(2012) 08 BOM CK 0167

In the Bombay High Court

Case No : Letters Patent Appeal No. 169 of 2012 in Writ Petition No. 1218 of 2012 With Civil Application No. 338 of 2012

Rustomjee Kerawalla Foundation APPELLANT

Vs

Avisha Gopalkrishnan Kulkarni RESPONDENT

Date of Decision : 29-08-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2013) 2 ALLMR 739 : (2013) 3 BomCR 290 : (2013) 1 MhLj 119

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Ravi Kadam, with Mr. Prateek Seksaria and Ms. Krishna Raja instructed by L.J. Law, for the Appellant; B.K. Subbarao with Mr. Vinit Kulkarni and Ms. Atiya Shaikh for Respondent No. 1 and Mr. Sandeep K. Shinde, GP with Mr. Prashant Darandale, AGP, for the Respondent

Final Decision : Dismissed

Judgement

Dr. D.Y. Chandrachud, J.—The present Letters Patent Appeal has been assigned to this Court for hearing by an administrative direction of the Hon''ble the Chief Justice and we have accordingly taken up the appeal for hearing and final disposal by consent. This appeal arises from a decision of a Learned Single Judge dated 31 July 2012 on a Petition filed by the Appellant under Articles 226 and 227 of the Constitution to challenge an order of the Charity Commissioner dated 11 January 2012. The Charity Commissioner rejected an application filed by the Appellant for dismissal of an enquiry which was initiated on the basis of a complaint dated 25 January 2011 lodged by the First Respondent. Briefly stated, it was urged before the Learned Single Judge that an enquiry into the complaint lodged on 25 January 2011 was barred by the principles of res judicata on the ground that on an earlier complaint dated 3 May 2008, a report was submitted by the Inspector on 4 June 2008 following which the Assistant Charity Commissioner concluded in his order dated 20 June 2008 that there appeared to be no substance. By the judgment and order which was sought to be challenged in appeal, the Learned Single Judge has come to the conclusion that the earlier order of the Assistant Charity Commissioner could not operate as res judicata since the enquiry which is conducted into a complaint dated 2 May 2008 was no enquiry in the eyes of law and that there was no finding on the merits of the allegation made by the First Respondent in regard to a misappropriation or siphoning off of the funds of a public trust.

2. Counsel appearing on behalf of the First Respondent has raised an objection to the maintainability of an appeal under Clause 15 of the Letters Patent on the ground that the judgment of the Learned Single Judge, properly construed, must be regarded as a decision rendered on a petition invoking Article 227 of the Constitution. Hence, it is urged that no Letters Patent Appeal would lie. The Appellant had invoked the provisions of Articles 226 and 227 of the Constitution in a petition filed before the Learned Single Judge. The basis on which the Petition has been filed and the jurisdiction of the Learned Single Judge was invoked, was that the Charity Commissioner had acted outside his jurisdiction in ordering an enquiry by the Inspector on the complaint which was filed by the First Respondent on 25 January 2011. According to the Appellant, the earlier complaint which was lodged on 3 May 2008 had been enquired into and had attained finality and that consequently, the fresh complaint would be barred by res judicata. The invocation of the provisions of both Articles 226 and 227 was, therefore, in any event, validly made. A decision rendered by the Learned Single Judge in a Petition under Articles 226 and 227 would, therefore, be subject to a Letters Patent Appeal under clause 15 of the Letters Patent. We, therefore, do not find any substance in the preliminary objection to the maintainability of the appeal.

3. That takes us to the merits of the order which is sought to be impugned in the appeal.

4. On 2 May 2008, a complaint was filed by B.Ramakrishnan claiming to represent the Parents'' Association of an educational institution by the name of Vibgyor High by seeking the intervention of the Charity Commissioner on allegations of misappropriation of the funds of a public charitable trust by the name of Rustomjee Kerawalla Foundation Trust. The allegations were to the following effect:

1. The RKF trustees and Kare Edumin Directors are same (Copy of proof attached).

2. Audited accounts show the entries that RKF has been transferring on an average Rs. 2 crores to Kare Edumin Ltd. (Copy of proof attached), every year.

3. RKF and Vibgyor High claiming to make a loss and demanding fee hike of 50% raising it to an exorbitant amount of Rs. 82,000. (Circular attached)

4. This has been done without giving sufficient notice to parents and making them go through the trauma of worrying about the future of their children.

(Circular attached).

5. RKF and Vibgyor High, also submitted in the Honourable Supreme Court and the High Court if they do not get this fee hike they will have to shut down the school which is like blackmailing. They also have gone to the extent of demanding an ex-parte order by hiding actual facts from the court and misguiding and wasting the precious time of the Honourable Courts (copy of Supreme Court Petition attached).

