

(2017) 02 BOM CK 0111

In the Bombay High Court

Case No : First Appeal No. 1346 Of 2010

Shri Shivajirao Bhavanrao Patil

APPELLANT

Vs

Shikshan Prasarak Mandal Malshiras

RESPONDENT

Date of Decision : 15-02-2017

Acts Referred:

Evidence Act, 1872 — Section 114

General Clauses Act, 1897 — Section 27

Maharashtra Public Trusts Act, 1950 — Section 50A

Citation : (2017) 2 AIRBomR 562 : (2017) 3 BCR 333 : (2017) 3 MhLJ 644

Hon'ble Judges : M.S. Sonak, J.

Bench : Single Bench

Advocate : Mr. R.V. Bansode, Advocate, for the Appellant; Mr. I.M. Khairdi, Advocate, for the Respondent Nos. 1 to 8

Final Decision : Disposed Off

Judgement

M.S. Sonak, J.—This appeal concerns "Shikshan Prasarak Mandal" (Trust), a trust duly registered under the Maharashtra Public Trusts Act, 1950 (said Act).

2. By order dated 29 May 2009, the Assistant Charity Commissioner (ACC) purporting to exercise powers under section 50A framed new scheme for the management and administration of the Trust, in substitution of the existing scheme. The new scheme, amongst other matters, involves the curtailment of the tenure of existing trustees and the reduction in the strength of the governing body from 17 to 7 trustees. The appellants, the then existing trustees, appealed ACC's order dated 29 May 2009 to the District Judge, Malshiras invoking provisions of section 72(2). This appeal was dismissed by order dated 17 July 2010. Section 72(4) provides that an appeal shall lie to the High Court, against the decision of the District Court under section 72(2), as if such decision was a decree from which an appeal ordinarily lies. The explanation clarifies that the expression "decision" shall include a scheme framed or modified under section 50A. Hence, the present appeal against orders dated 29 May 2009 and 17 July

2010.

3. On 4 November 2008, Santosh Shinde (R5) and Ramdas Kale (R3), members of the Trust, applied to the ACC for frame of new scheme of management and administration of the Trust, in substitution of the existing scheme invoking the provisions of section 50A. On 22 December 2008 Shivaji Abaji Mote [Mote -R6] and another, sought for their substitution in application dated 4 November 2008. On 18 March 2009, Mote filed "address pursis" before the ACC, stating that addresses of the existing trustees, who stood to be removed under the new scheme, have changed and the new address is "Post Bhamburdi (Mote Vasti), Taluka Malshiras, Zilla Solapur". ACC, without verification, addressed notices to the existing trustees at the new address indicated by Mote in the address pursis. Santosh Shinde (R5) by reference to certain registered acknowledgement due cards, purporting to bear signatures of the existing trustees, filed affidavit dated 25 May 2009 claiming that service was complete. The ACC, relying upon such affidavit, on 29 May 2009 made an order framing the new scheme in substitution of the existing scheme.

4. The appellants, who stood removed as trustees as consequences of ACC's order dated 29 May 2009, appealed against the same to the District Judge, Malshiras under section 72(2). By order dated 17 July 2010, the District Judge, Malshiras dismissed the appeal, hence the present appeal under section 72(4).

5. Mr. Bansode, learned counsel for the appellants has basically stressed upon the following main grounds in support of the appeal :-

(A) In terms of section 50A, no order framing or modifying an existing scheme for management and administration of the trust can be made without opportunity of hearing to the existing trustees. In the present case, there was no service of notice upon the existing trustees, most of whom except Mote (R6) stood to be removed under the new scheme. A fraud was played by Mote (R6) in order to create an impression that all the existing trustees have been duly served in the matter and on the said basis the ACC made the order dated 29 May 2009. Such order is in breach of the express provisions of section 50A; principles of natural justice and fair play; and can be said to have been procured by fraud and therefore, constitutes a nullity. The material on record clearly bears out the modus operandi with which such fraud was practised by Mote (R6). On such grounds the order dated 29 May 2009 and the order of the District Judge dated 17 July 2010, confirming the same, are liable to be recalled and status quo ante is liable to be restored;

(B) In any case, the ACC in making the order dated 29 May 2009 and approving the substitution of the old scheme with the new scheme, has completely ignored the parameters of Section 50A and exercised powers without application of mind and in a casual or cavalier manner. The approach of the ACC is in violation of the law laid down by this Court in the case of Mallikarjun Basvanappa Masute & Anr. v. Dattatraya Krushnath Wadane & Ors. 2005 (2) Mh.L.J. 266 and Paraskumar s/

o. Bhalchand Thole & Anr. v. Sureshkumar Hukumchandji Kasliwal & Ors. 2009 (2) Mh.L.J. 543, dealing with the scope of exercise of powers under section 50A of the said Act.

