

(2019) 10 BOM CK 0093

In the Bombay High Court

Case No : First Appeal No. 3027 Of 2015

Shaikh Arshad Maheebub And Anr

APPELLANT

Vs

Sayyed Samir Shah Mahmood And Ors

RESPONDENT

Date of Decision : 01-10-2019

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 22, 51

Citation : (2019) 10 BOM CK 0093

Hon'ble Judges : Vibha Kankanwadi, J

Bench : Single Bench

Advocate : Gulam Dastagir Shaikh, C.S. Deshmukh, L.V. Sangit

Final Decision : Dismissed

Judgement

1. Present appeal has been filed by those persons in whose favour an order dated 19-05-2014 was passed by learned District Judge, Ahmednagar, in a trust matter. Respondents no.01 to 07 are those persons in whose favour the impugned order dated 28- 08-2015 was passed on the basis of order dated 14-08- 2015. Respondents no.08 and 09 are the persons in whose favour order dated 19-05-2014 was passed and respondents no.10 and 11 are the persons who had filed application Exhibit 1002 before the trial Court. Basically the first appeal arises out of the order below Exhibit 01 and decree in Trust Suit No. 2 of 1970 by learned Ad hoc District Judge-2, Ahmednagar, thereby the said suit came to be partly decreed. Seven trustees were appointed with the consent of the said Court as per the scheme which was already formed and then the Court Receiver who was appointed since 1977 was directed to hand over all the trust properties, including the account books, to the newly appointed trustees.

2. One Mahmood Sharif Usmanmiya and Mohamad Ibrahim Mohamad Sharif had filed R.C.S. No. 2 of 1970 before District Judge, Ahmednagar, to declare the trustees as guilty of mismanagement and misappropriation of breach of trust and as such, those trustees i.e. the defendants to be removed from their office. The consequential prayer for giving them directions to submit the accounts was also

prayed. The suit was basically a trust suit in respect of trust called "Hajrat Sarkar Pir Sahab Sharif Dargah Dayra, Ahmednagar". It was registered with Assistant Charity Commissioner, Pune Region, Pune, vide No. B-117. The defendants were the trustees and one Shamsuddin Karimbhai was a trustee who expired in April 1968. It was contended that the plaintiffs are the beneficiaries of the trust and they are having interest in the same. They are the representatives of the family Saint Pir Shah Sharif. The trust properties were at Ekalahare village in Shrirampur Taluka and Konoshi village in Shevgaon Taluka. In 1951, the predeceased of the defendants were appointed as permanent 'Mutwallis' by District Judge in an ex parte proceedings and thereafter the defendants had taken over charge and possession of the trust properties. Thereafter, they felt that since they have been appointed as permanent 'Mutawallis', nobody can remove them and thereby they started mismanaging the properties and misappropriating funds of the trust. They have not kept regular accounts. So also, bank account has not been opened and therefore, the suit was filed after obtaining permission from Charity Commissioner, Bombay, under Section 51 of the then Bombay Public Trusts Act, 1950, dated 25-10-1984. As aforesaid, in the suit, plaintiffs had claimed for declaration, removal of defendants from trusteeship and for accounts.

3. It appears from the proceedings, that by order dated 31-01-1973, a retired Civil Judge (Senior Division) was appointed as a Court Receiver and directions were given to manage the properties. Thereafter, it appears that some other receiver was appointed under the order of the Court. Thereafter, there was a compromise which was recorded before the trial Court on 16-10-2014 for appointment of in all seven persons as trustees and in view of order dated 16-10-2014, seven persons named in the order were appointed as trustees of the trust and copy of the order was directed to be given to Assistant Charity Commissioner, Ahmednagar, for taking further steps in the matter. In view of the said order, learned Assistant Charity Commissioner made enquiry under Enquiry Application No.335 of 1991 and passed order to that effect on 19-05-2015. Thereafter, application Exhibit 1002 was filed and thereby the order passed by learned Assistant Charity Commissioner, Ahmednagar, in Enquiry No. 335 of 1991 dated 19-05-2015 was partly set aside to the extent of nomination of four persons from four villages and the learned Assistant Charity Commissioner was directed to follow the order passed by learned Ad hoc District Judge-2, dated 16-10-2014 scrupulously. The said order came to be passed on 13-08-2015 and thereafter by order passed below Exhibit 01, the Trust Suit came to be partly decreed. The names of seven persons as trustees appointed by Assistant Charity Commissioner, Ahmednagar, with the consent of the said Court, as per the scheme, was confirmed. The Court Receiver was directed to hand over the property along with the accounts. This is the order which is under challenge.

