
(2014) 04 BOM CK 0167
In the Bombay High Court
Case No : Writ Petition No. 10471 of 2013

M/s. Arole Construction Pvt. Ltd.

APPELLANT

Vs

Shaikh Sadullah Shahabuddin Peerzade and Others

RESPONDENT

Date of Decision : 11-04-2014

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 2(18), 2(8), 22, 36(1), 36(1) (b)
Constitution of India, 1950 — Article 226, 227

Citation : (2014) 4 ABR 39 : AIR 2014 Bom 84 : (2014) 4 ALLMR 227 : (2014) 4 BomCR 289 : (2014) 4 MhLj 702

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : Mohan Pungalia, i/by Mr. Abhishek Pungalia, Advocate for the Appellant; L.S. Gaikwad for Respondent No. 1, Mr. Ravi G. Shinde for Respondent No. 9 and Mr. S.D. Rayrikar, AGP for Respondent No. 10, Advocate for the Respondent

Final Decision : Allowed

Judgement

R.M. Savant, J.—Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard. The writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India is invoked against the order dated 13/9/2013 passed by the learned Joint Charity Commissioner, Pune Division, Pune by which order the Application No. 5 of 2009 filed u/s 36(2) of the Bombay Public Trusts Act (herein after referred to as the said Act) came to be allowed and resultantly the permission granted by the Joint Charity Commissioner u/s 36(1)(b) of the said Act came to be revoked.

2. The facts giving rise to the above Petition can be stated thus:-

The property in question which was the subject matter of the permission granted u/s 36(1)(b) of the said Act belongs to the public trust known as Dhakata Shaikh Salla Durgah which was registered as such under the said Act in the year 1952. By the judgment rendered in Appeal No. 539 of 1957 the mode of succession of

the trustees was prescribed and the father of the Respondent No. 2 herein was to be entrusted with the administration and management of the said trust. The property in question is the land admeasuring 2862.1 sq.mts in New Mangalwar Peth, Pune. It appears that Change Report No. 168 of 1964 came to be accepted by the Charity Commissioner as a consequence of which one Moinuddin Peerzade, the father of Respondent No. 2 was appointed as the Managing Trustee of the trust. In so far as the property in question which is the land admeasuring 2862.1 sq.mtrs is concerned, the entire land was tenanted since 1932. It appears that the proceedings were initiated against the trustees in the year 1976 u/s 41D of the said Act being Application No. 14 of 1976. In the said proceedings the trustees were suspended and an advocate by name Shri Y A Shaikh was appointed as a fit person to take charge of the affairs of the trust. It appears that inspite of his appointment, the said advocate Shri Y A Shaikh never took charge of the affairs of the trust. The order of suspending the trustees was challenged by the said Moinuddin Peerzade in a suit filed by him in personam, in which suit the order of suspension came to be stayed only qua the said Moinuddin Peerzade as a consequence of which he continued to manage the affairs of the trust as a Managing Trustee. The said stay continued to operate till 10/1/1990. It appears that advocate Shri Y A Shaikh, who was appointed as a fit person, made an application to the Charity Commissioner stating that he has not taken charge of the affairs of the trust. On 12/1/1991 the said Moinuddin Peerzade died. Since the mode of succession was hereditary and as a consequence of which only members of the Peerzade family could be appointed as trustees and only the eldest member of the eldest branch of the family could be appointed as the principal manager of the trust, the Respondent No. 2-Giyasuddin Moinuddin Peerzade filed Change Report No. 403 of 1991 thereby applying to be appointed as the principal manager of the trust after the death of his father Moinuddin Peerzade. The said Change Report No. 403 of 1991 was filed along with the order dated 27/8/1976 by which the trustees were suspended and by which order the advocate Shri Y A Shaikh had been appointed as a fit person.

3. The Deputy Charity Commissioner hearing the said Change Report No. 403 of 1991 was pleased to allow the same by the judgment and order dated 30/3/1991 and as a consequence of which the Respondent No. 2-Giyasuddin was appointed as the Managing Trustee of the trust. The said order was passed by considering the material on record which included the order dated 27/8/1976 by which order the trustees had been suspended and the fit person by way of advocate Shri Y A Shaikh was appointed. It is required to be noted that the said order dated 30/3/1991 accepting the Change Report No. 403 of 1991 was never challenged and therefore had become final and conclusive.

