

(1994) 07 BOM CK 0050

In the Bombay High Court

Case No : First Appeal No. 2591 of 1983

Taher Alimohohamad Poonawala

APPELLANT

Vs

Quizar Shaikh Nomanbhoy and others

RESPONDENT

Date of Decision : 22-07-1994

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 5

Citation : AIR 1995 Bom 422 : (1995) 1 BomCR 84 : (1994) 96 BOMLR 89 : (1995) 1 MhLj 906

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : C.R. Dalvi and S.M. Gorwadkar, for the Appellant; M.Y. Muchhala and Suresh Gupte, instructed by . Mulla and Mulla and Craigie Blunt and Carce, for the Respondent

Judgement

1. This is an appeal against order dated 28th October 1982 passed by the court of 6th Extra Assistant Judge, Pune in Miscellaneous application No. 171 of 1979. This appeal is preferred by one Taher Alimohohamad Poonawala (Original Respondent No. 3 in Misc. Application No. 171 of 1979).

2. On 9th February 1976, the Charity Commissioner, Maharashtra State, Bombay issued a notice u/s 50-A(2) of the Bombay Public Trusts Act, 1950 numbered as Misc. Proceeding No.50-A/185 of 1975. It was recited in the said notice that the learned Charity Commissioner was of the opinion that (1) Anjuman-e-Taheri Trust B-151 (Poona) and (2) Saifi Mahal Trust B-150 (Poona) ought to be amalgamated and a common scheme was necessary for such amalgamation in the interest of the proper management and administration of the. two trusts referred to therein. By the said order notice, the trustees of the two trusts were called upon to show cause as to why the said trusts should not be amalgamated and as to why a common scheme should not be settled in the interest of the proper management and administration of the said trusts. No grounds in support of the proposed amalgamation or the relevant materials justifying issue of such

notice were disclosed in the said notice. It appears that prior to issue of the said notice, the Charity Commissioner had passed an order. A copy of the said order is made available to this Court. A copy of the said order is at page 22 of the appeal paper book. The said order reads as under :--

"Since I find that it is necessary to exercise the power u/s 50-A of the Bombay Public Trusts Act, 1950, and on going through the record and proceeding of the above, trust, and the papers in this office put up by the Devasthan Branch, I, the Charity Commissioner do hereby order to start suo motu scheme framing proceeding u/s 50-A of the Bombay Public Trusts Act, 1950. Notices be issued to the Trustees of the both Trusts. A public notice be issued and published in Government Gazette."

3. The said order also does not disclose any factual data or material or formulated grounds on the basis of which the Charity Commissioner formed prima facie opinion for commencing suo motu inquiry for proposed amalgamation of the two trusts referred to hereinabove. The said proposal was vehemently opposed on behalf of the two trusts. The said proposal was supported by the appellant as well as Shri K. A. Poonawala, the respondent No. 4.

4. On 31st January 1977, Shri M. G. Madan, Deputy Charity Commissioner (with Appellate Powers) passed his order disposing of suo motu scheme proceeding No. 185 of 1975 started with issue of above referred notice dated 9th February, 1976. It appears from the contents of the said order that Shri K. A. Poonawala had made a complaint to the Charity Commissioner to the effect that the administration of the two trusts was not satisfactory and a proper scheme should be framed. It is not necessary for this Court to go into the merits of the allegations made by Shri K. A. Poonawala or by the appellant. The fact remains that the Deputy Charity Commissioner decided to drop the proceedings for amalgamation of the two trusts. In para 8 of his order, the Deputy Charity Commissioner observed as under:--

"Under the circumstances I think that it will not be proper to amalgamate both these trusts and they will serve a better purpose towards the beneficiaries if they are allowed to run separately."