6. The Supreme Court hearing is on Monday 5 May 2008. hence we earnestly request the Honourable Charity Commissioner to intervene immediately and at least issue a letter to the Honourable Courts about the misappropriation of funds by the trust and mismanagement of trust. Future of 2000 students is at stake.

7. RKF was warned earlier by your own good offices regarding siphoning of the trust funds to another Private Ltd. company and strictly warned not to do this through your order in the matter of Rustomjee Kerawalla Foundation dated 9/7/06. (Copy of the order is enclosed).

8. After your order RKF has again engaged in such activities which is not permitted by your office and your immediate action is requested.

5. On 3 May 2008, the complainant stated before the Charity Commissioner that he had nothing further to add to his complaint and supporting documents, but requested the Charity Commissioner to conduct a detailed enquiry. The Inspector working in the office of the Public Trusts Registration Office, Greater Bombay Region, Mumbai, dealt with the complaint in a report dated 4 June 2008 in the following manner :

(i) The issue of fee rise is subjudice before the apex Court and the Bombay High Court and that issue does not fall within his jurisdiction, and therefore, it will not be proper to make any comment on that issue.

(ii) The amount of Rs. 2 crore is transferred every year by the petitioner to Kare. The petitioner Trust has been giving land and school building on lease for a period of 26 years and the yearly lease rent is Rs. 2 crore 50 lac and accordingly, R.K.F. is paying that amount to Kare.

(iii) As far as point Nos. 3, 4 and 5 are concerned, it will not be proper to make comment as the said issues are subjudice.

(iv) It will not be proper to make any comment on point No. 6 as the matter is subjudice before the Apex Court.

(v) The Inspector is not in a position to make any comment in respect of point No. 7 as the Assistant Charity Commissioner has passed the order.

It was further noted that the separate inspection report of the Trust was made.

6. The Assistant Charity Commissioner did not issue a notice either to the complainant or to the Trust on the report which was submitted by the Inspector

and passed a brief order closing the file and disposing of the complaint in the following terms on 20 June 2008 :

Seen report, complaint application and documents on record. So far as point in respect of rise in fees is concerned, the said point is subjudiced before Hon''ble Supreme Court and Hon''ble High Court. So far as other points are concerned, there appears no substance. Hence, complaint is filed and is accordingly disposed of.

7. The First Respondent is a parent of a child who was studying in the school conducted by the Charitable Trust, the Court being informed that the child studied in the school for a period of about six years. The First Respondent was part of a group of five Petitioners who had moved this Court under Article 226 of the Constitution in which the legitimacy of the fees charged by the School was called into question. The child of the First Respondent was expelled or, as the case may be, refused admission to the next academic year. Those proceedings ended in an order dated 8 November 2011 passed by the Supreme Court, recording the submission of the First Respondent that the child would not seek admission to the school and recording the statement made on behalf of the management that the letter dated 2 June 2010 addressed to the First Respondent stood withdrawn. The dispute in regard to the payment of fees, it is common ground, is now pending in an appeal before the Supreme Court. In these proceedings, as well as in the proceedings before the Learned Single Judge, the issue relating to the fees charged by the institution was not in question since that is a matter which is pending before the Supreme Court.

8. On 25 January 2011, the First Respondent addressed a complaint to the Charity Commissioner, recording that she had applied for the disclosure of documents under the Right to Information Act, 2005 on the basis of which the earlier complaint had been disposed of. The First Respondent requested the Charity Commissioner to re-enquire into the matter. Though the original letter addressed by the First Respondent on 25 January 2011 was bereft of details, the record before the Court would indicate that on 3 March 2011, a detailed statement was filed by the First Respondent before the Charity Commissioner. On 8 February 2011, the Assistant Charity Commissioner made an endorsement by which he directed an enquiry by the Inspector in regard to the allegations contained in the complaint dated 25 January 2011. On 3 March 2011, the First Respondent filed a detailed statement before the Charity Commissioner setting out specific allegations in respect of the Trust. Among the allegations of the First Respondent is that the Trust had, for the year ending 2010, paid an amount of Rs. 5.92 crores to a private Company by the name of CARE Edumin Pvt. Ltd. by way of lease rent for the High School building besides which an amount of Rs. 1.75 crores was paid by way of repairs and maintenance. The First Respondent has alleged that the funds of the Trust were being siphoned off and that there was consequently a misuse. Moreover, it has been alleged that in breach of the provisions of Section 36(1)(b) of the Bombay Public Trust Act, 1950, the property

of the Trust had been alienated. The First Respondent has filed, apart from the statement dated 3 March 2011, a detailed written submission before the Charity Commissioner in support of the complaint dated 25 January 2011. We have not adverted in detail to the nature of the allegations in order to obviate any interference in the enquiry which has been ordered by the Charity Commissioner.

