
(1999) 03 BOM CK 0014
In the Bombay High Court
Case No : First Appeal No. 920 of 1987

R.P. Gupta and Others

APPELLANT

Vs

B.M. Grower and Others

RESPONDENT

Date of Decision : 26-03-1999

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 47
Trustee Act, 1925 — Section 36(1)

Citation : (1999) 101 BOMLR 844

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

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—Short and neat question that falls for determination in this first appeal is whether by a provision made in the trust deed dated 6th April, 1973 that vacancy of the trustee shall be filled up by the continuing or surviving trustee of the trust, it is obligatory that the appointment of new trustee on vacancy shall be by unanimity or be decided by majority.

2. The said question arises in the facts and circumstances thus ;

3. On 6.4.1973 a scheme was framed to manage the trust known as Lala Lajpatrai Memorial Trust. The number of trustees as settled under the scheme was to be between 5 to 12 including one nominated from Amar Gain Public Charitable Trust. At the time the scheme was framed, there were 8 trustees including Shri B.M. Grower (respondent No. 1 herein) being the nominee of the said Amar Gain Public Charitable Trust. In terms of the scheme in case vacancy arises in the trustees, other than the trustee of Amar Gain Public Charitable Trust, such a vacancy shall be filled up by the continuing or surviving trustees of the trust. It is also provided that in case the nominee of Amar Gain Public Charitable Trust vacates or ceases to be the trustee, such a vacancy shall be filled up only by nomination by the trustees of the said trust viz, Amar Gian Public Charitable Trust.

4. The respondent No. 1 herein is the applicant in the Charity Application No. 14 of 1982 made before the City Civil Court at Bombay. His case in the said application was that one of the original trustees, Shri Ramprakash Mehra died on 24.7.1977 and his vacancy was not filled up. According to him some of the remaining trustees intended to induct their sons on the board of trustees which he opposed. A meeting of the board of trustees was fixed on 12.11.1980 and due to inconvenience of one of the trustees the said meeting was not held on 12.11.1980 and later on it was held on 21.11.1980. The applicant had no notice of that meeting. The applicant allegedly sent a letter dated 28.11.1980 and sought for the agenda or the minutes of the meeting held on 21.11.1980. No reply was received by him. Thereafter he received a notice dated 25.11.1980 informing him that the meeting of the board of trustees was fixed on 1.12.1980. He could not attend the said meeting as it was not possible for him. In the meeting of 1.12.1980 a resolution was passed to induct sons of some of the trustees in the trust. The change report was lodged with the Assistant Charity Commissioner on 3.2.1981 and that was accepted. The applicant Shri B.M. Grower filed revision application before the Joint Charity Commissioner. The Revisional Authority did not find any error in the order of the Assistant Charity Commissioner and accordingly dismissed the revision application on 19.6.1982. The said order of the Joint Charity Commissioner affirming the order of the Assistant Charity Commissioner was challenged In the Charity Application No. 14 of 1982 before the City Civil Court at Bombay. The City Civil Court at Bombay after hearing the parties and upon construction of the scheme dated 6.4.1973 held that the appointment of trustees can only be made by unanimity of all the continuing and surviving trustees and since the resolution dated 1.12.1980 appointing new trustees was not unanimous resolution, the Assistant Charity Commissioner erred in changing the report and the Joint Charity Commissioner erred in affirming the same.

5. Mr. N.B. Shah, the learned Counsel appearing for the appellants assailed the judgment and order of the City Civil Court Bombay, impugned in the first appeal and urged that combine reading of Clauses 9, 17 and 18 of the scheme dated 6.4.1973 leaves no manner of doubt that the resolution appointing the new trustees could be made by majority. According to him since the new trustees were appointed by the majority, which was in accordance with the scheme, the Assistant Charity Commissioner rightly accepted the change report and no error was committed by the Joint Charity Commissioner in affirming the said order. Mr. Shah also referred to Section 47 of the Bombay Public Trusts Act, 1950.

6. On the other hand Mr. S.G. Mandrekar learned Counsel for the respondent No. 2 supported the judgment and order of the City Civil Court at Bombay.

7. The legal position seems to be that if the trust instrument or disposition makes a provision for appointment of new trustee, such appointment of new trustee has to be in conformity and in consonance with the provisions made in the trust instrument or disposition. The procedure prescribed there under has to

be strictly followed and cannot be deviated. An appointment of a new trustee under a power for that purpose contained in the trust instrument or disposition must be in accordance in all material respects with the terms of the power. If the source of appointment of new trustee is traced from the instrument or disposition, then the terms in such instrument or disposition must be strictly adhered to. The reason being that the appointment of trustee/s is a matter of prime concern for everyone connected with the trust and once the trust is set up under the trust instrument or disposition and such instrument or disposition makes provision for appointment of new trustee/s, then such appointment could only be made by the mode and manner provided in the trust instrument or the disposition. David B, Parker and Anthony R. Mellows in the Modern Law of Trusts, in Chapter 2 has dealt with the appointment, retirement and removal of trustees. In its 5th edition at page 250, the authors have stated the legal position thus:

(2). Appointment of a new trustee -

Whether the trust was setup inter vivos or arose on death, the rules relating to the appointment of new trustees are the same. The trust instrument may make provision for the appointment of new trustees, and if reliance is placed on that power, its terms must be strictly followed. If the trust instrument does not make provision there is a statutory power contained in Section 36(1) of the Trustee Act, 1925, and if there is conflict between the provisions of the trust instrument and the statutory power, the statutory power prevails. Under the statutory power, the following persons, and in the following order, have the right to appoint new trustees....

