

(2012) 12 BOM CK 0066
In the Bombay High Court
Case No : Writ Petition No. 946 of 2004

Panjabrao Mohanji Phalke

APPELLANT

Vs

Jeevan Tulshiramji Phalke and Others

RESPONDENT

Date of Decision : 12-12-2012

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 22, 41A, 41D, 41D(1)(b), 56A
Constitution of India, 1950 — Article 226, 227

Citation : (2013) 1 MhLj 515

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Advocate : A.A. Naik, for the Appellant; A.S. Chandurkar for Respondent Nos. 1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Deshpande, J.—Heard Shri Akshay Naik, the learned counsel for the petitioner; and Shri Atul Chandurkar, the learned counsel for the respondent Nos. 1 and 2. In the proceedings u/s 41-D of the Bombay Public Trusts Act, 1950 (for short, "the BPT Act") initiated by way of Application No. 6 of 1995, the learned Joint Charity Commissioner, Nagpur, though dismissed the claim for suspension, removal or dismissal of the Trustees u/s 41-D of the BPT Act, has issued certain directions on 3-9-2003, which are the subject-matter of challenge in this writ petition.

2. Misc. Application No. 2 of 2004 filed by the petitioner for extension of time to conduct fresh elections of the governing body as per the direction contained in clause (6) of the operative part of the order passed in Application No. 6 of 1995, was also dismissed, by holding that it is open for the applicant to raise all the objections in the proceedings of the Change Report filed pursuant to the elections held on 21-12-2003. Hence, the said order is also the subject-matter of challenge in this writ petition.

3. The petitioner is aggrieved by the directions issued on 3-9-2003 after

dismissing the proceedings u/s 41-D of the BPT Act. Hence, the said directions are reproduced below:

(1) The application stands dismissed.

(2) The present Executive Body on Sch. I headed by Shri M.M. Falke and the non-applicant No. 1 as the Secretary of the Trust are hereby directed to enroll new General Body members as per the current Constitution of the Trust, by following the due procedure prescribed thereunder.

(3) The applicants and other teaching and non-teaching staff of the schools run by the Trust and the general public will be at liberty to make the application to the non-applicant No. 1 giving necessary details and biodata for being admitted as the members of any of the categories prescribed under the constitution and the making payment of the necessary subscription.

(4) The Non-applicant No. 1 is further directed to issue a paper publication in the daily "LOKMAT" calling the applications from the willing persons to be enrolled as the General Body Members of the Trust.

(5) It is made clear that the application of a particular person should not be rejected simply because he is from adverse group and cogent reasons should be recorded if a decision is taken to reject his enrollment.

(6) The process of enrollment of new members should be completed by the end of 31-10-2003 commencing from 1-10-2003 and thereafter by appointing suitable Election Officer, fresh election for new Executive Body should be held by the end of 31-12-2003.

(7) The non-applicant No. 1 is further directed to file necessary Change Report for inclusion of the open plots allotted to the Trust on Sch. I.

(8) The non-applicant No. 1 is further directed to get the pending audited statement of accounts of the Trust prepared from the Auditor from the year 1990-91 onwards till this year, within the period of two months from today and shall submit the same to the office of the Dy. Charity Commissioner, Nagpur, for verification.

(9) In the facts and circumstances of the case, the parties are directed to bear their respective costs of these proceedings.

(10) The original Cash Book, - article "B" Ledger Book-article "E", Loan Register article "F", Voucher file - article "G" and the Proceeding Book article - "H" shall be returned to the non-applicant No. 1, who has produced the same during the course of Proceedings.

4. The contention of Shri Akshay Naik, the learned counsel appearing for the petitioner, is that once the learned Joint Charity Commissioner dismisses the application u/s 41-D of the BPT Act, then he becomes functus officio and any direction issued by him in such application would be without jurisdiction. He

submits that in the present case, since the learned Joint Charity Commissioner has rejected Application No. 6 of 1995 not only on the ground of locus of the applicants to file such applicant, but also on the merits of the matter, the subsequent directions issued to hold fresh elections are without jurisdiction. He further submits that even if it is assumed that such directions pertain to the jurisdiction of the learned Joint Charity Commissioner u/s 41-A of the BPT Act, then the same were not in the duly constituted proceedings under the said provision and that those were without providing an opportunity to the applicants as to why such directions should not be issued. He further submits that the directions issued by the learned Joint Charity Commissioner are even otherwise illegal, improper and without any basis, since.

5. In the decision in the case of Shri Damodar Jairam Sao vs. The Deputy Charity Commissioner, Nagpur Region, Nagpur, Writ Petition No. 4847 of 2010 decided on 19-9-2011 [since reported in 2011 (6) Mh.L.J. 431], which I have delivered, and the decision of the Division Bench of this Court in the case of Smt. Vanmala Manoharrao Kamdi, Ku. Kalpana Krishnarao Tule and Chandrakant Ganpatrao Telrandhe Vs. The Deputy Charity Commissioner, Nagpur Division, Nagpur, Behind G.P.O., Civil Lines, Nagpur and Others, , it has been held that the power u/s 41-A of the BPT Act is purely an administrative in nature and is to be exercised to ensure that the Trust is properly administered. The power can be exercised in the aid of other provisions of the Act and the directions can be issued on the basis of sufficient material available on record. It can be exercised by way of stop-gap arrangement and the directions issued can be altered, modified, annulled, withdrawn, cancelled or suspended at any time. Therefore is no lis, contest or adjudication involved in the process and hence while issuing such directions, the provision nowhere contemplates an opportunity of being heard to be given to the persons or parties to whom such directions are issued. No rights are adjudicated, but it is the duty of every Trustee or of such person to whom such directions are issued to comply with the same. In the decision of the learned Single Judge of this Court in the case of Berar General Education Society Vs. Jt. Charity Commissioner and Another, , relied upon by Shri Atul Chandurkar, the learned counsel appearing for the respondent Nos. 1 and 2, it has been held that the power u/s 41-A of the BPT Act can be exercised even while dealing with the proceedings u/s 22 of the said Act.