6. Mr. I. M. Khairdi, learned counsel who appears for respondent nos. 1 to 8 has defended the orders made by the ACC and the District Judge. He submits that apart from two appellants, none of the other existing trustees had appealed order dated 29 May 2009 made by the ACC. Therefore, the said order has attained finality in so far as the other trustees are concerned. The appellants, whose tenure, in any case, has long expired, can therefore, have no surviving grievance in the matter. Mr. Khairdi submitted that the District Judge has made reference to two coloured photographs produced on record by the respondents which clearly show felicitation of the newly elected president and secretary by the old president and vice chairman, which includes the present appellant no. 1. On this basis, it was suggested that the appellants have no real or surviving grievance in the matter and therefore, were dis entitled even to maintain the appeal before the District Judge. Mr. Khairdi submitted that the material on record establishes that due notices were issued to the existing trustees and the same were also duly served upon them. Mr. Khairdi submits that the trust operates two schools, one in the town of Malshiras where the existing trustees including the appellants reside and the other at Bhamburdi. Accordingly, there was nothing wrong in addressing the notices at Bhamburdi, where admittedly, the trust operates one of its school. The District Judge was right in ignoring the affidavit filed by the postman and this is not a case of any violation of principles of natural justice. Mr. Khairdi submitted that the perusal of the order dated 29 May 2009 made by the ACC indicates that the ACC has applied his mind to the proposed scheme and only thereafter, approved the same. For all these reasons, Mr. Khairdi submitted that the present appeal may be dismissed with costs.

7. Based upon the rival contentions, the points for determination which arise in this appeal are basically twofold :-

(A) Whether, there was proper notice and consequently afford of proper opportunity of hearing to the existing trustees before the ACC made his order dated 29 May 2009 or whether, the material on record establishes fraud on the part of Mote (R6), in the matter of service of notice upon the existing trustees?

(B) Assuming valid service upon the existing trustees, whether, ACC's order dated 29 May 2009 is vitiated by non application of mind to the parameters of section 50A?

8. Maharashtra Public Trusts Act is a legislation to regulate and to make provisions for administration of public religious and charitable trusts in the State of Maharashtra. Section 50A of the said Act empowers the Charity Commissioner to frame, amalgamate or modify schemes in the interest of proper management or administration of such trust. There is no dispute in this case that the powers of the Charity Commissioner have been validly delegated to the Assistant Charity

Commissioner (ACC).

9. Since, much turns in this appeal upon the provisions of section 50A, such provisions are transcribed below for convenience of reference :-

"50A. (1) Notwithstanding anything contained in section 50, where the Charity Commissioner has reason to believe that, in the interest of the proper management or administration of public trust, a scheme should be settled for it, or where two or more persons having interest in a public trust make an application to him in writing in the prescribed manner that, in the interest of the proper management or administration of a public trust, a scheme should be settled for it, the Charity Commissioner may, if, after giving the trustees of such trust due opportunity to be heard, he is satisfied that it is necessary or expedient so to do, frame a scheme for the management or administration of such public trust.

(2) Where the Charity Commissioner is of opinion that in the interest of the proper management or administration, two or more public trusts may be amalgamated by framing a common scheme for the same, he may, after -

(a) publishing a notice in the Official Gazette [and also if necessary in any newspaper which in the opinion of the Charity Commissioner is best calculated to bring to the notice of persons likely to be interested in the trust] with a wide circulation in the region in which the trust is registered, and

(b) giving the trustees of such trusts and all other interested persons due opportunity to be heard, frame a common scheme for the same.

(3) The Charity Commissioner may, at any time, after hearing the trustees, modify the scheme framed by him under sub-section (1) or sub-section (2).

(4) The scheme framed under sub-section (1) or subsection (2) or modified under sub-section (3) shall, subject to the decision of the competent court under section 72, have effect as a scheme settled or altered, as the case may be, under a decree of a Court under section 50]."

[Emphasis supplied]

10. The provisions of section 50A are quite clear in that they mandate the afford of opportunity of hearing to the existing trustees before framing or modification of existing scheme for management and administration of the trust. The furnish of such opportunity is mandatory even upon plain reading of the provisions in section 50A. The new scheme or the modified scheme may, as in the present case, involved removal of existing trustees or several other vital matters concerning the management and administration of the trust. The principles of natural justice and fair play, will also require that such a decision is preceded by afford of opportunity of hearing to the existing trustees. In order that such opportunity is afforded to the existing trustees, it is necessary that the ACC issues and is thereafter satisfied that there is valid service of notices upon the

existing trustees. The records and the material in the present case will bear out that there was no valid service of notice upon the existing trustees. In fact, valid service, was scuttled by Mote (R6), who stood to maximum gain under the new scheme and therefore, was interested in ensuring minimum opposition to the new scheme.