5. It appears from the contents of the said order dated 31st January 1977 that the Deputy Charity Commissioner settled a scheme in respect of Saifi Mahal I trust alone while deciding the proceedings for amalgamation of the two trusts referred to hereinabove. It appears that the said order for settlement of the scheme in respect of the said Saifi Mahal Trust was passed by the Deputy Charity Commissioner in purported exercise its powers u/s 50-A (1) of the Act. The said section obligates the Charity Commissioner to serve specific notice on the trustees of the trust in respect where of the scheme was proposed to be framed for the management or administering of the trust. It is clear from the record that no such notice was issued by the Charity Commissioner to the Trustees of Saifi Mahal Trust. It appears from the contents of the said order dated 31st

January, 1977 that the Deputy Charity Commissioner framed issues, reading as under:

(i) Whether the amalgamation of Anjuman-e-Taheri Trust registered at No. B-151 with the Saifi Mahal Trust is in the interest of the trust and the beneficiaries of the said trust ?

(ii) If not whether it is necessary to settle a scheme in respect of the said two trusts or any one of the trust ?

(iii) If yes, whether the scheme is necessary and what scheme be framed?

It further appears that the Deputy Charity Commissioner answered the said issues as under:

(i) No.

(ii) Scheme is necessary to settle in respect of Saifi Mahal Trust registered at No. B-150 and not in respect of the other trusts.

(iii) Scheme is necessary as per Exh. A.

6. I inquired from the learned counsel on either side as to whether the issues were framed prior to the commencement of the hearing or during the pendency of the hearing and as to whether the proposed scheme in respect of Saifi Mahal Trust was disclosed to the trustees of the said trust for their comments and submissions prior to passing of the order. The Court is informed by the learned counsel for the appellant that there is no material on record to indicate that the issues incorporated in order dated 31st January 1977 were formulated by the Deputy Charity Commissioner in advance or that opportunity was given to the parties to make submissions in respect of the scheme pertaining to one of the trust referred to hereinabove. The learned counsel for the contesting respondents submits that no opportunity whatsoever was given to the trustees of Saifi Mahal Trust in respect of the scheme sought to be settled by impugned order dated 31st January 1977. According to the learned counsel, the contesting respondents came to know about the scheme annexed to order dated 31st January 1977 for the first time on reading of a copy of the said order.

7. Since the Deputy Charity Commissioner dropped the proposal for amalgamation of the two trusts, no appeal was filed by the trustees of the two trusts or either of the trust before the District Court at Pune in view of the proposal for amalgamation of the two trusts referred to hereinabove having been rejected by the Deputy Charity Commissioner by his order dated 31st January ! 977.

8. One Sheikh Nomanbhai Taherali preferred Civil Application No. 171 of 1979 before the Court of VI Extra Assistant Judge, Pune at Pune, invoking jurisdiction of the District Court u/s 72 of the Bombay Public Trusts Act, 1950. The said proceeding is liable to be considered as an appeal before the District Court. It has been held by the Supreme Court in a reported judgment that the proceeding

u/s 72 of the Act is liable to be treated as an appeal. Shri Sheikh Nomanbhai Taherali was the manager of the said Saifi Mahal Trust at the material time. By the said application, the applicant before the District Court, the impugned order dated 31st January 1977 passed by the Deputy Charity Commissioner in so far as the scheme pertaining to Saifi Mahal Trust was sought to be framed and settled by the said impugned order. It was specifically alleged in para 7 of the said application made u/s 72 of the Bombay Public Trusts Act, 1950 that at no stage, the Deputy Charity Commissioner had intimated to the trustees of the two trusts that he proposed to frame a scheme in connection with the Saifi Mahal Trust. In the said application, it was specifically contended that the Deputy Charity Commissioner had formulated issues in para 6 of his order for the first time without giving any opportunity to the applicant or trustees of the said trust to make their submission in respect of the scheme sought to be settled under the said impugned order and marked Exhibit "A" to the said order. The notice was issued by the District Court in the said proceedings on 15th June 1977. The said notice was served on Mr. K. A. Poonawala on 30th June 1977. It appears that on 11th July 1977, Mr. K. A. Poonawala filed his written submissions in the above referred proceedings. A copy of written submissions filed by and on behalf of Mr. K. A. Poonawala is made available to this Court and the said submissions form part of the paper book consisting this appeal. Mr. K. A. Poonawala contended that the application bearing Misc. Application No. 171 of 1979 was bad in law for non-joinder of Anjuman-e-Taheri Trust as a party thereto. In Para 14 of the said written submissions, it was submitted as under:--

"Para 14 -- The applicant prays that the Hon"ble Court be pleased to order and to amalgamate the Saifi Mahal with mosque and be pleased to settle a common scheme for the two trusts."

