. Justice Broomfield no doubt said that the appointment of the receiver was not *ultra vires* under the peculiar circumstances of the case, but, I think, having regard to the whole of his judgment, that all he meant was that the District Judge, acting under the scheme, and removing a trustee, had an implied authority to protect the trust property in the meantime, and that he could appoint somebody to take charge of the property. That may be so, but unless the District Judge was acting judicially he could not appoint a receiver under the Code, who would become an officer of the Court. Obviously nobody can appoint an officer of the Court except a Judge, and if the District Judge was not acting as a Judge, he could not appoint a receiver as an officer of the Court. Then the Court, after making orders as to the amendment of the scheme, directed that "costs of the inquiry by the District Judge will be dealt with by the District Judge". The matter then went back to Mr. Lokur, the present District Judge of Poona, and he made an order on the present opponent to pay the present applicant a sum of Rs. 241-2-0 being his costs, and he said: "in case of failure, steps may be taken for the recovery of the amount".

9. Then an application was made to the learned Judge for recovery of the amount by execution, and the learned Judge then came to the conclusion that the District Judge of Poona, acting under Clause (4), was *persona designata*, and was not acting in a judicial capacity, and, therefore, could not make an order capable of execution under the Code.

10. It seems to me that the decision of this Court in *Lambodar v. Dharanidhar* that the District Judge, acting under Clause (4) of the scheme, is not acting in a

judicial capacity, is right on the words of the clause and it is binding upon us, and in my view that decision was not, and could not be, dissented from by this Court in Mahadev v. Govindrao, though, no doubt, in that case the Court considered matters which it had no jurisdiction to consider unless the District Judge was acting judicially.

11. That being so, in my opinion, the learned District Judge was right in holding that the order which he had made for payment of costs was not an order capable of execution, even if it was legal. That is all we need decide in the present matter.

12. The application must be dismissed with costs.