

(1965) 01 BOM CK 0010
In the Bombay High Court
Case No : Civil Appeal No. 634 of 1964

Shah Chhotalal Lallubhai	Vs	APPELLANT
The Charity Commissioner		RESPONDENT

Date of Decision : 22-01-1965

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 55(1)(b), 56

Citation : (1965) 67 BOMLR 432

Hon'ble Judges : K. Subba Rao, Acting C.J.; Ramaswami, J; Raghubar Dayal, J; R.S. Bachawat, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Bachawat, J.—One Jhaverehand Dahyabhai Shah died in 1916, leaving a will dated August 6, 1915. He was a resident of Vejalpore in the suburbs of Broach and a Ladva Shrimali Bania by caste. He professed the Jain religion, and believed in the tenets of the Swetambar Murti Pujak sect of Jains. By Clause (7) of the will, he directed his executors to spend out of the earnings of his- shop every year during the life-time of his niece, Bai Jakore, the amounts mentioned below on the following religious objects:

- (1) Rs. 100 for feeding cattle with grass, fodder, oil cakes etc., in the Broach Pinjrapole.
- (2) Ks. 100 for Jiva-daya Khata (fund for kindness to animals).
- (3) Rs. 25 for offering flowers for the worship of Lord Rikabdev in the Jain temple at Vejalpore, Broach.
- (4) Rs. 200 for providing food to Shravak pilgrims at the Shatroonjaya Hill at Palitana.
- (5) Rs. 50 for providing food to pilgrims at Mount Girnar.
- (6) Rs. 50 for providing food to pilgrims at Mount Abu.

- (7) Rs. 250 for providing cereals, clothes etc., to Shravaks and Shravikas.
- (8) Rs. 100 for providing cloth to Jain Sadhus and Sadhavis.
- (9) Rs. 200 for education and food of Hindu orphans.
- (10) Rs. 200 for Jain Gyan Khata (fund for imparting knowledge).
- (11) Rs. 100 for feeding Shravaks and Shravikas who have observed fast.
- (12) Rs. 300 for giving food, cloth etc., to the blind, lame and crippled members of the Hindu Community.

In addition, he also directed his executors to give a Swamivatsal feast or meal consisting of methi-dal and ladus made of sugar to the members of his caste at 15 specified villages and towns in the Broach and Surat Districts every year on the occasion of the sacred festival of Pajusan, By Clause (15) of the will, he directed that after the death of his niece, Bai Jakore, a sum of Rs. 75,000 should be set apart by the executors, and out of the moneys so set apart, suitable amounts should be sent to the respective Khatas (funds) in his name, so that the religious acts mentioned in Clause (7) be continued for ever.

2. On the death of Bai Jakore on May 20, 1928, the estate vested in the residuary legatee, Bai Chanchal, daughter of Bai Jakore. Mulchandbhai, husband of Bai Chanchal, set apart Rs. 75,000 on trust for the purposes mentioned in Clause (7) of the will, and began to manage the trust estate. Out of the trust moneys, he invested Es. 8,000 in 5 per cent, tax-free Government Loan, 1944-45, yielding an annual income of Rs, 400, and pursuant to the directions given in Clause (15) of the will, handed over loans of the face value of Rs. 4,000, Rs. 1,000, Es. 1,000 and Rs, 2,000 respectively to four religious and charitable institutions in full discharge of the obligation of the trust for expending annually the sums of Rs. 200, Rs. 50, Rs. 50, and Rs. 100 on items 2, 4, 5 and 6 of the religious purposes mentioned in Clause (7) of the will. On December 8, 1947, Bai Chanchal executed a trust deed in respect of the investments representing the balance amount of Rs. 67,000 and an accumulation of surplus or unexpended income amounting to Rs. 25,796-6-8. The trust is registered as a public trust under the Bombay Public Trusts Act, 1950, hereinafter referred to as the Act. The trust deed provided that the unexpended accumulation of Rs. 25,796-6-8 should be applied for establishing, maintaining and supporting a Nivas for housing the poor and middle-class Ladva Shrimali Jains at low and cheap rents. The trust deed also provided that after setting apart the aforesaid sum of Rs. 25,796-6-8 the balance funds would be held in trust for applying its income to the charities mentioned in Clause (7) of the aforesaid will other than items 2, 4, 5 and 6. Now, the trustees had no authority to divert any part of the trust fund for the purposes of the Nivas scheme. The establishment of a Nivas for housing the poor and middle-class Ladva Shrimali Jains is not one of the original objects of the trust. As a matter of fact, the Nivas scheme was not carried into effect. The Charity Commissioner, Bombay challenged the validity of the Nivas scheme. The Courts