8. In Mahomed Jaffer Haji Nazaralli Devji Vs. Mahomed Janmahomed, the question of appointment of new trustee in the light of the provision made in trust deed has been considered by this Court and it was ruled therein that where a deed of trust provides for appointment of a new trustee by the continuing trustees, such appointment must be made by all the trustees acting together. It is not competent to some only of the trustees to appoint a new trustee at a meeting at which one or more of them are absent. The Indenture of trust in Mohamed Jaffer Haji Nazaralli Devji inter alia provided as follows :

...And it is hereby agreed and declared that if and so often as any of the trustees hereby appointed or any future trustees of these presents shall die or renounce the Shia Asna Ashari faith it shall be lawful for the continuing trustees or trustee for the time being of these presents to appoint some fit person or persons following the Khoja Shia Asna Ashari religion to be a trustee or trustees in the place of the trustee or trustees so dying or renouncing the. Shia Asna Ashari faith....with liberty upon any such appointment to increase or diminish the original number of trustees which shall never be less than five or more than seven....

9. The relevant clause in the Indenture of trust in Mohamed Jaffer Haji's case as quoted above is quite similar and identical to the Clause 9 of the present scheme

of the trust which reads thus :

In the event of a vacancy being caused in the trustees other than the trustees of Amar Gian Public Charitable Trust for any of the reasons mentioned in Clause 9 hereof, such vacancy shall be filled by the continuing or surviving trustees of the trust. Provided however, that in the case of the nominee of the Amar Gian Public Charitable Trust vacating or ceasing to be trustee, such vacancy shall be filled up only by a nomination by the trustees of the said Amar Gian Public Charitable Trust.

10. The aforesaid clause in the scheme clearly provides that in the event of a vacancy being caused in the trustees, other than the trustees of Amar Gian Public Charitable Trust, such vacancy shall be filled up by the continuing or surviving trustees of the trust. Thus the scheme provides for appointment of new trustee/s by the continuing or surviving trustees all acting together and not by majority. In other words if in a meeting held for appointment of the new trustee/s, if any one or more of the trustees were absent, for any reason, good, bad or indifferent, new trustee/s could not be appointed since that would lack unanimity and if any decision for appointment of new trustee/s is taken in such meeting, such a decision of appointment of new trustee/s cannot be said to be either valid or binding. When a provision has been made in the scheme that vacancy shall be filled up by the continuing or surviving trustees, it necessarily enjoins upon all such trustees that they must join in appointment of new trustee.

11. Mr. Shah learned Counsel for the appellants strongly relied upon Clause 18 of the scheme, which provides that every resolution of question submitted to a meeting shall be decided by a majority of votes of the trustees present at such meeting and voting on the question. He submitted that since in the meeting held on 1.12.1980 majority decided to appoint the new trustees by a resolution, such resolution was valid. I find myself unable to concur with this submission of Mr. Shah. Clause 18 is a general clause relating to the resolutions to be passed in a meeting of board of trustees but in view of the specific clause in the scheme regarding appointment of new trustees to the effect that vacancy shall be filled up by the continuing or surviving trustees, the said specific clause overrides and prevails over the general Clause 18. The mode and manner of appointment of new trustee having been specifically provided in Clause 9 of scheme, such appointment of new trustee must adhere to Clause 9 and for the purposes of appointment of new trustee, Clause 18 has no application.

12. Mr. Shah learned Counsel for the appellants also urged that the judgment of this Court in *Mohamed Jaffer Haji Nazaralli Devji* (supra) cannot be said to be a good law presently in view of the enactment of Bombay Public Trusts Act, 1950 and particularly Section 47 of the said Act which empowers the Charity Commissioner to appoint, suspend and renew or discharge trustees and vest the property to new trustees. It is true that Section 47 empowers the Charity Commissioner to appoint, suspend, renew or discharge a trustee and vest the property to new trustee but such a power is subject to the existence of the

conditions stated in Sub-section (1) of Section 47 of the Bombay Public Trusts Act. If a vacancy arises in the board of trustees and a provision is made in the instrument of trust or in the scheme, obviously the Charity Commissioner too has to make appointment of the new trustees in case such eventuality arises in accordance and conformity with the provisions of such instrument of trust and / or scheme unless of course the provision made in the instrument of trust or scheme or disposition is in conflict with statute. That is not be case here. The enactment of Section 47 of Bombay Public Trusts Act, 1950 does not affect the correctness of the view taken by this Court in Mohamed Jaffer Haji's case. In the present case, moreover no application was made u/s 47 of the Bombay Public Trusts Act calling upon the Charity Commissioner to appoint the new trustee when vacancy fell vacant.

13. The City Civil Court thus, approached the matter with right perspective and the finding recorded by the said Court that since the resolution dated 1.12.1980 was not a unanimous resolution for appointment of the new trustee and therefore not valid and finding does not suffer from any error.

14. The first appeal has no merit and it is dismissed accordingly. Parties to bear their own costs.

15. For a period of four weeks the interim order passed by this Court on 5th December, 1997 shall remain operative.