No formulated grounds in support of the above referred plea for amalgamation are to be found in the said a written submissions.

9. By the impugned order dated 20th October 1972, the trial Court allowed Misc. application No. 171 of 1979 filed by Sheikh Nomanbhai Taherali u/s 72 of the Bombay Public Trusts Act, 1950. The trial Court took the view that the impugned order settling a scheme in respect of Saifi Mahal Trust annexed at Exhibit "A" to the impugned order was violative of the principle of natural justice and was also violative of the mandatory procedure prescribed u/s 50-A (1) of the Bombay Public Trusts Act, 1950. The trial Court took the view that the Deputy Charity Commissioner had not disclosed his intention to the trustees concerned that he was starting suo motu proceeding u/s 50-A (1) of the Bombay Public Trusts Act in respect of Saifi Mahal Trust and the impugned scheme (i.e. the scheme Exhibit "A" to the impugned order) was never made available to the trustees of the said trust for making of their submissions in the matter. As a matter of fact, the Charity Commissioner had commenced the suo motu proceeding only for amalgamation of the two trusts by passing the necessary writing a copy whereof is to be found on page 22 of the appeal paper book and by issue of notice dated

9th February 1976 referred to herein-above. From the said documents, it is obvious that the Commissioner had never invoked his suo motu powers in respect of framing of a scheme pertaining to one of the trust as contemplated u/s 50-A (1) of the Bombay Public Trusts Act. Altogether different scheme was proposed at the time of issue of above referred show cause notice i.e. the common scheme for amalgamation of the two trusts. The said scheme was dropped. The proposed scheme concerning one of the two trusts only i.e. Exhibit "A" to the impugned order was not even referred to in the show cause notice. The expression "trial Court" is used for "District Court, Pune".

10. The learned counsel for the appellant submits that the written submissions filed by Mr. K. A. Poonawala are liable to be treated as cross objections. The learned counsel for the appellants submits that the trial Court was in error when he held that the order passed by the Deputy Charity Commissioner rejecting the proposal for amalgamation of the two trusts had acquired finality. The learned counsel submits that it was not necessary for Mr. K. A. Poonawala to file an application/ appeal u/s 72 of the Bombay Public Trusts Act, 1950, and Mr. K. A. Poonawala was within his legal right to file cross objections in the appeal filed by Sheikh Nomanbhai Taherali referred to herein-above. The learned counsel points out that the provisions of the CPC are applicable to the proceedings before the District Court as clearly provided by Section 76 of the Act. On this aspect, the District Court undoubtedly observed in the order under appeal that the order passed by the Deputy Charity Commissioner refusing to amalgamate the two trusts had acquired finality as the only remedy available to Mr. K. A. Poonawala of the applicant, if any, was to file a regular application/appeal u/s 72 of the Act if he considered himself as "a person aggrieved" by that part of the order whereby the proposal to amalgamate the two trusts was rejected and/or dropped by the Deputy Charity Commissioner by his order dated 31st January 1977.

11. The basic question which is required to be considered is as to whether the grounds for proposed amalgamation of the two trusts were formulated and set out in the show cause notice or any other communication addressed to the trustees of the two trusts. In my opinion, it was the duty of the Charity Commissioner or Deputy Charity Commissioner to formulate the grounds for proposed amalgamation of the two trust and indicate at least broadly the material in his possession on the basis of which the requisite opinion was formed so as to initiate the suo motu inquiry u/s 50-A (2) of the Act prima facie conclusion of the Charity "Commissioner in this behalf must be backed by facts and objective analysis of the material sought to be relied upon howsoever brief. Such factual formulation must be set out at least broadly in the show cause notice issued to the trustees of the two trust. In absence of such formulation, the trustees can hardly make appropriate submissions in respect of proposal for amalgamation of the two trusts. The Charity Commissioner can initiate inquiry of issue notices u/s 50A (1) or Section 50A (2) of the Act only if he has reason to believe that the proposed scheme is in the interest of proper management or administration of public trust. The words "reason to believe" are specifically used