9. An application was filed u/s 69 before the Charity Commissioner by the Appellant for the dismissal of the complaint on 29 March 2011. The Charity Commissioner passed an order on 11 January 2012 dismissing the application. The Charity Commissioner held that the substance of the complaint which was filed earlier was that there was a misappropriation of the Trust funds and mis-management of the affairs of the Trust. The Charity Commissioner noted that in the report which the Inspector submitted on the earlier occasion, there was no enquiry into the allegations of misappropriation. The Charity Commissioner noted that while the Inspector had adverted to the fact that the dispute in regard to fees fixed was pending before the High Court and later before the Supreme Court, the Inspector ought to have held a thorough enquiry in regard to the allegations of misappropriation and mismanagement of the Trust funds. Since the material given in the complaint had not been enquired into, the Charity Commissioner came to the conclusion that a further enquiry should be carried out. The Charity Commissioner traced the source of that power to Section 22A of the Bombay Public Trust Act, 1950. Moreover, the view in the impugned order is that the Charity Commissioner and also the Assistant Charity Commissioner are also empowered to direct an enquiry suo motu. On this ground, he came to the conclusion that the subsequent enquiry was not barred on the principles of res judicata. It is this order of the Charity Commissioner which was questioned in the proceedings before the Learned Single Judge. By the order dated 31 July 2012, the Learned Single Judge dismissed the petition filed by the Appellant herein.

10. Counsel appearing on behalf of the Appellant submits that on the complaint filed on 2 May 2008, a report was submitted by the Inspector on 4 June 2008, upon which a final order was passed by the Assistant Charity Commissioner on 20 June 2008 closing the file. In this background it was urged that no fresh enquiry could have been ordered by the Charity Commissioner at least on the basis of the material which had fallen for consideration in the earlier enquiry which culminated in the order dated 20 June 2008. Counsel submitted that u/s 41B, the Charity Commissioner or, as the case may be, the Deputy or Assistant Charity Commissioner is empowered to institute an enquiry either on the receipt of the complaint or even suo motu. Under Sub-section (3) of Section 41B, the Deputy or Assistant Charity Commissioner is required to submit his enquiry report or the report received by him under the section to the Charity Commissioner or, he may proceed u/s 38. Consequently, it was urged that it was not mandatory for the Deputy or Assistant Charity Commissioner to proceed u/s 38. Consequently, upon the report of the Inspector received on the basis of the earlier complaint, which finds no irregularity, it was not necessary for the Assistant Charity Commissioner to hold a further enquiry before he decided to

accept the report and close the file. On this basis, it was urged that a fresh enquiry would be barred.

11. On the other hand, it has been urged on behalf of the First Respondent that the jurisdiction of the Charity Commissioner to order an enquiry is sufficiently wide having regard both to the Bombay Public Trust Act, 1950 as well as the specific provisions contained therein. Counsel submitted that one of the allegations of the First Respondent is that there has been an alienation of the property belonging to the charitable trust in violation of the provisions of Section 36(1)(b). Consequently, it was sought to be urged that in such a situation, it would be open to the Charity Commissioner to invoke his jurisdiction u/s 22A where it appears to the Deputy or Assistant Charity Commissioner that any particular relating to a public trust which is not a subject matter of an enquiry under Sections 19, 22(3) or 28, as the case may be, has remained to be enquired into. Moreover, it was sought to be urged that in any event, even u/s 41B, the Charity Commissioner has a wide jurisdiction to act not only on the basis of a complaint received from a complainant, but even suo motu. Ex-facie, it is urged that the allegations in regard to misappropriation of funds and of siphoning off funds was not enquired into by the Inspector on the earlier occasion. The Assistant Charity Commissioner did not follow any due process upon the report of the Inspector and before he closed the file he did not hear the complainant and the Trust. On this ground, it is urged that when subsequently information has come to the knowledge of the First Respondent, it was open to the Charity Commissioner, acting on the basis of the material which has been produced to order a further enquiry.