4. As indicated above the land in question was a tenanted land and since the trust was earning a meagre amount as rent from the said land from the tenants and since the municipal taxes payable in respect thereof were to the tune of Rs. 49,000/-, the trust made an application u/s 36(1)(b) of the said Act for leasing out the land for being developed. The Petitioners were proposed as lessees/

developers as they were closely associated with the tenant who occupied 75% of the trust land and whose co-operation would be vital for the implementation of any sanction granted u/s 36(1)(b) of the said Act. The said application was considered by the Joint Charity Commissioner, Pune who by his order dated 29/12/1994 allowed the said application. Pursuant to the said order dated 29/12/1994, Lease Deed granting lease for 99 years was executed by the trust in favour of the Petitioner on 9/5/1996. It appears that the said advocate Shri Y A Shaikh was summoned by the Charity Commissioner in the proceedings filed u/s 41D and in response to the same, he filed a purshis that he never took charge of the affairs of the trust. Pursuant to the said lease which was executed in their favour, the Petitioners commenced the development of the property and by the year 2008 the entire second floor of the building was constructed and sold to third parties by the Petitioners.

5. The Respondent No. 1 herein filed an application u/s 36(2) of the said Act on 3/1/2009 i.e. after 15 years of the permission being granted by the Charity Commissioner u/s 36(1)(b). The said Application was filed for revocation of the permission. The said application was founded on the fact that the procedure for granting lease/sale of the property belonging to the trust was not followed inasmuch as the advertisement in two local news papers one in English and one in vernacular was not issued, the tenders were not invited by publishing notice in newspaper, valuation of the property was not got done and a long term lease was granted in favour of the Opponent No. 3-M/s. Arole Construction Pvt. Ltd. i.e. the Petitioner herein. It was also the case of the applicant i.e. the Respondent No. 1 herein that since the trustees were suspended u/s 41(D) of the said Act in Application No. 14 of 1976, in absence of any resolution of the trustees the said Giasuddin Moinuddin Peerzade could not have filed the application u/s 36(1)(b) of the said Act for leasing out the property. It was the case of the applicant in the said application that the said sanction has been obtained by misleading and misrepresenting the authority and by concealing the fact that a fit person was appointed in place of the trustees. At the time when the application was filed, the construction on the said plot of land had progressed and a ground+stilt+ 5 storey building on the trust land was nearing completion and third party rights had also been created.

The said application was not replied to on behalf of the said Giasuddin Moinuddin Peerzade as also the said Muniruddin Moinuddin Peerzade, However, the Petitioner, who was the Opponent No. 3 in the said application, filed its reply. In the said reply the locus of the applicant to file the application invoking section 36(2) of the said Act was questioned on the ground that he was suspended trustee and therefore he does not have authority to file the application. It was contended that since all the trustees were suspended, there was no question of passing any resolution. In so far as calling of tenders was concerned, it was contended that the Joint Commissioner called for tenders, and after verifying all the tenders that the tender of the Opponent No. 3 i.e. the Petitioner herein was sanctioned. It was contended that the applicant was aware that one Shahabad

Stone Co. was in possession of the plot in question since 1932, however, the applicant has purposely shown ignorance of the said fact for extraneous reasons. It was contended that the Opponent No. 3 i.e. the Petitioner herein was not concerned as regards the allegations of mis-management of the trust. It was contended that Opponent No. 3 filed the entire lease rent, had got the construction plan sanctioned, and that the said application has been filed after the earlier application has been withdrawn by the trustees.