below rightly proceeded on the footing that the Nivas scheme is invalid. Subsequent to the execution of the trust deed, there were further accumulations of unexpended income. The Swamivatsal feasts were given, and the fixed annual payments to all the charities were duly met up to Samvat year 1999 corresponding to 1942-1943 A.D. During the subsequent years, the fixed annual payments to the charities were duly made, but on account of rationing restrictions the feasts could not be given up to Samvat year 2010 corresponding to 1953-1954 A.D. During the samvat year 2011 corresponding to 1954-1955 A.D., the feast was, not given in spite of the removal of rationing restrictions. The trustees allege that the current income of the trust fund after disbursing the fixed annual payments is not sufficient to meet the usual expenses of annual feasts. On June 3, 1955, the Charity Commissioner filed an application before the District Judge, Broach, u/s 55(1)(b) and Section 56 of the Act for suitable directions for the utilisation of the accumulations of the unexpended income of the trust for some educational purpose. The trustees were impleaded as respondents to this application. Pursuant to a general notice issued by the Court, the appellants and four other members of the Ladva Shrimali Shravak Bania Community in Broach and Surat Districts appeared, and intervened in the application. On their behalf, it was contended that the trust was for religious purposes and its funds could not be diverted for other purposes under Sections 55(7)(b) and 56 of the Act, and that the accumulations should be utilised year after year for meeting the deficit amount required for the annual Swamivatsal feasts.

3. The district Judge held that the provisions of Section 56 of the Act did not apply to the funds of a public religious trust, and if the accumulations were held for a religious purpose, the Court could not give any directions for its utilisation, under that section, that the Swamivatsal feast confers religious benefits and objects Nos. 2, 3, 4, 5, 6, 8 and 11 are also religious in character, while the remaining objects are charitable, and therefore the entire feast was not of a religious character, but assuming that the trust was wholly religious, the accumulation was not held for religious purposes, and was subject to the directions of the Court as to its utilisation u/s 56 read with Section 55(1)(b) of the Act. He also held that the trustees could not save any moneys in future by simply refusing to give the Swamivatsal feasts but it was not in the public interest to provide for the expenses of the feast out of the accumulation, and the accumulation should be spent for educational and medical purposes. The District Judge passed final orders on October 25, 1956. On that date, the accumulation of unexpended income amounted to Rs. 45,019-14-0, besides another sum of Rs. 107-2-0. The District Judge directed the trustees to hand over a sum of Rs. 22,509-15-0 to an institution known as the Sad Vidya Mandal for giving four freeships every year to deserving students, who should preferably be Jains of Broach District and failing such deserving cases, to other Hindu students. Subject to the condition of giving freeships, the Sad Vidya Mandal would be at liberty to spend the amount for purposes of the building of the college or its hostel or in

providing other educational facilities to the students. He also directed the trustees to pay another sum of Rs. 22,509-15-0 to the trustees of the Sevashram Hospital at Broach on condition that the amount be invested in any approved trust security and its income be utilised in providing maintenance, food and medicine to poor and deserving patients. He directed the payment of the remaining sum of Rs. 107-2-0 towards costs.

4. The appellants and two other members of the Ladva Shrimali Shravak Bania Community preferred an appeal to the Bombay High Court. The High Court held that the Court could on an application u/s 55 of the Act deviate from the directions of the settlor, even if the purpose of the trust has not failed, where the Court finds that it is inexpedient, impracticable, undesirable, unnecessary or improper in the public interest to abide by his directions, but the Court could exercise this power only in respect of funds of a public trust which was not a trust for religious purposes.. The High Court held that none of the purposes mentioned in Clause (7) of the will except the one mentioned in. item 3 of the clause could be regarded as religious, that the object of providing funds for annual Swamivatsal feasts was charitable and not religious, and that the Court was, therefore, competent to entertain the application u/s 55. The High Court further held that providing a feast to the members of the caste even on the occasion of a religious festival or on days which may be regarded as holy is not expedient, desirable, necessary or proper in the public interest, and the directions of the District Judge with regard to the distribution of the fund should not be interfered with. The High Court accordingly dismissed the appeal. The appellants now appeal to this Court by special leave. They challenge the propriety and the legality of the directions given by the District Judge below, and repeat the submission made on their behalf in the Courts below. The respondents contend that the aforesaid directions were rightly given under Sections 55(1)(b) and 56 of the Act.

