(2003) 09 GUJ CK 0071

In the Gujarat High Court

Case No : Special Civil Application No. 10246 of 2003

Nityanand M. Thakore APPELLANT

Vs

Charity Commissioner RESPONDENT

Date of Decision : 10-09-2003

Acts Referred:

- Ahmedabad Small Causes Court Rules, 1961 — Rule 38
- Bombay Public Trusts Act, 1950 — Section 22 , 22(3)
- Bombay Public Trusts Rules, 1951 — Rule 7
- Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4
- Presidency Small Cause Courts Act, 1882 — Section 9

Citation : (2004) 8 GLH 24 : (2004) 24 GLH 8 : (2004) 2 GLR 971

Hon'ble Judges : Jayant M. Patel, J

Bench : Single Bench

Advocate : M.I. Merchant, for the Appellant; Desai, AGP for Respondent Nos. 1-2 and Kirit J. Macwan, for Respondent Nos. 3-4, for the Respondent

Final Decision : Dismissed

Judgement

Jayant Patel, J.—Rule. Mr. Desai waives service of rule on behalf of respondent Nos 1 & 3 and Mr. Macwan waives service of rule on behalf of respondent Nos 3 & 4. With the consent of learned advocates for the parties matter is taken up for final hearing today.

2. The question arises in this petition is whether the Deputy Charity Commissioner has power to accept the deposition by affidavit as per amended provisions of O.18 R.4 of CPC while holding the inquiry u/s 22 of Bombay Public Trusts Act or not.

3. The short facts of the case as per the petitioner are that the First District Church Brethern (hereinafter referred to as "the Brethern Church" for short) came to be formed by registration of the society as per the Societies Registration Act in the year 1944. The said Brethern Church subsequently in the year 1960 came to be registered as Bombay Public Trust under Bombay Public Trusts Act,

1950 (hereinafter referred to as "the Act" for short). The respondent No.3-Church of North India Gujarat Diocease Trust (hereinafter referred to as "NIGD Trust" for short) came to be registered in the year 1980. However, it is the case of NIGD trust-respondent No.3 herein that the aforesaid Brthern Church came to be dissolved and the respondent No. 3 trust is the successor of all rights and properties of the Brethern Church. Respondent No.3-trust for asserting such right on account of dissolution and merger filed Civil Suit No. 72/79 in the court of Civil Judge (SD) Bharuch and the said suit came to be decreed in favour of respondent No.3 on 31.3.84. Reg. Civil Appeal No. 72/84 came to be preferred against the said judgment and decree of the learned Civil Judge (SD), Bharuch before the Court of Extra Asst. Judge, Bharuch and the said appeal came to be allowed on 11.8.1986 and the said decision of the Ld.Extra Asst. Judge in Reg. Civil Appeal No.72/84 was challenged by preferring Second Appeal No.303/86 before this court and ultimately as per the decision dated 2.4.03 passed by this court (Coram: K.M. Mehta, J) the said second appeal is dismissed. There is no dispute on the point that against the said decision of this court in SA No.303/86 SLP No.8665/03 is preferred by the respondent No.3 before the Apex Court and the Apex Court has issued notice and the matter is pending at that stage.

4. It appears that two change reports came to be filed by the respondent No.3 trust before the Dy. Charity Commissioner being Change Report Nos 44 and 665 of 1981. Said change reports, in substance, are pertaining to the dissolution of Brethern Church and acquisition of property and taking over of the management by the respondent No.3-Trust. The petitioner is claiming as one of the beneficiaries of Brethern Church. Since, there were objections against the aforesaid change reports which were filed by the respondent No.3 u/s 22 of the Act, inquiry was required to be held and accordingly it was initiated by the Dy. Charity Commissioner. During the course of inquiry, the respondent No.3 has submitted the deposition by affidavit and the learned Dy. Charity Commissioner, as per order, dated 21.6.03, has accepted the said affidavit of the respondent No.3 as the examination in chief and has allowed the cross examination of the said witness to the objectors and under the circumstances the petitioner has approached this court for appropriate writ to quash the order passed by the Dy. Charity Commissioner and for directing that the evidence of witnesses as per provisions of Rule 38 of Small Causes Court Rules required to be recorded and the inquiry be held strictly as per said rules.