11. There is no serious dispute that the existing trustees, including the appellants are residents of the town at "Malshiras, Taluka Malshiras, Zilla Solapur". This is the address referred to in the application dated 4 November 2008 or rather its accompaniments. Even otherwise, the names and addresses of the existing trustees, are a matter of record before the ACC, who is required to approve change reports consequent upon any changes in the composition of the trustees. In the normal course therefore, the ACC was duty bound to address notices to the existing trustees, at the town of "Malshiras, Taluka Malshiras, Zilla Solapur".

12. However, the ACC, without verification, addressed notices to the existing trustees at the so-called changed address furnished by Mote (R6) vide address pursis dated 18 March 2009. In fact, this so-called changed address i.e. "Post Bhamburdi (Mote Vasti), Taluka Malshiras, Zilla Solapur", is the address where Mote (R6) resides and not the address where the remaining existing trustees reside. The ACC was not at all justified in blindly accepting the address pursis dated 18 March 2009 submitted by Mote (R6). Under the new scheme proposed by Santosh Shinde (R5) and Mote (R6), it was the son and the daughter-in-law of the said Mote (R6) who were to hold positions of chairperson and secretary of the Trust. Mote (R6) was himself to remain as one of the trustees of the Trust. The strength of the governing body of the Trust was to stand reduced from 17 to 7. Thus, out of the 7 positions on the governing body, Mote (R6) and his family members were to hold 3 key positions. These circumstances, at least prima facie, were sufficient to at least warrant some independent verification by the ACC, before, acceptance of the address pursis dated 18 March 2009 and acting on the basis of the same. On 25 May 2009 Santosh Shinde (R5) filed affidavit of service claiming that existing trustees have been duly served. The ACC, relying upon such affidavit and noting that there is no challenge to the new scheme by any of the existing trustees, proceeded hurriedly to make order dated 29 May 2009 framing new scheme for the management and administration of the Trust, in substitution of the existing one.

13. In the appeal instituted by the appellants before the District Judge, under section 72(4), the appellants filed affidavits of themselves and the other trustees except Mote (R6) stating emphatically that they never received any notices from the ACC regards the proceedings under section 50A and that the signatures on the registered acknowledgement due cards are not their signatures. The trustees stated that they reside in the town of Malshiras and not at Bhamburdi (Mote Vasti).

14. As if, the aforesaid were not sufficient, one Shaukat Jafar Pathan, the

postman assigned duties by the postal department at Malshiras during the relevant period has filed a detailed affidavit dated 21 April 2010 before the District Judge, affirming in unambiguous and clear terms the following :-

(A) That on 28 March 2009, he was assigned the duty of delivering postage at Bhamburdi (Mote Vasti);

(B) Accordingly, on the said date, he visited Bhamburdi (Mote Vasti) to deliver postage to 1) Shivaji Abaji Mote, 2) Shivaji Bhavanrao Patil, 3) Bajirao Babaso Deshmukh, 4) Buvaso Rajaram Kolekar, 5) Suresh Eknathrao Kulkarni, 6) Gyaneshwar Bhalchandra Jamdare, 7) Gajanan Balaso Patil, 8) Subhash Balaso Patil, 9) Eknath Panditrao Gaikwad, 10) Abdullatif Karim Shaikh, 11) Ganpatrao Baburao Waghmode, 12) Tukaram Govind Pawar, 13) Sahebrao Sugreev Patil, 14) Kisan Ramchandra Tele and 15) Anil Roopchand Doshi, and other persons in the said locality at the address indicated.

(C) However, he found that apart from Mote (R6), all the other trustees are residents in the town of Malshiras and that they are not residents of Bhamburdi (Mote Vasti). One Ganpatrao Baburao Waghmode resides in Bhamburdi but not in Mote Vasti;

(D) Mote (R6) was present at Bhamburdi on 28 March 2009. The said Mote (R6) accosted him (the postman) and informed him that he is the chairperson of Malshiras Shikshan Prasarak Mandal (said Trust) and all the addressees are the directors (trustees) of the said trust / institution and therefore, the registered acknowledgment due letters may be handed over to Mote (R6) and he will obtain the signatures of the said trustees on the registered acknowledgment due cards and hand over the same to him (the postman). Bona fide, believing that Mote (R6) would do needful, he (the postman) handed over the envelopes containing the notices of the ACC and the registered acknowledgement due cards to Mote (R6).

(E) That aforesaid addressee have not signed registered acknowledgement due card in front of him and that he never delivered the registered acknowledgement due notices to the aforesaid persons at Bhamburdi (Mote Vasti), which was the stated address.

(F) That he does not know whose signatures were obtained on the registered acknowledgment due cards by Mote (R6).

(G) That apart from himself, there was no other postman who delivered the letters on the said date at Bhamburdi (Mote Vasti);

(H) That what is stated in the affidavit is true and correct.