5. The Bombay Public Trusts Act, 1850, was passed on August 14, 1950, with a view to regulate and make better provision for the administration of public religious and charitable trusts in. the State of Bombay. Soon after the Act came into force, its constitutional validity was assailed. In *Ratilal Pamachand Gandhi v. The State of Bombay* [1954] S.C.B. 1055, s.c. 56 Bom. L.R. 1184 this Court held that a religious sect or denomination has the right guaranteed by the Constitution to manage its own affairs in matters of religion, and this includes the right to spend the trust property or its income for religion and for religious purposes and objects indicated by the founder of the trust or established by usage obtaining in a particular institution. To divert the trust property or funds for purposes which the Charity Commissioner or the Court considers expedient or proper, although the original objects of the founder can still be carried out, is an unwarranted encroachment on the freedom of religious institutions in regard to the management of their religious affairs and therefore Section 55(1)(c), which contains the offending provision and the corresponding provision relating to the powers of the Court occurring in the latter part of Section 56(1) must be held to

be void. Subsequently, Bombay Act LIX of 1954 amended Section 55(1)(c) by excluding from its purview a trust for a religious purpose, Sections 55 and 56 of the Bombay Trusts Act, 1950, as they stand now, are as follows:

55. (1) If upon an application made to him or otherwise the Charity Commissioner is of opinion that?

(a) the original object for which the public trust was created has failed,

(b) the income or any surplus balance of any public trust has not been utilized or is not likely to be utilized,

(c) in the case of a public trust other than a trust for a religious purpose, it is not in public interest expedient, practicable, desirable, necessary or proper to carry out wholly or partially the original intention of the author of the public trust or the object for which the public trust was created and that the property or the income of the public trust or any portion thereof should be applied to any other charitable or religious object,

(d) in any of the cases mentioned in Sections 10 to 13 or in regard to the appropriation of the dharmada sums held in trust u/s 54 the directions of the court are necessary, the Charity Commissioner shall require the trustee to apply within the prescribed time for directions to the Court within the local limits of whose jurisdiction the whole or part of the subject-matter of the trust is situate.

(2) If the trustees fail to make the application as required under Sub-section (1) or if the Charity Commissioner himself is a trustee or if there is no trustee of the public trust, the Charity Commissioner shall make an application to the Court.

56. (1) On such application being made, the court after hearing the parties and making an inquiry shall decide the matter and shall give directions. In giving the directions, the court shall, so far as may be expedient, practicable, desirable, necessary or proper in public interest, give effect to the original intention of the author of the public trust or the object for which the public trust was created. If the court is of opinion that the carrying out of such intention or object is not wholly or partially expedient, practicable, desirable, necessary or proper in public interest the court may direct the property or income of the public trust or any portion thereof to be applied cy pres to any other charitable or religious object. In doing so, it shall be lawful for the court to alter any scheme already settled or to vary the terms of any decree or order already passed in respect of the public trust or the conditions contained in the instrument of the public trust.

(2) Any decision or order passed by the court under Sub-section (1) shall be deemed to be a decree of such court and an appeal shall lie therefrom to the High Court.

6. Section 2(13) of the Act provides that unless there is anything repugnant in the subject or context, public trust means an express or constructive trust for either a public religious or charitable purpose or both. Section 55(1)(c) expressly

excludes from its operation a trust for a religious purpose. But Sections 55(1)(a) and 55(1)(b) do not exclude religious trusts from their operation, and they apply to all public trusts for religious and charitable purposes. On an application either u/s 55(1)(a) or Section 55(1)(b) read with Section 56(2), the Court is bound to give directions in respect of all public trusts. Section 56(1) provides that in giving the directions, the Court shall, so far as may be-expedient, practicable, desirable, necessary or proper in the public interest, give effect to the original intention of the author of the trust or the object for which the trust was created. The conjunction "or" in this sentence introduces several alternatives. The Court must give effect to the original intention or object if and so far as it may be either expedient or practicable or desirable or proper or necessary to do so. If for example, the Court finds that it is proper in the public interest to give effect to the original object, the Court must give effect to it, though it is not necessary to do so in the public interest. Under the latter part of Section 56(1), if the Court finds that the carrying out of the original intention or object wholly or partially is neither expedient nor practicable nor desirable nor necessary nor proper in public interest, the Court may direct the property or income of the trust or any portion thereof to be applied cy pres to any other charitable or religious object. The latter part of Section 56(1) thus permits the diversion of trust funds for other objects, though the original objects of the founder can still be carried out. But we think that the respondents have made out no case for such a diversion of trust funds. One of the objects for which the trust was created was that a Swamivatsal feast to the members of the Ladva Shrimali Bania caste should be given every year on the occasion of the holy-festival of Pajusan. The Jains of Ladva Shrimali Shravak Bania Community are the chief beneficiaries of this trust. Looking at their interest, it is certainly expedient, practicable, desirable and proper to give the feast. The giving and taking of the Swamivatsal feast on the occasion of the holy festival of Pajusan, if not a religious act, is a meritorious act prescribed by the scriptures of Swetambar Murti Pujak Jains. The wider public interest does not require that this special charity for a section of the Jain public should be subverted and overthrown. In the wider public interest also, it is expedient, practicable, desirable and proper to respect the sentiments and interests of this section of the Jain public and to give effect to this charity, and we find no reason for giving directions under the latter part of Section 56(1). We, therefore, propose to give directions under the first part of Section 56(1).