6. The Joint Charity Commissioner heard the said application filed u/s 36(2) of the said Act and has by the impugned order dated 13.9.2013 has allowed the same. The Joint Charity Commissioner though allowed the said application has observed in the impugned order that the applicant Shaikh Sadullah Shahabuddin Peerzade has not explained as to why he filed the said application after a period of 15 years when the order u/s 36(1)(b) of the said Act was passed on 29/12/1994. The Joint Charity Commissioner further observed that the applicant has not explained as to when he became aware of the order dated 29/12/1994. The Joint Charity Commissioner has also observed that the Board of Management had filed an application being No. 7 of 2002 on 28/10/2002 for cancellation of the lease deed and when the applicant came to know about it in the year 2002 itself, why he had not taken steps from 2002 to 2009 for challenging the order dated 29/12/1994. The Joint Charity Commissioner has further observed that the applicant Shaikh Sadullah Shahabuddin Peerzade though having issued notice to the Petitioner herein i.e. M/s. Arole Construction Pvt. Ltd. that he would be initiating civil and criminal proceedings against it, he did not take any objection in the notice that the permission has been granted to Giyasuddin Moinuddin Peerzade and has obtained the permission by fraud. The Joint Charity Commissioner has observed that the said Shaikh Sadullah Shahabuddin Peerzade has raised objection only for executing the Deed of Confirmation by the Board of Management. The Joint Charity Commissioner has adverted to the objection raised on behalf of the said Shaikh Sadullah Shahabuddin Peerzade viz. that the tenders were not invited by publishing a notice in two newspapers; valuation report was not submitted in accordance with the provisions of the law; that the draft of the lease deed which was prepared by the said M/s. Arole Construction Pvt. Ltd. was accepted and that a false reason was given that the permission for leasing the property was required for paying the taxes of the Municipal Corporation, that no accounts were submitted. In so far as the said objections were concerned, the Joint Charity Commissioner has observed that the scope of the inquiry in the application filed u/s 36(2) is limited, and no review can be conducted as regards the order passed u/s 36(1)(b). The Joint Charity Commissioner observed that in such matters the material thing is whether on the basis of misappropriation, fraud or misleading that the order has been obtained and it is only those aspects can be considered, and therefore the objection raised on behalf of the applicant cannot be given importance. The Joint Charity Commissioner lastly observed that in so far as the said application u/s 36(2) of the said Act is concerned, the only point that arises is that though the trustees

were suspended, a fit person was appointed but it is without taking consent of the fit person and without giving him any idea about the sale transaction and without showing anywhere that there is consent of the fit person, the said Giasuddin Moinuddin Peerzade has obtained the order from the Joint Charity Commissioner of giving property on long terms lease. The Joint Charity Commissioner therefore on the said grounds recorded a finding that the said order has been obtained by practicing a fraud on the authority and therefore it is necessary to cancel the same. The Joint Charity Commissioner concluded that the order dated 29/12/1994 passed u/s 36(1)(b) has been obtained by the said Giasuddin Moinuddin Peerzade without obtaining the consent of the fit person for leasing out the property as well as by concealing the fact that the fit person is working in place of the suspended trustees. The Joint Charity Commissioner therefore allowed the said application and set aside the order passed u/s 36(1)(b) of the said Act. The Joint Charity Commissioner directed the trustees to take back the property which was given on lease to the Petitioner herein i.e. M/s. Arole Construction Pvt. Ltd. within six months from the date of the order. The Joint Charity Commissioner further directed that if any loss is caused to the trust or the Petitioner herein i.e. M/s. Arole Construction Pvt. Ltd. on account of revocation of the lease, the Respondent No. 2 herein i.e. Giasuddin Moinuddin Peerzade and the Respondent No. 3 herein i.e. Muniruddin Moinuddin Peerzade would be individually liable. As indicated above, it is the said order dated 13/09/2013 passed by the Joint Charity Commissioner which is taken exception to by way of the above Petition.

7. Submissions on Behalf of the Petitioner by the Learned Counsel Shri Mohan Pungalia

A] That the Joint Charity Commissioner has erred in exercising the powers u/s 36(2) of the said Act for cancellation or revocation of the lease after a period of 15 years of the order u/s 36(1)(b) being passed which was passed on 29/12/1994.

B] That the Joint Charity Commissioner erred in exercising powers u/s 36(2) and cancelling the lease though having recorded a finding that the objections raised on behalf of the applicant were not entertainable u/s 36(2) of the said Act.

C] That the Joint Charity Commissioner erred in holding that the order passed u/s 36(1)(b) is vitiated on account of the fact that the same has been obtained without the consent of the fit person for leasing out the property as well as concealing the fact from the authority that the fit person is working in place of suspended trustees.