5. Ld. counsel, Mr. Merchant, appearing on behalf of the petitioner contended, interalia, that the scope of inquiry u/s 22(3) of the Act, which is to be held by the Charity Commissioner is of judicial inquiry and there are provisions of appeal against such decision of the Deputy Charity Commission. He submitted that appeal u/s 70 would lie at the first instance and thereafter another appeal u/s 72(4) of the Act can also be preferred as first appeal before this court. Therefore, Mr. Merchant further submitted that as per section 74 of the Act inquiries and appeals under the Act are deemed as judicial proceedings within the meaning of sections 193, 219 and 228 of the Indian Penal Code. Therefore, he submitted

that the strict view for the purpose of holding judicial inquiry is called for. In furtherance to his submission, Mr. Merchant relied upon the provisions of Rule 7 of Bombay Public Trusts Rules, 1951 (hereinafter referred to as "the Rules" for short) and he submitted that as per Rule 7 procedure prescribed for the appeals and suits in the Presidency Small Causes Court Act, 1982 as that Act is in force is to apply and he also submitted that as per Rule 38 of Ahmedabad Small Causes Court Rules, 1961 which has been framed by the High Court in exercise of powers u/s 9 of the Presidency Small Causes Court Act, 1982 the deposition of the witnesses is required to be recorded by the judge concerned either in his own hand or he may cause it to be written at his dictation mentioning in substance of what the witnesses deposed. He therefore submitted that the deposition by way of affidavit which is treated as examination in chief by the Dy. Charity Commissioner is not permissible. Mr. Merchant also submitted that as per section 73 of the Act, there is a separate provision for proof of facts by affidavit for which a separate order is required to be passed by the Dy. Charity Commissioner as contemplated under Order 19 of CPC and therefore he submitted that the CPC and more particularly the amended provisions of Order 18 Rule 4 would not automatically apply for the purpose of inquiry by the Charity Commissioner u/s 22(3) of the Act. He, therefore, contended that there is procedural lapse or material irregularity in the procedure which deserves to be interfered with and the order passed by the Dy. Charity Commissioner deserves to be quashed and set aside.

6. On behalf of respondent Nos. 3 and 4, Mr. Macwan submitted that as such in view of the provisions of Rule 7 of the Rules and Section 73 of the Act, the language is that "as far as possible" and therefore it cannot be said that there is no power and in the submission of Mr. Macwan u/s 73 it is provided for proving the fact by affidavit and therefore he submitted that the proceedings before the Dy. Charity Commissioner are like that of quasi judicial authority and there is no error committed by the Dy. Charity Commissioner in accepting the affidavit as examination in chief by the impugned order. Mr. Desai, Ld. AGP has also supported the order passed by the Charity Commissioner.

7. Rule 7 of the Bombay Public Trust Rules which is mainly relied upon by the learned counsel appearing for the petitioner reads as under:

"7. Manner of inquiries: Except as expressly provided in the rules inquiries under the Act shall be held, as far as possible, in accordance with the procedure prescribed for the trial of suits under the Presidency Small Cause Courts Act, 1882, where that Act is in force and elsewhere under the Provincial Small Cause Courts Act, 1887. In any inquiry a party may appear in person or by the recognised agent or by a pleader duly appointed to act on his behalf;

Provided that any such appearance shall, if the Deputy or Assistant Charity Commissioner so directs, be made by the party in person."

It is apparent that the language is "as far as possible". Therefore, the applicability of procedure prescribed for the trial of suits under the Presidency Small Cause Courts Act, 1882 can not be read as strictly to be followed or that the Deputy Charity Commissioner has no option but to follow the said procedure.

Section 73 of the Act which is relevant for the purpose of this petition reads as under:

"73. In holding inquiries under this Act, the officer holding the same shall have the same powers as are vested in courts in respect of the following matters under the Code of Civil Procedure, 1908 in trying a suit:--

(a) proof of facts by affidavits,

(b) summoning and enforcing the attendance of any person and examining him on oath,

(c) compelling the production of documents,

(d) issuing of commissions."