12. Before we deal with the relevant provisions of the Bombay Public Trust Act, 1950, a brief reference to the earlier complaint and to the proceedings which arose out of the complaint would be in order. The earlier complaint dated 2 May 2008 contained allegations that there was a misappropriation of funds of the charitable trust and that funds of the trust had been siphoned off. The Inspector submitted his report on 4 June 2008. Even a bare perusal of the report, is sufficient to indicate that the allegation in regard to misappropriation and siphoning off of funds was not enquired into. The Inspector referred to the fact that the dispute in regard to the enhancement of fees was pending before the Supreme Court. The Assistant Charity Commissioner on this report passed an order recording that the dispute in record to the increase in fees was pending before the Supreme Court and the High Court. Apart from this statement, all that the order dated 20 June 2011 records is as follows:

So far as other points are concerned, there appears no substance. Hence, complaint is filed and is accordingly disposed of.

13. Even a bare perusal of the earlier order would indicate that the substance of the allegation made by the complainant was not analysed, enquired into or determined. Contrariwise, in support of the fresh complaint which has been filed on 25 January 2011, the First Respondent had filed a detailed statement dated 2

March 2011 and a written submission in support of the allegations which have been made in the complaint. In these circumstances, it cannot be held that the fresh complaint is barred by the principles of res judicata or the principles analogous thereto. In order to attract the principles of res judicata, the earlier determination is one which must be rendered on the merits of the dispute. Ex-facie, there was no determination on the merits of the complaint which was made in regard to the allegations of misappropriation and siphoning off of funds.

14. That apart, the scheme of the provisions of the Bombay Public Trust Act, 1950 would indicate that wide powers are conferred upon the Charity Commissioner. u/s 37(1), the Charity Commissioner, the Deputy or Assistant Charity Commissioner or any other officer authorised by the State Government are empowered inter alia to inspect the property belonging to the Trust, to inspect the proceedings, books of account or documents in possession of the Trust, to call for any return, statement, account or record and to obtain an explanation of the trustees or of any person connected with the Trust. Under Sub-section (3) of Section 37, the Deputy or Assistant Charity Commissioner or the officer authorised under sub-section (1) is empowered to submit a report to the Charity Commissioner. Similarly, the person authorised by the State Government is required to submit a report to the Deputy or Assistant Charity Commissioner. The power under sub-section 3 comes into existence if upon inspection it is revealed that a loss has been caused to the public trust inter alia on account of gross negligence, breach of trust, mis-application or misconduct on the part of a trustee or a person connected with the trust. u/s 38, on the receipt of a report of an authorised officer u/s 37 or on receipt of the complaint in respect of any trust, the Deputy or Assistant Charity Commissioner is mandated to require a trustee or a person connected with the trust to submit an explanation. On considering the report referred to in Section 38 or, as the case may be, the explanation furnished by a trustee or by any person connected with the public trust and after holding an enquiry in the prescribed manner, Section 37 requires the Deputy or Assistant Charity Commissioner to record his finding on the question as to whether the trustees or a person connected with the Trust is guilty of gross negligence, breach of trust, misappropriation or misconduct which has resulted in a loss to the Trust. Quite apart from this power, the Charity Commissioner is vested by Section 41B with the power to institute an enquiry either suo motu or on the receipt of a complaint in writing. The power u/s 41B can also be exercised by the Deputy or Assistant Charity Commissioner. Section 41B sets out the manner in which the enquiry is to be conducted. Under sub-section (7), the Deputy or Assistant Charity Commissioner has to submit his enquiry report or the report received by him under the Section to the Charity Commissioner or he may proceed u/s 38. The Charity Commissioner, if he is satisfied that there is a prima facie case against trustees, is empowered to take such steps as are necessary under the provisions of the Act. The Charity Commissioner is vested with a general power of superintendence of the administration and carrying out of the purposes of the Act u/s 69 of the Act. The First Respondent who is the

complainant, has invoked the jurisdiction of the Assistant Charity Commissioner. We are of the view that in the present case, the Assistant Charity Commissioner, was acting within jurisdiction in directing an enquiry. The exercise of that jurisdiction was not barred by principles of res judicata or principles analogous thereto. Whether any of the allegations which have been made by the First Respondent have any substance, is a matter which has to be determined after following due process of law. At this stage, we have refrained from expressing any opinion whatsoever on the merits of the allegations and we clarify that nothing contained in this order shall be read as indicative of even a prima facie opinion by the Court on the merits of the allegations. We have dealt only with the question as to whether the enquiry was liable to be dismissed at the threshold which was the application which was filed by the Appellant.

15. For the reasons which we have indicated, we have come to the conclusion that the Learned Single Judge was not in error in dismissing the petition challenging the order of the Charity Commissioner which declined to reject the enquiry at the threshold. For these reasons, we do not find any merit in the appeal. The appeal is dismissed.

16. In view of the dismissal of the appeal, the Civil Application does not survive and is accordingly disposed of. There shall be no order as to costs.