15. The sections 114 of the Evidence Act and 27 of the General Clauses Act do raise certain presumptions in the matter of service of notice by registered acknowledgment due. However, before such presumptions are raised, it will have to be established that the notices were addressed to the correct address. In the

present case, Mr. Khairdi, learned counsel for the respondents did not even dispute that the existing trustees except Mote (R6) reside in the town of Malshiras, which is at the distance of 3 kms. from Bhamburdi (Mote Vasti). Mr. Khairdi's only submission was that the Trust, apart from operating school in the town of Malshiras, also operates a second school at Bhamburdi and therefore, there was nothing wrong in indicating the changed address as Bhamburdi (Mote Vasti). Such explanation, in the facts and circumstances of the present case, is certainly not acceptable. Mote (R6) despite full knowledge that the existing trustees do not reside at Bhamburdi (Mote Vasti), deliberately furnished such incorrect address to the ACC in order to scuttle effective service of notice upon existing trustees, except himself. In such circumstances, presumptions under section 114 of the Evidence Act and section 27 of the General Clauses Act cannot even be raised, much less, relied upon. That apart, it is settled position that such presumptions are rebuttable. In the present case, the presumptions, if any, stood sufficiently rebutted, not only by the affidavits filed by the existing trustees denying receipt of such notices or denying the signatures on the registered a.d. Cards, but further, by the clear and unambiguous affidavit of the postman Shaukat Jafar Pathan. The postman, has clearly deposed that he never served the notices upon the existing trustees at Bhamburdi (Mote Vasti) or any other place, since the existing trustees did not even reside at Bhamburdi (Mote Vasti). He has deposed that he handed over the envelopes containing notices to none other than Mote (R6) and relied upon Mote (R6), when he stated that he was the chairperson of the trust and he would serve and obtain signatures from the other existing trustees. In the facts and circumstances of the present case, there is no reason to disbelieve such clear and unambiguous statements made by the postman in his affidavit. Significantly, neither Santosh Shinde (R5) nor Mote (R6) chose to either seriously contradict the statements of the existing trustees and the postman or file any independent evidence to the contrary. Santosh Shinde (R5) and Mote (R6) did not even apply to the District Judge for leave to cross-examine the existing trustees or most importantly, the postman ? Pathan who filed the affidavit, explaining very clearly the position in the matter of service or rather, non service of notices to the existing trustees. The material on record amply establishes that there was no service of notices upon the existing trustees except Mote (R6) and consequently, there was a breach of the mandatory provisions of section 50A, in the matter of afford of opportunity of hearing to the existing trustees.

16. The modus operandi resorted to by Mote (R6), virtually sounds in the arena of fraud and misrepresentation. As noted earlier, it was Mote (R6), who was to gain maximum, if, the ACC were to frame the new scheme in substitution of the existing one. The strength of the governing body was to stand reduced from existing 17 trustees to 7 trustees. The son and daughter-in-law of Mote (R6) were to assume the key positions of chairperson and secretary of the trust. Mote (R6) was himself to retain position as trustee. The new scheme, if approved, therefore, was virtually a coup by Mote (R6) to assume substantial control over

the management and administration of the trust. In such circumstances, it is reasonable to presume that Mote (R6) was interested in ensuring that there is no opposition to the frame of new scheme and substitution of the existing scheme. The new scheme contemplated removal of the existing trustees, consequent upon curtailment of their tenure. The new scheme contemplated reduction in the strength of the governing body from 17 to 7 trustees. Opposition was therefore naturally expected from the existing trustees and Mote (R6) was interested in outmaneuvering such opposition, by means, which turn out to be more foul than fair. Therefore, Mote (R6), with full knowledge that there is no change in the address of the existing trustees filed an address pursis on 18 March 2009 indicating his own address at Bhamburdi (Mote Vasti) as the changed address of the existing trustees. On basis of such misrepresentation. The ACC was prevailed upon to issue notices to such incorrect addresses.

17. Thereafter on 28 March 2009, when the postman ? Pathan came to deliver the notices to the existing trustees at Bhamburdi (Mote Vasti), Mote (R6) accosted him, informed him that he is the chairperson of the trust and the addresses are only the trustees. Mote (R6) further informed the postman that he will deliver the notices to the existing trustees and obtain their signatures on the registered a.d. Cards. Again on basis of such misrepresentation, Mote (R6) prevailed upon the postman Pathan to hand over the notices to him. Mote (R6) thereafter returned acknowledgement a.d. Cards to the postman Pathan with signatures / endorsements, which, Mote (R6) was aware, were never made by any of the existing trustees.

18. Mote (R6), by the aforesaid modus operandi, clearly practised misrepresentation and fraud, not only upon the ACC, but also upon the existing trustees who, as a consequence were deprived of their trusteeship, even without any opportunity of being heard in the matter. The ACC clearly erred in failing to be alert in the matter of this nature. Considering the complicity of Mote (R6) in the entire matter, the ACC was required to exhibit greater alertness and examine whether there was any valid service of notice upon existing trustees or not.