Section 73(a) provides for proof of facts by affidavits. Section 73(b) provides for summoning and enforcing the attendance of any person and examining him on oath. As per the provisions of Section 73, an officer holding the inquiry under this Act has the same powers as are vested in courts in respect of the matters under clauses (a), (b), (c) and (d) as they are under the Civil Procedure Code. Therefore, on conjoint reading of section 73 of the Act read with Rule 7 of the Rules, it transpires that the proof of facts by affidavit is not unknown to the procedure for holding inquiry and secondly for examination of any witness on oath the officer will have the same power as are vested with the civil court under Civil Procedure Code. Order 18 Rule 4 (after amendment with effect from 1.7.02) interalia provides for examination in chief of a witness by affidavit and therefore it can reasonably be construed that the CPC mutatis mutandis would apply for giving effect to the provisions of section 73 the Act. Rule 7 can not be read for curtailing the power of an officer as that of a civil court under CPC for compliance of the procedure prescribed under the provisions of Rule 4 of Order 18. In any case, even no rule can be allowed to operate on the face of any statutory provisions u/s 73. Further, as observed earlier, even if the rule is to operate, then also as such there is no conflict and rule itself provides the language "as far as possible" and therefore the legislature itself has thought it proper to apply only as far as possible and not with full force as sought to be canvassed on behalf of the petitioner.

8. Normally, the procedure to be followed in the civil suit by the civil court would stand on a much higher footing and would be more strict procedure in comparison to the proceedings to be held or inquiry to be conducted by another authority under special enactment. It is true that if there is any conflict, the provisions made under special enactment would prevail, but in view of the interpretation as observed earlier as such there is no conflict. When, for the whole of the country in the trial of civil suit the Parliament has found it proper to

incorporate the provisions for accepting of examination in chief by affidavit, there is no reason why such speedier method should not be made applicable in a matter of holding inquiry u/s 22 of the Act. The Judicial notice can be taken of the fast developing science and the various advance modes of communication. The amendments are also made for service of summons through E-mail and other various methods and amendment in CPC, more particularly, Order 18 Rule 4 which came into force with effect from 1.7.02 is one of such steps taken up by the parliament for gearing up speedy trial in the proceedings of civil suit. If for the proceedings of civil suit such provisions are made which are rather made strictly judicial proceedings in comparison to the proceedings u/s 22 of the Act, it would be more reasonable to construe such power vested which helps the litigant or the parties or the authority to speed up the proceedings of the inquiry. If the witness is to be examined on oath, even for examination in chief, the same would consume more time, but if only cross examination is to be permitted after accepting the affidavit as examination in chief it would certainly reduce the time consumption for conducting trial and therefore I find that when the CPC itself is amended by the parliament such amendment under Order 18 Rule 4 can also be resorted to by the Dy. Charity Commissioner u/s 73 of the Act for the purpose of examination on oath as well as for proof of fact by affidavit.

9. Mr. Merchant made an attempt to submit that if Order 18 Rule 4 is read in isolation, Rule 5 of CPC read with Rule 38 of Ahmedabad Small Cause Courts Rules would be redundant. In my view, such contention is ill founded in as much as Rule 5 of Order 18 or Rule 38 of the aforesaid rules does not provide for deposition which may be recorded by the judge or he may cause it to be recorded must also be examined in chief. In view of Rule 4 (after amendment under Order 18) Rule 5 of Order 18 can be given effect to the extent that the deposition which is required to be recorded. Therefore, if the learned judge has accepted the examination in chief by affidavit only cross examination would be required and as a consequence such cross examination would be required to be recorded by the learned judge or he may cause it to be recorded. Therefore, in my view, there is no conflict between Rules 4 and 5 of order 18 and on the same parity there would not be any conflict with Rule 38 of Ahmedabad Small Cause Courts Rules. Further, as observed earlier, Rule 38 can not be pressed in service in strict sense and even if it is to apply it would apply only to the extent of recording of evidence or examination of witness which is required to be recorded and it is not necessary that it must be also for examination in chief. Therefore, such contention of Mr. Merchant fails and deserves to be rejected.

10. In view of the aforesaid observations and discussion, petition fails. The order passed by the Dy. Charity Commissioner for accepting the evidence of examination in chief by affidavit does not call for any interference and hence petition is dismissed. Rule is discharged with costs of Rs. 2,000/- to be paid to respondent Nos 1 & 2, i.e. Charity Commissioner and Dy. Charity Commissioner in one set and the same shall be paid by the petitioner within one month from today.