6. In the decision of the Full Bench of Punjab High Court in the case of Davinder Singh and Amar Singh and Another Vs. Deputy Secretary Cum Settlement Commissioner and Others, , it has been held in para 11 that if the challenge is based upon the jurisdiction of the Authority to pass such an order, the Court, in the exercise of its discretion, can refuse to grant a relief. In the decision of the Apex Court in the case of Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, , it has been held that long participation and acquiescence in the proceedings preclude such a party from contending that the proceedings were without jurisdiction.

7. In view of the three decisions of this Court in the cases of Shri Damodar Jairam Sao, Vanmala Manoharrao Kamdi and Berar General Education Society, cited supra, the power u/s 41-A of the BPT Act can be exercised even in the proceedings u/s 41-D of the said Act. If the Joint Charity Commissioner, on the basis of the material available on record, finds that the circumstances warrant issuance of certain directions to ensure proper administration of Trust, it is not necessary to grant hearing to the parties concerned to whom the directions are issued, though it may be desirable to grant hearing. Since the directions issued are not expected to decide any rights or disputes, the parties are bound to follow the same. Hence, mere absence of hearing will not vitiate the order.

8. If the exercise u/s 41-A of the BPT Act adjudicates upon any disputes or decides the rights of the parties or if the directions issued are not legal, proper, justified or without any propriety or jurisdiction, then it is open for the parties to approach the said Authority for modification, withdrawal, variation or cancellation of such directions by invoking the same jurisdiction u/s 41-A of the BPT Act. Any order passed in such substantive proceedings can thereafter be challenged in an independent writ petition, as it would lie before the Division Bench. If any action is initiated by the Charity Commissioner u/s 41-D(1)(b) of the BPT Act for willful disobedience of any lawful orders issued by the Charity Commissioner under the provision of section 41-A of the said Act, then it is open for the Trustee to raise a defence that the directions issued u/s 41-A of the BPT Act are without jurisdiction, not legal or lawful or without any justification and propriety. In such eventuality, the Charity Commissioner is bound to consider such defence on its own merits. The jurisdiction of the District Court u/s 56-A of the BPT Act, dealing with the power of the Trustee to apply for the directions, can also be invoked by filing a separate applications, and any question affecting the management or, administration of the Trust property or income thereof, can be dealt with and appropriate opinion, advice or direction can be sought. Even in the proceedings of the Change Report filed pursuant to any directions issued u/s 41-A of the BPT Act, a defence can be raised that the directions so issued are unlawful, illegal, unjustified, without propriety or jurisdiction, and hence the Change Report based on that, is illegal.

9. Shri Atul Chandurkar for the respondent Nos. 1 and 2 has rightly pointed out that the petitioner himself had taken the steps to implement such directions. He had issued an advertisement on 10-10-2003 for enrollment of new members. Similarly, he had also filed an application for extension of time to comply with the directions in clause (6) of the impugned order regarding enrollment of new members. The steps taken by him to implement the directions impugned are narrated in the application itself. On such application, the learned Joint Charity Commissioner has issued certain directions, which are reproduced below:

(1) The request made by the recorded Secretary of the Trust for extension of time to conduct the election stands rejected, since election is already shown to have been held on 21-12-2003 and the Change Report is pending.

(2) However, since at present there are 5 surviving members on Schedule-I, till the pending change reports are finally decided, the said body shall continue to manage the affairs of the Trust by taking decision by majority.

(3) However, the said body on Schedule-I is not permitted to take decision in the matter of making appointment of teaching and non-teaching staff working in the Schools run by the Trust including their promotion, suspension, termination and dismissal, without the previous permission of the concerned Education Department and of this Authority.

(4) Further, the body on Schedule-I shall also not take any other major policy decision involving huge financial burden on the Trust, without the previous permission of this Authority.

(5) The three pending Change Reports concerning the Trust namely Inquiry Application No. 1176/2003, 317/2003 and 788/2000 shall be decided expeditiously, preferably within a period of 6 months from the date of this order. The Change Reports No. 317/2003 and 788/2003 presently pending on the file of the Dy. Charity Commissioner, are withdrawn and are transferred to the file of the Asstt. Charity Commissioner, Nagpur, for trial along with the pending Change Report No. 1176/2003.

(6) So far as operation of the Bank account standing in the name of the Trust is concerned, it is hereby directed that same shall be jointly operated by the President and Secretary of the Trust.

(7) Copy of this order shall be sent to the Asstt. Charity Commissioner, Nagpur, for information and necessary action.

(8) Application stands disposed of accordingly, with a direction to the parties to bear their respective costs of these proceedings.

The question whether such steps were taken without prejudice to the rights of the petitioner, has been gone into in the proceedings u/s 22 of the BPT Act and ultimately the second appeals arising therefrom filed in this Court are pending.

10. In view of the aforesaid position, it is not a fit case to exercise the jurisdiction under Articles 226 and/or 227 of the Constitution of India to disturb the situation and it is open for the parties to agitate such question in the second appeals 12. In the result, the writ petition is dismissed. Rule is discharged. No order as to costs.