

(2008) 07 BOM CK 0104

In the Bombay High Court

Case No : First Appeal No's. 580 and 632 of 2007

Zitru Lahanuji Lonare

APPELLANT

Vs

Rajesh Trimbakrao Deshmukh and Others

RESPONDENT

Date of Decision : 17-07-2008

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 2(18), 2(8), 41B, 41D, 41D(1)
General Clauses Act, 1897 — Section 16

Citation : (2008) 6 ALLMR 229 : (2008) 6 MhLj 348

Hon'ble Judges : Vasanti A. Naik, J

Bench : Single Bench

Advocate : A.C. Dharmadhikari, J.M. Shamkuwar and Nitin Jachak, for the Appellant; Rohit Deo and Uday Gosavi for Respondent Nos. 1 to 3 and Nilesh Adbe, for the Respondent

Judgement

Vasanti A. Naik, J.—Since common questions of law arise for consideration in these two first appeals, they are heard together and are being decided by this common judgment.

2. The appeals were admitted on the following substantial question of law.

Whether a person appointed under the provisions of Section 41D(4) of the Bombay Public Trusts Act, 1950, could challenge his removal from the Body of Fit Persons, by filing an application u/s 41D(5) of the Bombay Public Trusts Act, 1950, before the "Court"?

3. To answer the aforesaid substantial question of law, it is necessary to note few facts.

The Ideal Education Society was registered as a public trust under the provisions of the Bombay Public Trusts Act (hereinafter referred to as "The Act" for the purpose of brevity) in the year 1963. An enquiry u/s 41D of the Act was initiated against the founder recorded trustees in the year 1981. The Joint Charity Commissioner decided the proceedings on 27-11-1989 and while removing the

original trustees, appointed a Body of five Fit Persons to perform the functions of the Trust only until a trustee was duly appointed according to the provisions of the instrument of the trust. The appellant in First Appeal No. 632/2007 is one of them. The Body was reconstituted from time to time in proceedings u/s 41D of the Act. The appellant in First Appeal No. 580/2007 was appointed as one of the members on the Body of Fit Persons which was reconstituted on 17-1-2005. It is worth mentioning that the proceedings for framing of the scheme had been stalled for a long time due to one reason or the other and the trustees are not appointed according to the provisions of the instrument of the trust.

4. In Enquiry No. 7/2005 initiated by the The Joint Charity Commissioner, the Body of Fit Persons was again reconstituted by the impugned order passed by the Joint Charity Commissioner on 11/12-9-2006. In this Body of Fit Persons, the respondents were appointed and the appellants were removed therefrom. The appellants in both the appeals challenged the order passed by the Joint Charity Commissioner on 11/12-9-2006 by separate applications before the District Judge u/s 41D(5) of the Act. The Ad-hoc District Judge-I, Nagpur (hereinafter referred to as the District Judge for the purpose of brevity), however, dismissed both the applications by a common judgment dated 26-4-2007. The order dated 11/12-9-2006 and the judgment dated 26-4-2007 are challenged by these appeals.

5. A preliminary objection is raised to the maintainability of these appeals and also the applications filed by the appellants under the provisions of Section 41D(5) of the Act before the District Judge. It is submitted by the learned Counsel for the respondents that only a "Trustee", removed, suspended or dismissed under the provisions of Section 41D(1) of the Act, can challenge the order of dismissal, suspension or removal before the District Judge u/s 41D(5) of the Act. According to the learned Counsel for the respondents, since the appellants are not "Trustees" and are not removed u/s 41D(1) of the Act, the appeals/applications were not tenable before the District Judge under the provisions of Section 41D(5) of the Act. Since the appeals u/s 41D(5) of the Act were not tenable, the instant appeals are also not maintainable. The Counsel for the respondents relied on the judgment reported in 1979 Mh.L.J. 267 to canvass that under the provisions of Section 16 of the General Clauses Act, the power to appoint includes, a power to dismiss and remove and by exercising such power, The Joint Charity Commissioner was entitled to remove the members on the Body of Fit Persons by invoking the provisions of Section 41D(4) of the Act. The Counsel for the respondent, therefore, sought for the dismissal of the second appeals.