7. In this view of the matter, it is not necessary to decide whether the trust is a trust for religious purposes, and if so, whether, having regard to Ratilal Panaehand's ease its income or surplus balance spendable for the purposes of the trust can be diverted for other purposes, though the original object of the trust can still be carried out. The question whether or not objects mentioned in Clause (7) of the will are religious objects is not raised in the pleadings. No issues "were framed and no evidence was led on this point by either" party. What are religious purposes must be decided according to the tenets and religious beliefs of the Murti Pujak Swetambar sect of Jains, to which the testator

belonged. It is difficult to decide the point in the absence of relevant pleadings, issues and evidence. The District Judge held that the Swamivatsal feast and many other objects are religious objects. The High Court too lightly brushed aside this finding. Chapter IX of the Report of the Hindu Religious Endowments Commission (1960-62) contains an interesting discussion of Jain endowments. Paragraphs 7 to 11 of Chap. IX of the Report refer to seven types of religious funds specifically recognised by the Jain scriptures concerning (1) Jeena, Bimba, (2) Jeena Chaitya, (3) Gyan "Fund, (4)) Sadhu, (5) Sadhvi, (6) Shravak and (7) Shravika. The Jains recognise numerous other endowments or funds for general or specific purposes, the corpus or interest of which is to be utilised as per the donor's intentions. The question whether the several objects of the trust including the giving of a Swamivatsal feast are religious in their character must be left open for future decision.

8. We must now consider what directions should be given u/s 56(1) on the present application. No case for applying the latter part of Section 56(1) and for refusing to give effect to the original objects of the trust has been made out. We should, therefore, give effect to the original intention of the founder as far as that intention can be carried out. If the method indicated by the founder cannot be carried out, the Court will substitute another method *cy pres*, that is to say, as nearly as possible to the method specified by the founder. The application of the *cy pres* principle is explained in Story's Equity Jurisprudence, 3rd edn., Article 1176, at p. 494 thus:

The doctrine of *cy pres* as applied to charities was formerly pushed to a most extravagant length. But this sensible distinction now prevails that the Court will not decree the execution of the trust of a charity in a manner different from that intended, except so far as it is seen that the intention cannot be literally executed. In that case another mode will be adopted, consistent with the general intention, so as to execute it, although not in mode, yet in substance. If the mode should become by subsequent circumstances impossible, the general object is not to be defeated, if it can in any other way be attained.

9. In the instant case, the overriding intention of the founder of the trust is that the sum of Rs, 75,000 set apart by him should be devoted to the objects; mentioned in Clause (7) of the will, so that those objects may be continued and carried out for ever. His intention was that fixed sums should be expended annually for the 12 items of charity mentioned and reasonable sums should be expended annually in giving Swamivatsail feasts to members of his caste. The sum spendable annually for the feast was necessarily of a fluctuating character. In accordance with the directions given in Clause (15) of the will, the obligations of the trust for the charities mentioned in items 2, 4, 5 and 6 of Clause (7) of the will have been fully discharged by donating Rs. 8,000" out of the corpus of the trust. The expenses of the annual Swamivatsail feasts were met, and the payments to other charities were duly made out of the income of the balance" funds every year up to Samvat 1999 corresponding to 1942-43 A.D., and the