19. It is settled position in law that where a party obtains an order by misrepresentation or by playing fraud upon the competent authority, such an order cannot be sustained in the eyes of law. Fraud avoids all judicial acts, ecclesiastical or temporal (1994) 1 SCC 1 S. P. Chengalvaraya Naidu Jagannath. No judgment of a court, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. (1956) 1 QB 702 Lazarus Estates Ltd. v. Beasley. The courts, in exercise of equitable jurisdiction should never promote perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law.(1994) 2 SCC 647 A. P. State Financial Corporation v. GAR Re-Rolling Mills (1994) 2 SCC 481 State of Maharashtra v. Prabhu.Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence.(1992) 1 SCC 534 Shirsh Dhanwan v. Shaw Bros. Fraud and justice

never dwell together (*fraus et jus nunquam cohabitant*) and it is pristine maxim which has even lost its temper over all these centuries.(2000) 3 SCC 581 United India Insurance Co. Ltd. v. Rajendra Singh.

20. The Supreme Court in *Meghmala & Ors. v. G. Narasimha Reddy & Ors.*(2010) 8 SCC 383, after digesting several decisions upon this issue has held that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or practised misrepresentation. In such circumstances, it is the duty of the court to prevent any perpetration of the fraud. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine, including *res judicata*. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth or recklessly, carelessly whether it be true or false. Suppression of material document would also amount to a fraud on the court. Thus, even in a judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away.

21. The learned District Judge, in the order dated 17 July 2010, with respect, has dealt with the issue of non service of notices and fraud in a casual and non serious manner. The affidavits filed by the existing trustees have not been given their due weight. The affidavit filed by the postman ? Pathan has been disbelieved by simply observing "it requires a big courage which the servants like postman cannot possess in ordinary course." The learned District Judge has purported to "read between the lines", as observed by him in paragraph 7 of the order dated 17 July 2010. The learned District Judge has also relied upon certain photographs allegedly depicting the felicitation of the new chairperson in the presence of some earlier trustees. The learned District Judge has also made observations to the effect that there is nothing wrong in converting a public trust into a private trust or a family run trust. All this is quite unsatisfactory. In reading between the lines, it appears that the actual lines have been completely ignored. There was no reason to discard the evidence filed by the existing trustees or the postman ? Pathan on basis of surmises, conjectures and even inferences which are far from reasonable. In this case, there was not even a request made on behalf of any of the respondents to either cross examine the trustees or the postman ? Pathan. None of the respondents filed any independent evidence to prove service upon the existing trustees. The circumstances were such that it was quite clear that Mote (R6) had every interest to deprive the

existing trustees even the minimum opportunity of being heard before a new scheme was framed substituting earlier scheme. The material on record very clearly establishes that the existing trustees except Mote (R6) were never served notices of the proceedings before the ACC. In fact, the material on record establishes that such service was deliberately scuttled by the fraud played by Mote (R6) upon the ACC as well as the existing trustees, including the appellants. The learned District Judge, on the basis of observations in paragraph 7 was therefore not justified in not interfering with the ACC's order dated 29 May 2009.

22. The importance of opportunity of hearing to the existing trustees before a scheme for management and administration of the trust is framed or modified has been emphasized in at least two decisions of this Court. In *Anil s/o. Govindrao Shirkhedkar v. Babanrao Ganpatrao Wadaskar & Ors.* 2013 (3) Mh.L.J. 849, this court has held that in order to divest existing trustees of such vesting under an existing scheme, the trustees were entitled to be heard in proceedings under section 50A. Where no such hearing was offered, the consequent decision was set aside. Similarly, in *Taher Alimohohamad Poonawala v. Quizar Shaikh Nomanbhoy & Ors.* 1995 (1) Mh.L.J. 906, this Court has ruled that the opportunity as contemplated by section 50A must be reasonable, effective and real. In the present case it is quite clear that on account of fraud and misrepresentation practised by Mote (R6) or even otherwise, the existing trustees were not afforded opportunity of hearing, much less, any reasonable, effective or real opportunity of hearing before the ACC made the order dated 29 May 2009 framing a new scheme in substitution of the existing scheme.

23. Therefore, upon cumulative consideration of the aforesaid facts and circumstances, the impugned orders dated 29 May 2009 and 17 July 2010 are liable to be set aside on the ground of failure to afford the existing trustees opportunity of being heard before framing new scheme for management and administration of the trust in substitution of the existing scheme. The impugned orders are also liable to be set aside on the ground of fraud and misrepresentation on the part of Mote (R6) in the matter of furnish of incorrect address pursis and the modus operandi adopted by him to create an impression that there was valid service upon the existing trustees, when in fact there was none. The first submission of Mr. Bansode, is therefore required to be accepted.