4. The entire history was required to be taken into consideration to appreciate the dispute and the point that is under challenge in this appeal.

5. Heard learned Advocate Mr. Gulam Dastagir Shaikh appearing for the appellants. Heard Mrs. C.S. Deshmukh appearing for respondents no.01, 04 to 07, 10 and 11. So also, heard learned Advocate Mr. L.V. Sangit appearing for respondents no.02 and 03. None for respondents no.08 and 09 though served.

6. At the outset, it can be said that all the three Advocates have made submissions in support of their respective contentions. They have given the history of the litigation. What is emerging from the submissions is that the scheme was framed in Trust Suit No.5 of 1961 and it had attained finality. As per the said scheme, procedure was prescribed as to how trustees can be appointed and thereafter in pursuant to the same, it appears that defendants were appointed as permanent 'Mutawallis'. Thereafter, the said Trust Suit bearing No.2 of 1970 was filed in which the order of Court Receiver was passed. The Court Receiver was holding charge since 1977 till the date of decree and he was Advocate Mr. Mirikar; though initially as per the order one retired Civil Judge (Senior Division) was the Court Receiver. But then there was a compromise on 16-10-2014 having consensus for the appointment of seven persons as trustees and accordingly the order was passed to appoint them as trustees. But it appears further, that the learned Assistant Charity Commissioner had appointed four more persons from different village in addition to the other trustees, which was then again challenged in the same suit and in that suit itself, learned Ad hoc District Judge has set aside the order partially. It has been pointed out by the learned Advocate for the appellants, that in fact, the trust was a hereditary trust. There was no attempt to bring the legal representatives of trustees who had expired in between. The said compromise Pursis was at Exhibit 993 and out of those persons, some of them have not been made as party to the proceedings. As per the scheme that was framed, Clause 8 empowered Assistant Charity Commissioner to nominate four trustees with the consent of District Judge. There was absolutely no application made under Section 22 of the then Bombay Public Trusts Act for such nomination and appointment. Only on the basis of the Pursis, learned Ad hoc District Judge has exercised the jurisdiction and then directed the learned Assistant Charity Commissioner to take further steps. In fact, learned Assistant Charity Commissioner being subordinate could not have gone against the order and therefore, those directions by learned Ad hoc District Judge on the basis of said compromise Pursis were absolutely illegal. Therefore, when the learned Assistant Charity Commissioner tried to adopt the procedure as per the scheme, the learned Ad hoc District Judge came down on him heavily by passing the said order Exhibit 1002. In fact, if there would have been a grievance regarding the order passed by learned Assistant Charity Commissioner, the appeal could have been preferred before the learned Joint Charity Commissioner; but the respondents adopted shortcut and filed application Exhibit 1002 in the suit itself. In fact, the scheme does not empower the learned District Judge to appoint or set aside the nomination and therefore, the decree that has been ultimately passed is in violation of the Bombay Public Trusts Act and the scheme formulated.

7. Learned Advocate for respondents no.02 and 3 submitted that the scheme was modified. Three branches nominated by family members were made part of the trustees and therefore, the order which was passed by learned Ad hoc District Judge on 29-10-2014 had, in fact, adopted due procedure. Further, the said order was not challenged even by the present appellants and, therefore, it has achieved finality. Learned Assistant Charity Commissioner proceeded to appoint four persons from villages and in fact, four were appointed by learned Ad hoc District Judge. The said appointment was not as per scheme and therefore, it was rightly set aside. In fact, the order passed regarding appointment of Court Receiver was challenged and in the Letters Patent Appeal filed before this Court, Clause no.08 was modified. The said decision in Letters Patent Appeal was not challenged by anybody before the Apex Court. The appellants have come in picture only after they were appointed and therefore, they have no right to challenge the impugned decree. The trust has not been made as a party to the present proceedings and the period of appointment i.e. five years is about to end. Therefore, practically the appeal has become infructuous.