accumulations of the unexpended income up to that year represent a true surplus. In accordance with the intention of the founder of the trust, the surplus should be applied as nearly as possible to the original uses and purposes of the trust. In all the circumstances of the case, the surplus should be applied to increase the amounts spendable for the surviving objects of the trust. During the subsequent years up to Samvat year 2010 corresponding to 1953-54 A.D., the annual feasts could not be given due to rationing restrictions, but the expenses of the other charities were duly met. The savings of the income spendable during these years for the feasts should be applied suitably for carrying, out the same object in future. The balance savings, if any, should be devoted towards increasing the amounts-spendable for the other objects of the trust. The savings during Samvat year 2011 corresponding to 1954-55 A.D., were due to the fact that the annual feast was not given in spite of the absence of rationing restrictions. The savings for this year should be devoted towards the giving of the Swamivatsail feasts. The trustees cannot be allowed to defeat the objects of the trust by refusing to carry them out. It is said that the giving of a Swamivatsail feast on the scale given in the past would now cost about Rs. 3,000. But if the income at the disposal of the trustees will not permit the spending of such a large amount, there is no reason why the trustees would not spend a smaller amount and give the feast to a smaller number of guests. In view of the enormous rise in prices since the creation of the trust, an increase of the amounts spendable for the charities would be in accordance-with general intention of the founder. This is an additional reason for applying the unexpended income for the original objects of the trust instead of diverting them, for other purposes. It is desirable that instead of spending the¹ accumulations, the same should be invested and its income should be applied towards the original objects. In the light of all these considerations, we propose to give the directions set out in our order.

10. The scheme framed by the Courts below is objectionable in several ways. In framing the scheme, the Courts below erroneously disregarded one of the main objects of the trust, viz., the giving of the annual, Swamivatsal feast on the-ground that it is not expedient, desirable, necessary or proper in the public interest to carry out this object. The scheme disregards the basic principle that the trust funds should be applied for effectuating the intention of the founder of the trust as far as possible. The direction for payment of one half of the accumulations to the Sad Vidya Mandal on the ground that its object is analogous to the object of the Jain Gyan Fund mentioned in item 8 of Clause 10 of the will is objectionable on the ground that the freeships are not restricted to the Jains and also on the ground that subject to giving the freeships the donee is entitled to spend the corpus for other purposes. Moreover, the purposes of the Sad Vidya. Mandal and its freeships are not analogous to the purposes of the Jain Gym Fund, which is a religious fund for imparting knowledge of Jain religion and Jain Shastras, The direction for payment of one half of the accumulated amount to the Sevashram Hospital is objectionable on the ground that medical treatment of

the poor and deserving is not one of the objects specifically mentioned in Clause 7 of the will. Both these directions are also objectionable on the ground that they do not take into account the original objects of the trust. For "all these reasons, the directions given by the Courts below must be set aside.

11. In the result the appeal is allowed, and the judgments and decrees passed by the Courts below are set aside. In lieu of the directions given by the Courts below, we give the following directions.

12. Out of the accumulations of the unexpended income up to October 25, 1956, amounting to Es. 45,091-14-0 the trustees will set apart a reasonable sum not exceeding Rs. 5,000 as a working fund to meet current expenses. The trustees will invest the balance amount in such manner as they think fit in accordance with Section 35 of the Bombay Public Trusts Act, 1950. The trustees will spend and utilise every year one-half of the annual income from these investments for the charities mentioned in items 1, 3, 7, 8, 9, 10, 11 and 12 of Clause 7 of the will of Jhaverchand Dahyabhai Shah dated August 6, 1915 in such proportion and in such manner as the trustees think fit and proper. The trustees will spend and utilise every year the balance one-half of the annual income of those investments for the annual Swamivatsal feast (caste-dinner) mentioned in Clause 7 of the aforesaid will. The disbursements to be made under these directions will be in addition to the payments to be made by the trustees out of the income of the investments of the original corpus of the trust funds. Out of the net income of the investments of the original corpus, the trustees will continue to make the annual payments to the charities mentioned in items 1, 3, 7, 8, 9, 10, 11 and 12 of Clause 7 of the aforesaid will and will spend the balance income for giving the annual Swamivatsal feasts. The trustees shall give the Swamivatsal feast every year as far as possible. If for some reason the feast cannot be given in any year, the amount spendable for this object in that year should be spent for giving the feast in the following years.

13. In the circumstances of the case, we direct that the parties will pay and bear their own costs throughout in this Court as also in the Courts below, except that the trustees will pay the sum of Rs. 64-8-0 to the Charity Commissioner and the sum of Rs. 42-10-0 to opponents Nos. 6 to 13 to the application, as originally directed by the District Judge.