24. Even if it is to be assumed that there was valid service upon the existing trustees, the perusal of order dated 29 May 2009 makes it quite clear that the ACC has completely failed to appreciate the scope and ambit of the provisions in section 50A. The order dated 29 May 2009 proceeds on the basis that since there was no challenge on the basis of any of the existing trustees to the new scheme and since the new scheme has provided for the usual clauses with regard to membership, elections, property rights etc., the same can be framed in terms of section 50A. This is hardly the manner in which the power and the jurisdiction conferred by section 50A has to be exercised by the ACC.

25. Before the ACC exercises power and jurisdiction under section 50A in the matter of framing of or modification of any existing scheme for the management and administration of a public trust, the ACC must have "reason to believe" that it is in the interest of proper management or administration of the public trust that such a proposal must be considered. Thereafter, the ACC is required to afford the trustees "due opportunity to be heard". The ACC after due application of mind to the predicates of the scheme or the modified scheme and upon due consideration of the submissions, if any, which the trustees may make, is then required to record his satisfaction that it is "necessary or expedient" to frame a scheme or to modify any existing scheme for the management or administration of such public trust. The perusal of the order dated 29 May 2009, at once indicate that the ACC has been oblivious to the jurisdictional parameters of section 50A. The learned District Judge has also not adverted to the provisions of section 50A and upheld the new scheme on grounds, which are not very different from the grounds stated by the ACC in his order dated 29 May 2009.

26. *Taher v. Quizar* (supra) was a case of suo moto exercise of powers by the Charity Commissioner under section 50A(2) in the matter of amalgamation of two or more public trusts by the frame of a common scheme for the same. The learned Single Judge of this Court took cognizance of the circumstance that expressions like "reason to believe" or "is satisfied that it is necessary or expedient to do so" as obtain in section 50A(1) find no place in section 50A(2). Even then, it was held that such expressions will have to be read in section 50A(2) by way of necessary implication. Therefore, even where the Charity Commissioner exercises powers under section 50A(2), he is required to record his reasons, at least briefly as to why he had reasons to believe that the framing of a common scheme was necessary for the interests of the two trusts or either of them or for their better management and administration. In the present case, there is nothing to indicate that the ACC had any "reason to believe" that the new scheme was in the interest of proper management or administration of the trust. In the impugned order, there is nothing to indicate that the ACC was indeed satisfied that it was "necessary and expedient" to frame the new scheme in substitution of the existing scheme for the management and administration of the trust.

27. In *Paraskumar v. Sureshkumar* (supra), another learned Single Judge of this court has considered and explained the scope of section 50A by emphasizing that a Charity Commissioner cannot frame a scheme at his whim or caprice. The existence of necessity or expediency to frame a scheme in the interest of proper management or administration of the public trust is a sine qua non for the exercise of powers under section 50A. The scheme so framed, was set aside for want of such a sine qua non. In paragraph 10, the learned Single Judge has made the following observations, which are quite apposite :

"10. Section 50-A of the B.P.T. Act provides that where the Charity Commissioner has a reason to believe that in the interest of proper management, or

administration of public trust, a scheme should be settled for it, or where two or more persons having interest in public trust make an application to him in writing in prescribed manner that in the interest of proper management, or administration of the public trust a scheme should be settled for it, the Charity Commissioner may, after giving the trustees of such trust opportunity to be heard, after he is satisfied that it is necessary or expedient so to do, permit a scheme for the management or administration of such trust. The power of the Charity Commissioner to frame a scheme is not unbridled. It can be exercised only if the Charity Commissioner must have a reason to believe so. That reason to believe must be based on objective assessment of facts. He cannot frame a scheme at the whim or caprice. The existence of a necessity to frame a scheme in the interest of the proper management or administration of a public trust is a *sine qua non* for framing of a scheme under section 50-A of the B.P.T. Act. Whether the trust is ancient and its origin is not known, the trust has no written constitution or a proper set of rules for the management and administration of trust and there exist circumstances from which it can be reasonably inferred that a trust is not well managed or mismanaged and that mismanagement can reasonably be attributed to absence of a trust deed or a written constitution or set of rules of governance or management the Charity Commissioner may readily believe that it is necessary to frame a scheme for the proper management or administration of the trust.

But where a trust is created by a trust deed which contains the basic objects of the trust and the set of rules for the proper management or administration of the trust, the Charity Commissioner must have due regard to the wishes of the settlor and cannot on his whim say that the trust could be better managed if it is governed by another set of rules or another constitution settled by a scheme framed under section 50-A of the B.P.T. Act. In the present case the trust was created by written deed of indenture dated 28.4.1961, a copy of which is annexed to the appeal memo. It does contain the rules for the administration and management of the trust. The order of the Charity Commissioner does not disclose how these rules are insufficient for the proper management and administration of the trust. In the circumstances the finding recorded in the negative by the learned District Judge that the Assistant Charity Commissioner could not in law had a reason to believe that in the interest of the proper management or administration of the Trust a scheme should be settled for it was in any way erroneous, much less perverse".