8. Further, learned Advocate appearing for respondents no.01, 04 to 07, 10 and 11 submitted that no procedure was prescribed for nominating anybody. The communication produced on record would show that it was at the instance by the District Court. The consent of learned Assistant Charity Commissioner was sought. In fact, the procedure which was discarded in earlier order by this Court was followed by learned Assistant Charity Commissioner which shows from the order passed on 29-10-2014, that during the course of the enquiry, learned Assistant Charity Commissioner had issued paper publication for inviting applications from interested persons to be appointed as trustees from the respective villagers. This procedure was, in fact, discarded by this Court. The appointments those were made by the learned Assistant Charity Commissioner were without the consent of District Judge and therefore, application Exhibit 1002 was filed. Notice of that application was, in fact, given to the appellants; however, they did not contest. Under such circumstance, they cannot now challenge the said order which was passed below Exhibit 1002. Now, while filing this appeal when the present appellants were not party in the suit, they ought to have obtained leave to file appeal. No stay has been granted and therefore, the trustees who have been appointed under the decree, they had taken charge since 2015 and they are managing the trust properly.

9. The perusal of the impugned order dated 28- 08-2015 would give impression in view of the wording used in the operative part, that the suit is decreed. However, in view of the fact that the said R.C.S. No.02 of 1970 was decided on merits on 31st January 1973 itself, it cannot be taken that it would have been decreed again. Needless to say, it can be observed that proper format has not been used by the learned Ad hoc District Judge while passing said order dated 28-08-2015. Note is required to be taken as to how the matter had proceeded after the R.C.S. No.02 of 1970 was partly decreed. In view of the decision, scheme was framed for administration of the Trust and thereupon a receiver was

appointed in the matter. That scheme was framed on 29-09-1973 by Extra Assistant Judge in Trust Suit No.05 of 1961. The said order of framing scheme was challenged before this Court in First Appeal No. 219 of 1974 and then in Letters Patent Appeal bearing No. 06 of 1975. It appears that another proceedings arising out of those proceedings was Misc. Application No. 100 of 1982 before learned District Judge, Ahmednagar and Writ Petition No. 1202 of 1983. As regards the order that was passed by the learned District Judge in relation to the procedure to be adopted for selection of representatives of three branches was set aside and the learned Assistant Charity Commissioner was directed to make enquiry into the objections raised regarding the suitability of the petitioners to be selected as representatives of the three branches to hold them as trustees. The further communication between the District Court and learned Assistant Charity Commissioner, Ahmednagar, would show that the District Court intended to take proceedings for final decree to be passed in Trust Suit No.02 of 1970. If it is so, that the final decree proceedings was to be completed, then it ought to have been an application to that effect by the concerned parties and by taking appropriate procedure for final decree, adjudication ought to have been made. The apparent perusal of order dated 28-08-2015 does not give an impression that it is a final decree; but taking into consideration the entire history of the litigation, it will have to be taken that the learned Court has passed that order as a final decree.

10. In view of the scheme, the learned Assistant Charity Commissioner was supposed to select four trustees with the consent of learned District Judge. It was in tune with the directions given in Letters Patent Appeal No.06 of 1975. The order that was earlier passed by the District Judge regarding the selection of the persons to be nominated by Assistant Charity Commissioner is concerned, it has been discarded thereby the act of publication of advertisement and inviting applications was not approved by this Court in the Letters Patent Appeal. However, it appears that the learned Assistant Charity Commissioner by passing the said order dated 29-10-2014, had issued paper publication inviting applications of interested persons to be appointed as trustees from the respective villagers. That means, the procedure which was discarded by this Court was adopted by learned Assistant Charity Commissioner and therefore, the learned Ad hoc District Judge was right in directing Assistant Charity Commissioner to correct the procedure because as per the scheme itself, it ought to have been with the consent of the District Judge. It can be observed that when in the scheme it was stated that the selection of trustees by Assistant Charity Commissioner would be with the consent of District Judge, then for obtaining consent there could have been an administrative order; it could not have been a judicial order in view of the fact that procedure of inviting applications for the appoint of trustees was deprecated by this Court.

Therefore, when the impugned order is passed in consonance with the procedure stated in view of the judgment in the Letters Patent Appeal, no fault can be found though it appears that the learned Ad hoc District Judge was confused

about the format of the order.

11. In view of the said order, in fact, the trustees who were appointed by the said order have been functioning since 2015 and their duration of 05 years is on the verge of completion. Under such circumstance, no interference is required.

12. There is no merit in the appeal. It deserves to be dismissed and it is accordingly dismissed. There shall be no order as to costs.