D] That the Joint Charity Commissioner failed to appreciate that the fit person appointed u/s 41(D) of the said Act loses all powers after a trustee has been appointed. That in the instant case on the date of sanction obtained i.e. 29/12/1994 the Respondent No. 2 herein had been appointed as the Managing Trustee in the year 1991 u/s 22 and therefore the fact that the fit person being

appointed was not relevant to the application made by the managing trustee u/s 36(1)(b) of the said Act. In support of the said contention the learned counsel sought to rely upon the unreported judgment of a learned Single Judge of the Nagpur Bench of this Court in First Appeal No. 580 of 2007 and other companion matters in the matter of Zitru Lahanuji Lonare v/s. Rajesh Trimbakrao Deshmukh.

E] That Joint Charity Commissioner failed to take into consideration the fact that the appointment of the Respondent No. 2 as a managing trustee u/s 22 of the said Act has never been challenged.

F] That though there was substantial material on record that the fit person never took charge of the affairs of the trust after his appointment in 1976 and in fact has preferred an application for removing him as a fit person, the Joint Charity Commissioner still laid undue emphasis on the fact that the fit person was looking after the affairs of the trust.

G] That the Joint Charity Commissioner failed to take into consideration the developments which were carried out in the property since the year 1994 after obtaining permission of the Pune Municipal Corporation and third party rights which were created in the property.

H] The Joint Charity Commissioner failed to take into consideration that in terms of the agreement between the trust and the Petitioners herein an area of 1400 sq. ft. on the first floor of the constructed building has already been handed over to the trust.

I] That the Joint Charity Commissioner failed to take into consideration the fact that the Respondent No. 1 herein i.e. the original applicant Shaikh Sadullah Shahabuddin Peerzade was suspended from the trusteeship in the year 1976 along with other trustees and therefore he had no locus to file the application in the year 2009. The Joint Charity Commissioner also failed to take into consideration the fact that the applicant had been later on removed as a trustee by an order passed u/s 41(D) on 12/9/2013 i.e. on the next day of the impugned order. This was done in view of the misdemeanors which were committed by the applicant Shaikh Sadullah Shahabuddin Peerzade vis-?-vis the trust property.

J] That the Joint Charity Commissioner failed to appreciate that in so far as sale of the trust property and the lease of the trust property for development is concerned, the same would stand on the same footing as in the instant case. The lessee i.e. the Petitioners by investing huge amount carried out development of the property and has also created third party rights and therefore equity was in favour of the Petitioner herein.

8. Submissions on Behalf of the Respondent No. 1 by the Learned Counsel Shri L.S. Gaikwad

1] That the said Giyasuddin Moinuddin Peerzade was not entitled to be hereditary trustee as he was not the eldest son in the Peerzade family. The said Giyasuddin Moinuddin Peerzade therefore did not have the locus to submit the said proposal

u/s 36(1) to the Charity Commissioner for approval.

2] That the procedure which is required to be followed for sale or lease of the trust property was not followed, viz. no tenders were invited, no valuation report was obtained.

3] That the lease rent payable per month is also meager and grossly undervalued.

4] That the construction has not been carried out by the Petitioner within the stipulated time, no lease rent has been paid and that no bank guarantee was given by the Petitioner while getting sanction on the revised plan.

5] That the affairs of the trust were not being conducted in a proper manner by the said Giasuddin Moinuddin Peerzade which can be seen from the report submitted by the Inspector from the Office of the Joint Charity Commissioner Pune on 8.1.2002.

6] That the trustees are misappropriating the amount of lease rent which is causing loss to the trust and that the land of the trust is not managed properly and that there are encroachments and illegal structures standing on it, and no steps are taken by the said Giasuddin to recover the lease rent.

7] That the fact that the Giasuddin did not contest the proceedings u/s 36(2) is a pointer to the fact that he accepts the allegations made in the application that the permission has been obtained by the said Giasuddin by keeping in dark the other trustees and the fit person and therefore the order passed by the Joint Charity Commissioner revoking the permission on the ground that the consent of the fit person was not obtained or the fit person was not taken into confidence need not be interfered with.