6. It was submitted on behalf of the appellant by the learned Counsel that the proceedings were initiated against the appellant in First Appeal No. 632/2007 under the provisions of Section 41D(1) of the Act. It is further submitted on behalf of the appellant that though the appellant in First Appeal No. 580/2007 was not joined as a party to those proceedings, he was removed by the

impugned judgment and order dated 11/12-9-2006 passed by The Joint Charity Commissioner in the suo motu enquiry bearing No. 7/2005. It is submitted on behalf of the appellants that though the appellants are not the recorded trustees and are appointed after the founder trustees were removed u/s 41D(1) of the Act, they definitely fall within the definition of the word "Trustee" as defined in Section 2(18) of the Act. According to the Counsel for the appellants, the definition of the word "Trustee" includes a "Manager". It is submitted that the appellants were "Trustees" as they were administering the trust. Since the appellants are removed by the order passed by the Joint Charity Commissioner u/s 41D(1) of the Act, according to the learned Counsel for the appellants, they had rightly filed the appeal u/s 41D(5) of the Act before the learned District Judge and consequently the present appeal u/s 41D(6) of the Act is also tenable.

7. To test the submissions made on behalf of the parties, it is necessary to consider the provisions of Section 41D of the Act. The power to remove, suspend or dismiss a "trustee" u/s 41D(1) of the Act can be exercised only in any of the six cases or circumstances mentioned in Clauses (a) to (f) of the sub-section. A reading of the provisions of Section 41D of the Act further reveals that the Joint Charity Commissioner can exercise the power u/s 41D of the Act on an application made by a trustee, or an interested person or on a report u/s 41B or suo motu. In case, the Joint Charity Commissioner proposes to take action against the trustee u/s 41D(1) of the Act, the procedure prescribed under Sub-section (2) of Section 41D needs to be followed. Under Sub-section (3) of Section 41D, pending disposal of the charges framed against a trustee, the Charity Commissioner is empowered to place the trustee under suspension. Whenever the Charity Commissioner makes an order suspending, removing or dismissing any trustee and the remaining trustee or trustees cannot function or administer the trust without the vacancy being filled, the Charity Commissioner is empowered to appoint a Fit Person to discharge the duties and functions of the trust and such person is entitled to hold office only until the "trustee" is duly appointed according to the provisions of instrument of trust. The aforesaid power is exercised under Sub-section (4) of Section 41D of the Act. A trustee, aggrieved by the order made under Sub-section (1) is entitled to apply to the "Court" against the order of his suspension, removal or dismissal u/s 41D(5) of the Act. An appeal lies to this Court under the provisions of Sub-section (6) against the decision of the "Court" under Sub-section (5) of Section 41D of the Act.

8. It is clear from the provisions of Sub-section (4) of Section 41D that the Joint Charity Commissioner is empowered to appoint a "Fit Person" to perform the functions of the trust until a trustee is duly appointed according to the provisions of the instrument of trust. Sub-section (1) of Section 41D of the Act speaks of the removal, dismissal or suspension of a "Trustee", whereas Sub-section (4) of Section 41D of the Act speaks of appointment of a "Fit Person" and not a "trustee". Then again, Sub-section (5) of Section 41D of the Act speaks of a "trustee", who is aggrieved by the order of suspension, removal or dismissal

under Sub-section (1) of Section 41D of the Act. It is not necessary to refer to the provisions of Section 2(8) or 2(18) of the Act for considering whether the appellants, appointed on the body of Fit Persons are "trustees" within the meaning of Sub-section (1) of Section 41D of the Act as the provisions of Section 41D of the Act themselves make a clear distinction between a "trustee" and a "fit person". A combined reading of all the Sub-sections of Section 41D makes it clear that the provisions make a clear distinction between a "trustee" and a "fit person". A person appointed under Sub-section (4) of Section 41D of the Act is neither a "trustee" nor a "manager". The provisions of Section 41D elaborately deal with the procedure for removal, dismissal and suspension of the trustee and also provide for a stop gap arrangement between the point of removal, suspension and dismissal of the trustees and the appointment of trustees in accordance with the provisions of the instrument of trust. Thus, a "Fit Person" is appointed temporarily and in a stop gap arrangement, to perform functions of the trust only until a "trustee" is duly appointed according to the provisions of the instrument of trust.