[Emphasis supplied]

28. *Mallikarjun v. Dattatraya* (supra) was a case involving frame of a new scheme in substitution of a existing scheme for management and administration of the trust. In this context, the learned Single Judge of this court has held that power and jurisdiction under section 50A cannot be ordinarily exercised to frame an entirely new scheme in substitution of the existing one. Such power or jurisdiction can be exercised in very very exceptional circumstances upon

arriving at a conclusion that the existing scheme is proved to be inadequate to safeguard the interests of the public trust and such interest cannot be safeguarded even by making variations, alterations or amendments to the existing scheme. Further, frame of an entirely new scheme without a finding as to necessity or expediency would be illogical and therefore unsustainable. By reference to the decision in the case of Dr. R. P. Kapoor & Ors. v. Charity Commissioner, Maharashtra AIR 1989 Bom. 274, the learned Single Judge of this Court has made the following observations which are quite apposite in the facts of the present case:

"What is necessary or expedient is borrowed in para 15 of the judgment in the matter of Dr. R. P. Kapoor from commentary on The Bombay Public Trusts Act, 1950, which reads as follows :

" "Necessary" and "Expedient" -meaning : This is a power conferred under the Act in a special contingency, when it is necessary or expedient to frame a scheme in the interest of a public trust. Recently the Gujarat High Court explained the words "necessary" and "expedient". The term "necessary" means what is indispensable, needful and essential. The term has a precise meaning and a connotation and there is nothing vague or nebulous about it. The term "expedient" has no doubt a wider ambit and gives much scope to the exercise of power. But this expression has also a recognised connotation in the eye of law. The dictionary meaning of the term "expedient" that what in the context it is used and which is most fitting is "useful for effecting a desired result, fit or suitable for the purpose."

Even taking into consideration the wider meaning of the term "expedient", the Court ought to come to a conclusion that it is desirable for achieving the necessary result i.e. safeguarding the charity, to settle a new scheme and. therefore, unless the learned Charity Commissioner can arrive at a conclusion that existing scheme is insufficient for the purpose, or that even after amendment to the existing scheme the purpose of the trust would not be served, the Charity Commissioner would not be in a position to record a finding that it is expedient in the interest of trust to settle a new scheme".

[Emphasis supplied]

29. In Vasantrao s/o. Vishwanathrao Mane & Ors. v. Apparao s/o. Baibanna Sidore & Ors. 2008 (3) Mh.L.J. 242, once again the learned Single Judge of this Court, has interpreted the provisions of section 50A and listed out the criteria, which is required to be complied with, before a new scheme is framed. In paragraphs 28 and 29, the learned Single Judge has observed thus :

"28. There cannot be duality of opinion that the Charity Commissioner may exercise power available under Section 50A in appropriate case where, he is of opinion that in the interest of proper management or administration of a public trust, such scheme should be settled. He may act suo motu or may act upon application filed by two or more persons, who have interest in the public trust. A

plain reading of Section 50A(1) reveals that after giving the trustees due opportunity to be heard, the Charity Commissioner must be satisfied that it is necessary or expedient to frame a scheme for the management or administration of such trust. Thus, the criteria, which is required to be complied with, before a new scheme is framed, may be stated thus:

(a) That, there must be some material available, which if considered objectively, would furnish the Charity Commissioner to reach conclusion that there exists reason to believe that in the interest of the proper management or administration of a public trust, a scheme should be settled;

(b) That, the Charity Commissioner is required to give the trustees of such trust due opportunity to be heard;

(c) That, he ought to record his satisfaction, on strength of material available before him, that it is necessary or expedient to frame a scheme for the proper management or administration of such a trust; and

(d) That, his opinion regarding necessity of the scheme ought to be supported by written reasons.

29. Obviously, the discretionary power conferred under the B.P.T. Act is required to be exercised in a special contingency. The words "necessary" and "expedient" would mean existence of a situation occasioned, which makes it necessary or indispensable to frame a new scheme, if already there exists a scheme, to ensure proper administration of such a trust. In *Dr. R.P. Kapoor v. Charity Commissioner* AIR 1989 SC 274, the expression "expedient" and "necessary" is succinctly made clear. It is held that recourse cannot be had to Section 50A for the mere purpose of filling any of the vacancies of trustees. In such a case, resort can be had to Section 41D and 47 rather than Section 50A. Therefore, a new scheme cannot be framed only on the ground that the trustees were not managing the trust properly. This is what appears to have occurred in the instant case. The members of the Managing Committee of the trust were removed. Therefore, the Assistant Charity Commissioner decided to frame the new scheme without ascribing adequate reasons. It is difficult to see as to how he formed opinion that "it was expedient and necessary" to frame a new scheme for better management of the trust in question. The 1st Ad-hoc Additional District Judge also did not properly appreciate the said requirements of law."