9. CONSIDERATION

Having heard the learned counsel for the parties, I have bestowed my anxious consideration to the rival contentions. In the instant case, it is required to be noted that the application u/s 36(2) of the said Act was filed by the Respondent No. 1 herein-Shaikh Sadullah Shahabuddin Peerzade. It would be apposite to refer to the said provision which for the sake of ready reference is reproduced herein under:-

36. Alienation of immovable property of public trust:

1) Notwithstanding anything contained in the instrument of trust-

(a) no sale, exchange or gift of any immovable property, and

(b) no lease for a period exceeding ten years in the case of agricultural land or for a period exceeding three years in the case of nonagricultural land or a building, belonging to a public trust, shall be valid without the previous sanction of the Charity Commissioner. Sanction may be accorded subject to such condition as the Charity Commissioner may think fit to impose, regard being had to the interest, benefit or protection of the trust;

(c) if the Charity Commissioner is satisfied that in the interest of any public trust any immovable property thereof should be disposed of, he may, on application, authorise any trustee to dispose of such property subject to such conditions as he may think fit to impose, regard being had to the interest or benefit or protection of the trust.

(2) The Charity Commissioner may revoke the sanction given under clause (a) or clause (b) of subsection (1) or, the ground that such sanction was obtained by fraud or misrepresentation made to him or by concealing from the Charity Commissioner, facts material for the purpose of giving sanction; and direct the trustee to take such steps within a period of one hundred and eighty days from the date of revocation (or such further period not exceeding in the aggregate one year as the Charity Commissioner may from time to time determine) as may be specified in the direction for the recovery of the property.

(3) No sanction shall be revoked under this section unless the person in whose favour such sanction has been made has been given a reasonable opportunity to show cause why the sanction should not be revoked.

(4) If, in the opinion of the Charity Commissioner, the trustee has failed to take effective steps within the period specified in subsection (2), or it is not possible to recover the property with reasonable effort or expense, the Charity Commissioner may assess any advantage received by the trustee and direct him to pay compensation to the trust equivalent to the advantage so assess

The application of the Respondent No. 1 was founded on the fact that the procedure which is required to be followed in respect of the lease and sale of the property was not followed viz. tenders were not invited, valuation report was not obtained, and the lease was created in favour of the Petitioner who, according to the applicant Shaikh Sadullah Shahabuddin Peerzade was detrimental to the interest of the trust. Since the application was one u/s 36(2) of the said Act, the Joint Charity Commissioner exercising the powers under the said Act has rightly observed that there cannot be a review of the order passed u/s 36(1)(b) of the said Act on the ground urged by the applicant Shaikh Sadullah Shahabuddin Peerzade. The Joint Charity Commissioner therefore did not countenance the objections raised on behalf of the applicant Shaikh Sadullah Shahabuddin Peerzade. The impugned order is founded on the fact that though a fit person was appointed in place of the trustee who had been removed, the application was submitted by the Respondent No. 2 herein Giyasuddin Peerzade without the consent of the fit person and without taking the fit person into confidence. This is the only ground on basis of which the Joint Charity Commissioner has come to a conclusion that a fraud has been practiced on the authority by not bringing to the notice of the authority the appointment of the fit person and that the consent of the fit person has not been obtained. It is on the said basis that the above Petition would have to be adjudicated upon.

10. In the said context it is required to be noted that vide Change Report

proceedings No. 168 of 1964 the father of the Respondent No. 2 the late Moinuddin Peerzade came to be appointed as managing trustee. It appears that the proceedings u/s 41(D) of the said Act were initiated for removal of the trustees on account of the alleged misdemeanors committed by them. In the said proceedings an order came to be passed on 27/8/1976 by which order the trustees were suspended and advocate Shri Y A Shaikh was appointed as a fit person to take charge of the affairs of the trust. The material on record creates doubt as to whether even after his appointment, the fit person had taken charge of the affairs of the trust. In fact by letter dated 5/12/1990 the said advocate Shri Y A Shaikh informed the Charity Commissioner that he would not take charge of the affairs of the trust. The said letter therefore in a way discloses that the fit person did not show any interest in taking charge nor did he take any step to take charge of the affairs of the trust.