9. Though Sub-section (4) provides for appointment of a "Fit Person", it does not specifically provide for removal of the "Fit Person", so appointed. Here, as rightly pointed out on behalf of the respondents, the provisions of Section 16 of the General Clauses Act would come into play. Since the appointment is stop gap and interlocutory, it is subject to change and could be varied if a case is made out. The power to remove and make a fresh appointment of a "fit person" can be read into Sub-section (4) itself. It is now firmly established that the power to terminate or remove is a necessary adjunct of the power of appointment and is exercised as an incident to, or a consequence of that power. Resort, therefore, cannot be had to Sub-section (1) of Section 41D for removal of a "fit person". Moreover, elaborate procedure provided for removal of the trustee cannot be made applicable and resorted to, before removal of a fit person. A fit person, therefore, cannot expect the Joint Charity Commissioner to follow the procedure prescribed under 41D(2) of the Act before his removal as his removal is not u/s 41D(1) of the Act. It is also necessary to note that a "fit person" may be removed for reasons and grounds other than those mentioned in Clauses (a) to (f) of Sub-section (1) of Section 41D of the Act. It is also clear from the provisions of Sub-section (4) of Section 41D of the Act that a fit person is appointed only to discharge some of the duties of a trustee and he is not a "trustee" within the meaning of Sub-section (1) of Section 41D of the Act. Consequently, the power u/s 41D(1) of the Act cannot be exercised to remove or dismiss a "fit person", appointed under Sub-section (4) of Section 41D of the Act as a "fit person" can be removed u/s 41D(4) of the Act. In this view of the matter, a "fit person" cannot challenge his removal u/s 41D(5) of the Act as he is not a "trustee" removed or dismissed u/s 41D(1) of the Act. It is also doubtful whether a fit person appointed under Sub-section (4) of Section 41D of the Act could have a right to challenge his removal and insist that he is fit and should as such, be continued in the stop-gap arrangement.

10. For the reasons aforesaid, it would not be necessary to consider the nature or correctness of the order passed by the Joint Charity Commissioner on 11/12-9-2006 at this stage. The order dated 11/12-9-2006 cannot fail merely because the Joint Charity Commissioner assumed that he was exercising jurisdiction u/s 41D(1) of the Act as it could be demonstrated by a party that the Joint Charity Commissioner was competent to exercise the power u/s 41D(4) of the Act and the order could be read as one, passed u/s 41D(4). The validity of the order of the Joint Charity Commissioner has to be judged on a consideration of its substance and not its form. This Court would, therefore, not like to make any observations on the correctness or otherwise of the order passed by the Joint Charity Commissioner on 11/12-9-2006 as the same may be subjected to challenge.

For the aforesaid reasons, I hold that a fit person appointed u/s 41D(4) of the Act cannot challenge his removal under the provisions of Section 41D(5) of the Act in an application before the "Court" as he is not a "trustee" within the meaning of Section 41D(1) of the Act. The substantial question of law is, therefore, answered in the negative and against the appellants.

11. Having held so, it is necessary to set aside the judgment passed by the District Judge on 26-4-2007 in Regular Civil Appeal (Trust) No. 21/2006 and Regular Civil Appeal (Trust) No. 22/2006. The judgment passed by the District Judge on 26-4-2007 is hereby set aside. In the facts of the case, there would be no order as to costs.

Order accordingly.