30. Even though, the present case involves framing of an entirely new scheme in substitution of the existing scheme of management and administration of the trust, the ACC as well as learned District Judge have failed to appreciate the scope of provisions contained in section 50A, as interpreted by this court in the case of *Taher v. Quizar* (supra), *Paraskumar v. Sureshkumar* (supra), *Mallikarjun v. Dattatraya* (supra) and *Vasantrao v. Apparao* (supra). Accordingly, there is merit in the second submission of Mr. Bansode and the impugned orders dated 29 May 2009 and 17 July 2010 are liable to be set aside on the grounds of non application of mind to the essential parameters of section 50A.

31. Mr. Khairdi, however submitted that since the making of the impugned orders, there have been subsequent developments. He submits that elections have been held in terms of the new scheme. Change reports have been filed and accepted, in terms of the new scheme. He submits that taking into consideration such subsequent developments this court, by its order dated 15 March 2012 declined interim reliefs to the appellants. Mr. Khairdi submits that it is now too late to interfere with the impugned orders dated 29 May 2009 and 17 July 2010 and this would amount to setting the clock back. There is no merit in this submission.

32. Once the impugned orders dated 29 May 2009 and 17 July 2010 are set aside, the elections held or the change reports accepted on the basis of the same cannot survive or in any case bear any mark of legitimacy. Such subsequent developments may have been sufficient to deny interim reliefs to the appellants. However, they are certainly not sufficient to deny final relief to the appellants, particularly in the facts and circumstances of the present case. Even so, it is required to be noted that this court, in its order dated 15 March 2012 whilst denying interim reliefs to the appellants, had made it clear that the respondents shall not take any major policy decisions including recruitment without the permission of the ACC, pending the disposal of this appeal. Even the hearing in this appeal had been expedited.

33. On 6 January 2017, Mr. Bansode applied for placing this matter for final hearing in view of the earlier orders and the circumstance that the appellant no. 1 was 90 years of age, and eager to see the fruits of his litigation. The matter was directed to be placed for final hearing on 2 February 2017. When the matter reached for final hearing on 3 February 2017 however, Mr. Bansode regretfully informed the court that appellant no. 1 has since expired in the interregnum. Such unfortunate demise makes no dent to the maintainability of the appeal, since, the appellant no. 2, could have always maintained the appeal in his own right. However, what is unfortunate is that the appellant no. 1 could not live to see the fruits of his litigation in his lifetime. The appellant no. 1 could not secure redressal, in the matter of his unceremonious and fraudulent removal as a trustee of the trust, on account of acts of omission and commission on the part of Mote (R6). This is accordingly a fit case to saddle Mote (R6) with exemplary costs, a portion of which, payable to the family members of deceased appellant no. 1. This is also a fit case to restore the status quo ante, to the extent possible, consequent upon setting aside the impugned orders dated 29 May 2009 and 17 July 2010.

34. This appeal is therefore disposed of with the following order :-

(A) Appeal is allowed and the impugned orders dated 29 May 2009 and 17 July 2010 are set aside;

(B) The scheme of management and administration of the trust, in existence prior to 29 May 2009, is hereby restored. The trust shall be managed and

administered as per the old scheme, which is now restored;

(C) The elections and the acceptance of the change reports in pursuance of the impugned orders dated 29 May 2009 and 17 July 2010 and the new scheme, stand set aside;

(D) Since, the tenure of the trustees as existing on 29 May 2009 may have long ended, the ACC is directed to forthwith commence the election process in terms of the old scheme, which is now restored. The ACC is however directed to ensure that such election process is completed within a period of three months from today;

(E) The respondents shall cease to be the governing body of the trust forthwith. Instead, pending the results of the fresh elections and the installation of governing body in terms of the old scheme, which is now restored, the day to day management and administration of the trust shall now be undertaken by the following body / committee :

(I) Assistant Charity Commissioner or any officer duly authorised by him;

(II) Mr. Buvasaheb Rajaram Kolekar (appellant no.2);

(III) Any one of the respondents, other than respondent nos. 2, 4 and 6 (Motes) to be nominated by the Assistant Charity Commissioner;

(F) The aforesaid body / committee shall only undertake day to day management and administration of the trust but shall not take any major policy or financial decisions, including recruitment of any staff or employees;

(G) Shivaji Abaji Mote (R6) shall pay costs of Rs.25,000/- (Rupees Twenty Five Thousand) to appellant no. 2 and costs of Rs.25,000/- (Rupees Twenty Five Thousand) to the widow or son of the deceased appellant no. 1, within a period of four weeks from today. The ACC shall ensure the compliance of this direction.

(H) All concerned to act on basis of authenticated copy of this order.