11. In so far as the suspension of the trustees is concerned, the said Moinuddin Peerzade-the managing trustee filed a suit in personam and obtained a stay of the suspension order dated 27/8/1976 as against him which was granted to him by the concerned court on 10/12/1976 pursuant to which stay, he continued to manage the affairs of the trust as managing trustee. The said stay continued till 10/1/1990. It appears that the father of the Respondent No. 2 Moinuddin Peerzade died on 12/1/1991. The Respondent No. 2 in view of the fact that succession to the trust was hereditary and since only the eldest member of the eldest branch of the family could be appointed as the principal manager of the trust, the Respondent No. 2-Giyasuddin Moinuddin Peerzade filed Change Report No. 403 of 1991 thereby seeking his appointment as the principal manager of the trust after the death of his father Moinuddin Peerzade who was managing the affairs of the trust since the year 1963. To the said Change Report No. 403 of 1991 filed by the Respondent No. 2 the order passed on 27/8/1976 by which the trustees were suspended and advocate Shri Y A Shaikh was appointed as a fit person was annexed. The Deputy Charity Commissioner by his order dated 30/3/1991 was pleased to allow the application of the Respondent No. 2 and appointed him as a managing trustee of the trust by approving the said Change Report No. 403 of 1991. The appointment of the Respondent No. 2 by acceptance of the Change Report was therefore done after considering the relevant material on record i.e. the order dated 27/8/1976 suspending the trustees as also appointment of a fit person. It is required to be noted at this stage that the said order dated 30/3/1991 appointing the Respondent No. 2 as managing trustee was never challenged by anybody. The Respondent No. 2 in his capacity as a managing trustee was the proponent of the said application u/s 36(1)(b) of the said Act which came to be allowed by the Charity Commissioner by order dated 29/12/1994 pursuant to which the lease deed was executed on 9/5/1996.

12. In the said context of the appointment of the Respondent No. 2 as managing trustee, the consequences that flow out of it would have to be seen. It would therefore be apposite to refer to Section 41(D) of the said Act which is reproduced herein under:-

41 D. Suspension, removal and dismissal of trustees.

1) The Charity Commissioner may, either on application of a trustee or any person interested in the trust, or on receipt of a report u/s 41B or suo motu suspend, remove or dismiss any trustee of a public trust, if he,--

a) makes persistent default in the submission of accounts, report or return

(b) willfully disobeys any lawful orders issued by the Charity Commissioner, under the provisions of this Act or rules made thereunder by the State Government;

(c) continuously neglects his duty or commits any malfeasance or misfeasance, or breach of trust in respect of the trust;

(d) misappropriates or deals improperly with the properties of the trust of which he is a trustee; or

(e) accepts any position in relation to the trust which is inconsistent with his position as a trustee;

(f) is convicted of an offence involving moral turpitude.

(2) when the Charity Commissioner proposes to take action under subsection (1), he shall frame charges against the trustee or the person against whom action is proposed to be taken and give him an opportunity of meeting such charges, of testing the evidence adduced against him, and of adducing evidence in his favour. The order of suspension, removal or dismissal shall state the charges framed against the trustee, his explanation and the finding on each charge, with the reasons therefor.

(3) Pending disposal of the charges framed against a trustee, the Charity Commissioner may place the trustee under suspension.

(4) Where the Charity Commissioner has made an order suspending, removing or dismissing any trustee and such trustee is the sole trustee, or where there are more than one trustee and the remaining trustees, according to the instrument of trust, cannot function or administer the trust without the vacancy being filled, then in that case the Charity Commissioner shall appoint a fit person to discharge the duties and perform the functions of the trust, and such person shall hold office only until a trustee is duly appointed according to the provisions of the instrument of trust.

(emphasis supplied)

(5) A trustee, aggrieved by an order made under subsection (1) may, within ninety days from the date of communication of the order of suspension, removal or dismissal, apply to the Court against such order.

(6) An appeal shall lie to the High Court against the decision of the Court under subsection

(5) as if such decision was a decree from which an appeal ordinary lies.

(7) The order of the Charity Commissioner shall, subject to any order of the Court or in appeal, be final.