in Section 50A (1) of the Act. The said words shall have to be read in Section 50A (2) of the Act also by necessary application. Mere use of the words of section in the show cause notice or order authorising initiation of suo motu inquiry is totally insufficient. The Charity Commissioner is required to record his reasons at least briefly in his order sanctioning initiation of suo motu proceedings under either of the two sub-sections. In inquiry of this kind, even evidence may be led by the parties particularly in relation to alleged mismanagement or misfeasance. In this case, the order passed by the Charity Commissioner sanctioning the initiation of suo motu inquiry concerning the proposed common scheme which appears at page 22 of the appeal paper book does not disclose any grounds whatsoever on the basis of which the Charity Commissioner was prima facie satisfied that suo motu inquiry should be started and a common scheme should be framed for amalgamation of the two trusts. Even in the written submissions filed by Mr. K. A. Poonawala, one does not find reference to any concrete material in support of the prayer made in 14 of written submissions filed by him before the District Court on 11th July 1977. In my opinion, the basic procedure required to be followed in cases of this kind has not been followed at all and the entire proceedings suffer from fundamental defections aforesaid.

12. The learned counsel for the appellant has submitted that it would be in the interest of justice to remand miscellaneous application No. 171 of 1979 to the District Court, Pune with direction to re-hear the said application in the light of cross objections filed on behalf of Mr. K. A. Poonawala. The learned counsel for the appellant has then submitted that it would be still better if the proceedings are remanded to the Charity Commissioner for holding of fresh inquiry in continuation of suo motu inquiry commenced by the Charity Commissioner by issue of show cause notice dated 9th February 1976. The learned counsel for the appellant submits that in such an inquiry on remand, parties can be given reasonable opportunity to formulate their respective grounds/submissions and lead evidence. Having regard to the totality of the fact emerging from the records of this case, I am not convinced that passing of such order of remand to the District Court or to the Charity Commissioner would be in the interest of justice.

13. It is necessary and desirable to explain the relevant principles and lay down guidelines inherent and implicit in the provisions contained in Sections 50A (1) and 50A (2) of the Act and the objective thereof. The Charity Commissioner may hold a suo motu enquiry in relation to proposed amalgamation of the two trusts, or in relation to settlement of a scheme pertaining to a single trust in exercise of his powers u/s 50 (i) (ii) or Section 50A (1)(i) of the Act provided he "has reason to believe" that the proposed amalgamation of the two trusts or the proposed scheme in respect of a single trust is necessary for better management of the trusts concerned or is in the interest of the trusts or trust or in the interest of beneficiaries as more particularly set out in the said provisions. Formation of prima facie opinion by the Charity Commissioner on these aspects and "reasons to believe" is the very jurisdictional condition attached to exercise of power