The provision of sub-section (4) therefore posits that the Charity Commissioner shall appoint a fit person to discharge the duties and perform the function of the trust, until a trustee is duly appointed. In the instant case since the Respondent No. 2 was appointed as managing trustee on 30/3/1991 in terms of operation of Section 41(4) of the said Act, the fit person ceased to exercise functions of the trust after the managing trustee is appointed. In the said context, a useful reference could be made to the unreported judgment of a learned Single Judge of this Court sitting at Nagpur Bench in First Appeal No. 580 of 2007 in the matter of Zitru Lahanuji Lonare v/s. Rajesh Trimbakrao Deshmukh and ors. Paragraph 8 of the said report is material and is reproduced herein under:-

8. It is clear from the provisions of sub Section 4 of Section 41D that the Joint Charity Commissioner is empowered to appoint a "Fit Person" to perform the functions of the trust until a trustee is duly appointed according to the provisions of the instrument of trust. Sub Section 1 of Section 41D of the Act speaks of the removal, dismissal or suspension of a "Trustee", whereas sub Section 4 of Section 41D of the Act speaks of appointment of a "Fit Person" and not a "trustee". Then again, sub Section 5 of Section 41D of the Act speaks of a "trustee", who is aggrieved by the order of suspension, removal or dismissal under sub Section 1 of Section 41D of the Act. It is not necessary to refer to the provisions of Section 2(8) or 2(18) of the Act for considering whether the appellants, appointed on the body of Fit Persons are "trustees" within the meaning of Subsection (1) of Section 41D of the Act as the provisions of Section 41D of the Act themselves make a clear distinction between a "trustee" and a "fit person". A combined reading of all the sub Sections of Section 41D makes it clear that the provisions make a clear distinction between a "trustee" and a "fit person". A person appointed under sub Section 4 of Section 41D of the Act is neither a "trustee" nor a "manager". The provisions of Section 41D elaborately deal with the procedure for removal, dismissal and suspension of the trustee and also provide for a stop gap arrangement between the point of removal, suspension and dismissal of the trustees and the appointment of trustees in accordance with the provisions of the instrument of trust. Thus, a "Fit Person" is appointed temporarily and in a stop gap arrangement, to perform functions of the trust only until a "trustee" is duly appointed according to the provisions of the instrument of trust.

(emphasis supplied)

Hence the learned Single Judge of this Court has held that a fit person is appointed temporarily and in a stop gap arrangement, to perform functions of the trust only until a trustee is duly appointed according to the provisions of the instrument of trust. In my view, therefore, once the Respondent No. 2

Giyasuddin Peerzade was appointed as managing trustee, the appointment of advocate Shri Y A Shaikh as a fit person made on 27/8/1976 lost its significance as he ceased to perform functions of the trust. Hence the fact of there being a fit person and the consent of the fit person having not been obtained was of no relevance when the application u/s 36(1)(b) was filed some time in the year 1993. It is pertinent to note that the ground on which the Joint Charity Commissioner has set aside the order was not even a ground in the application on the basis of which Section 36(2) was invoked. In the application the grounds made out can be said to be impinging on the merits of the order passed u/s 36(1) (b) of the said Act. The Joint Charity Commissioner has therefore erred in setting aside the order on the ground of existence of the fit person not being pointed out and the consent of the fit person not being obtained.

The submissions made by the learned counsel for the Respondent No. 1 Shri Gaikwad were mainly revolving around the merits of the order passed u/s 36(1) (b) of the said Act, and the manner in which the affairs of the Trust are being conducted. The said submissions therefore cannot aid the Respondent No. 1 in justifying the ground which is the basis for the impugned order namely that the consent of the fit person was not obtained or the appointment of the fit person was not brought to the notice of the authority.

It is required to be noted that the permission u/s 36(1) (b) was granted on 29/12/1994 and thereafter lease deed was executed on 9/5/1996. The development of the property has been undertaken by the Petitioners right from the year 1996 and a five storeyed building has been constructed on the suit property. The Petitioners have placed on record that third party rights have been created in respect of the entire second floor of the building comprising 8 office units on 29/8/2008 i.e. before the filing of the application u/s 36(2) of the said Act, and that possession of 1400 sq. ft. on the first floor of the constructed building has been handed over to the trust on 16/1/2009, and that completion certificate in respect of the ground + stilt + 5 storeyed building has been obtained on 11/2/2010. The Petitioners have further placed on record that a leave and licence agreement has been executed in favour of one Rosary Education Group in respect of the entire 3rd, 4th and 5th floors wherein a school has been run by the said Rosary Education Group where 1400 students are undertaking education. The Petitioners have also placed on record that the lease rent at the of Rs. 84,000/- per year has been paid from 1994 to 2010 and that the balance amount has also been paid as per the order dated 12/9/2013 passed by the Charity Commissioner. The aforesaid facts have not been taken into consideration the Joint Charity Commissioner whilst setting aside the order dated 29/12/1994. In so far as the fit person is concerned, as indicated above, the fit person after his appointment on 27/8/1976 had never taken charge of the affairs of the trust, and in fact in the order dated 22/9/1997 passed in the proceedings u/s 41(D) of the said Act, had filed a purshis that he had never taken charge of the affairs of the trust. If that be so apart from the fact that after appointment of Respondent No. 2 Giyasuddin as managing trustee, the fit person ceases to

function, the fact that he had not taken charge was also relevant factor which was required to be considered by the Joint Charity Commissioner which has not been done.

Though the Joint Charity Commissioner did not seem to be satisfied with the fact that the order dated 29/12/1994 was challenged in the year 2009 by the applicant Shaikh Sadullah Shahabuddin Peerzade by invoking section 36(2) of the said Act, the Joint Charity Commissioner nevertheless without taking into consideration the developments subsequent to the order dated 29/12/1994 has allowed the application on the ground that the consent of the fit person was not obtained and the existence of the fit person was not pointed out. Apart from the fact that the said ground is unsustainable for the reasons stated in the earlier part of this Judgment, the subsequent developments in my view were also material, or otherwise entertaining the application after 15 years would apart from causing grave prejudice to the parties in whose favour rights have been created would amount to laying a premium on delay and latches.

The Joint Charity Commissioner ought to have taken into consideration the fact that the applicant i.e. the Respondent No. 1 herein was suspended as a trustee by virtue of the order passed in the proceedings filed u/s 41(D) and has therefore a suspended trustee on the date when he filed the application u/s 36(2). The Joint Charity Commissioner had refused to pass any interim orders in the application filed by the Respondent No. 1 u/s 41(E) of the said Act. The Joint Charity Commissioner has by the order passed on 13/9/2013 has removed the Respondent No. 1 as a trustee, in view thereof the locus of the Respondent No. 1 to file the application was therefore in question. The motive of the Respondent No. 1 in filing the application especially in the light of the allegations of the Petitioner that the same has been done for extraneous reasons also could not have been lost sight of.

The Joint Charity Commissioner also erred in exercising the jurisdiction u/s 36(2) of the said Act long after the lease deed was executed. The Joint Charity Commissioner in my view has erred in distinguishing the judgments i.e. Mrs. Fatmabai B. Bachooali, Adv. Vs. State of Maharashtra and others, and, Mrs. Fatmabai B. Bachooali, Adv. Vs. State of Maharashtra and others, cited on behalf of the Petitioner before her on the ground that the said judgments concern the sale of the trust property whereas the instant case concerns a lease. The question is not whether it is a sale or lease, the issue is after the document is executed i.e. either a sale deed or a lease deed, whether the provisions of Section 36(2) could be invoked, moreso in the instant case wherein pursuant to the lease deed the property is developed and third party rights have been created. If such belated challenges are entertained, it would create doubts and uncertainty in the matter of judicial proceedings and would strike at the very root of the concept of finality which is attached to judicial orders. Hence the impugned order dated 13/09/2013 is not sustainable for the aforesaid reasons also. In my view, therefore, the order passed by the Joint Charity Commissioner

suffers from an error of jurisdiction and is therefore required to be interfered with in the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. The impugned order is therefore required to be quashed and set aside and is accordingly quashed and set aside. However, it is clarified that if there are any compliances to be made by the Petitioners under the lease deed, it would be open for the trustees to file an application before the Charity Commissioner in that regard. If any such application is filed, the Charity Commissioner would consider the same on its own merits and in accordance with law. The above Petition is accordingly allowed. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.