concerning commencement of suo motu inquiry. Formation of such prima facie opinion leading "reasons to believe" must be supported by a brief order recording reasons and prima facie formulation of grounds in support thereof at least broadly backed by statement of facts and summary of materials sought to be relied upon in support of the prima facie conclusion the Commissioner to commence a suo motu inquiry. It has to be borne in mind that the opportunity to be provided to the trustees to show cause must be reasonable, effective and real and not an empty formality. In this case, the suo motu inquiry was commenced by and at the instance of the Charity Commissioner and completed by Deputy Charity Commissioner (with appellate powers). Neither the order passed by the Charity Commissioner directing holding of a suo motu inquiry nor the show cause notice issued to the trustees disclose "reasons" for starting of a suo motu inquiry or formulated grounds or the material on basis of which the Charity Commissioner had formed the requisite prima facie opinion to the effect that the commencement and holding of a suo motu inquiry was necessary in the interest of the trusts or the trust. There is nothing on record to show as to on what materials the Charity " Commissioner formed his requisite opinion in the matter, if any. Even the gist of materials relied upon by the Charity Commissioner before commencing the suo motu inquiry, if any, is available. Even if the Charity Commissioner broadly complies with the fundamental procedure and principles of natural justice or even briefly records reasons in support of his order directing commencement of suo motu enquiry, it would be sufficient compliance of law. Having regard to facts of this case, it shall have to be held that the jurisdictional condition prescribed by law for commencement of suo motu inquiry in the matter aforesaid is non-existent and the mandate of law in respect of procedure to be followed and observance of principles of natural justice is clearly breached in this case. In my opinion, the very initiation of suo motu inquiry is liable to be treated as non-est on the ground of non-compliance with mandatory procedure and jurisdictional conditions as discussed above. It is axiomatic that mere reproduction of words of the section in the order directing commencement of suo motu inquiry or in the show cause notice can never amount to sufficient compliance of law. At least some factual data and material sought to be relied on must find place in the show cause notice issued to the trustees as indicated above. In this case, even the final order of the Deputy Charity Commissioner does not set out factual data in support of the original proposed amalgamation of two trusts. It is most unfortunate that the impugned order of the Deputy Charity Commissioner suffers from such fundamental procedural defects. The impugned order of District Court is correct in so far as it sets aside the order of the Deputy Charity Commissioner settling scheme for Saifi Mahal Trust on ground of breach of principles of material justice. The said order is erroneous in so far as it does not take of cross-objections. The said cross-objections are rejected for "went of particulars" and for lack of "formulated grounds" in support of the prayer made in para 14 thereof.

14. In the result, I dismiss this appeal with no order as to costs.

15. It is hereby clarified that this order shall not preclude the Charity Commissioner from starting de novo inquiry under S. 50A(1) or S. 50A(2) of the Act provided the Charity Commissioner has reason to believe that a common scheme or a single scheme should be settled in the interest of proper management or administration of the two trusts or either of them. If the Charity Commissioner decides to exercise any such powers hereafter, the Charity Commissioner must follow the procedure as indicated in the foregoing part of this judgment and must give real and effective reasonable opportunity to the trustees of the two trusts. If two or more persons having interested in the said trust make an application to the Charity Commissioner for settlement of a common scheme for the two trusts or for settlement of a scheme in respect of one of the trust, such persons shall also be under an obligation to disclose factual data, formulated grounds and the material sought to be relied upon in the application made to the Charity Commissioner on the basis of which the Charity Commissioner can objectively come to the conclusion as to whether a prima facie case was made out for issue of show cause notice or for invoking of statutory powers under S. 50A(2) or S. 50A(1) of the Act. Since all contention on merits are being kept open if an occasion arises for holding of a fresh inquiry in the matter, I need say no more.

16. The learned counsel for the respondents Nos. 1 and 2 has submitted that the Court be pleased to clarify that in any such fresh inquiry, if any, it shall be open to the trustees of the two trusts to raise all contentions available to them under the law. These proceedings are not being decided on merits. These proceedings are being decided in favour of the respondents Nos. 1 and 2 basically on the ground that the Charity Commissioner or Mr. K. A. Poonawala had not even formulated the grounds in support of the proposed amalgamation or in support of the proposed settlement of the scheme pertaining to one of the trust as required by law. I have already taken the view that these proceedings shall have to be considered as nonest in view of fundamental procedural defect pertaining thereto and the non-compliance of jurisdictional condition by the Charity Commissioner before issuing the show cause notice. There is no material on record on the basis of which this Court can infer that the Charity Commissioner had reason to believe that framing of the scheme was necessary in the interest of the two trusts or either of them or for their better management or better, administration. It is hereby clarified that if any fresh show cause notice is issued by the Charity Commissioner hereafter invoking S. 50A(1) or S. 50A(2) of the Act, it shall be open to the trustees to resist the proceedings on grounds available to them under the law. It is however necessary to clarify one more aspect of the matter. Since no findings are recorded on merits of the allegations made against trustees concerning the management of the two trusts or either of them, the plea of bar of fresh proceedings as grounds analogous to res judicata would not be available.

17. Subject to above observations, the appeal is dismissed.

18. Having regard to the facts and circumstances of the case, there shall be no

order as to costs.

19. Issuance of certified copy is expedited.

20. Appeal dismissed.