

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO. 7913 OF 2016

Manmathappa Pandbappa Lokhande
Age 83 years, occup. Business and
Secretary of Mahatma Basweshwar
Education Society, Latur, Tq. and
District Latur

.. Petitioner/orig.
Respondent no.1

versus

01. Manohar Keshavrao Patil,
Age 65 years, occup. Chincholi (Tapse)
Tq. Ausa, Dist. Latur

02. Vishwanath Prabhakar Nigudge,
Age 57 years, occup. Agril.,
R/o Adarsh Colony, Ausa Road,
Latur, Tq. Dist. Latur.

03. Sambappa Trimbakappa Girwalkar,
Age 85 years, occup. Advocate,
R/o Near Panchayat Samiti, Latur,
Tq. Dist. Latur

04. Kantrao Eknathrao Buke,
Age 85 years occup. Business,
R/o Shahu Chowk, Latur,
Tq. Dist. Latur

05. Anil Dagdu Karpe,
Age 55 years, occup. Service,
R/o Opp. Tahsil Office, Latur,
Tq. Dist. Latur

.. Respondents/
[R. Nos. 1 and 2 Orig.
Applicants and R.Nos.
3 to 5 Orig. R.Nos. 1,
3 and 4]

06. The Joint Charity Commissioner,
Latur, Tq. Dist. Latur

Mr. V. D. Gunale, Advocate for petitioner

Mr. B.B. Dahiphale, Advocate for respondent no. 1

Mr. G. L. Awale, Advocate for respondent no. 2

Mr. S. V. Natu, Advocate for respondent no. 3

Mr. S. S. Thombre, Advocate for respondent no. 4

Mr. V. S. Kodale, Advocate for respondent no. 5

Mr. M. B. Bharaswadkar, Asstt. Govt. Pleader for respondent no. 6

CORAM : SUNIL P. DESHMUKH, J.
DATE : 9th August, 2017

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard learned counsel for parties finally by consent.

2. The petitioner is before this court, posing challenge to the order dated 28-06-2016 whereunder prayers in applications bearing Exhibits no. 17, 30 and 33 raising the issue of maintainability of application bearing no. 32 of 2015 have been rejected by the Joint Charity Commissioner, Latur, holding that said applications would be decided while hearing main inquiry application bearing no. 32 of 2015.

3. Learned counsel Mr. Gunale appearing on behalf of the petitioner submits that application no. 32 of 2015 is not tenable primarily on three grounds viz. applicants are not the members of the trust as they have been removed from the membership long-back, secondly application is bad and not maintainable for want of mandatory compliance of rule 25AA of the Maharashtra Public Trusts Rules, 1951 (for brevity, 'the rules') whereunder all the trustees are required to be

made parties and while application had been filed only trust is shown to be made party and thirdly, application as has been filed does not disclose any of the ingredients as are required under section 41E of the Maharashtra Public Trusts Act, 1950 (hereinafter, for brevity 'The Act').

4. He submits, despite the objections as aforesaid under Exhibits – 17, 30 and 33 have been taken to maintainability of the proceedings under application no. 32 of 2015, the charity commissioner has erred in passing an order deferring hearing of the applications Exhibits 17, 30 and 33 to the hearing of application no. 32 of 2015.

5. He submits that having regard to the definition of person having interest, the trust being the society registered under the Maharashtra Societies Act, 1960, a person not a member of society would not qualify to be a person having interest as defined under sub-section (10) of section 2 of the Maharashtra Public Trusts Act. As such, the applicants do not qualify as persons having interest in the trust. The applicants do not claim to be member of the society registered under Societies Registration Act, 1860.

6. Mr. Gunale states that applicants are no longer members of the trust and there is sufficient record indicating that the applicants' membership of the trust has been cancelled and not accepted and/or they are removed and as such on their behalf application bearing no. 32 of 2015 is not maintainable.

7. He submits that even if it is assumed for the sake of argument that these aspects require evidence, an opportunity can be made available to the parties to lead evidence in this respect and for that purpose hearing of Exhibits – 17, 30 and 33 ought not to be deferred unnecessarily requiring petitioner to face proceedings which are untenable on merits or even technically and much less the proceedings by the applicants.

8. Mr. Gunale submits, rule 25AA of the Rules as reproduced in the body of Exhibit 33 entails all the trustees to be parties, yet application is filed without making a single trustee as a party which throws sufficient light on the real intention of the applicants.

9. He submits, the orders ought not to have been passed in the absence of management of the trust and/or trustees and further submits, even after these applications had been

filed, there had been no efforts to bring the trustees on record of the application.

10. He goes on to submit that perusal of section 41E of the Act which reads as follows:

" 41E. Power to act for protection of Charities.

(1) Where it is brought to the notice of the Charity Commissioner either by the Deputy or Assistant Charity Commissioner through his report or by an application by at least two persons having interest supported by affidavit,-

(a) that any trust property is in danger of being wasted, damaged or improperly alienated by any trustee or any other person, or

(b) that the trustee or such person threatens or intends to remove or dispose of that property,

the Charity Commissioner may by order grant a temporary injunction or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of such property on such terms as to the duration of injunction, keeping an account, giving security, production of the property or otherwise as he thinks fit.

(2) The Charity Commissioner shall, in all such cases, except where it appears that the object of granting injunction would be defeated by delay, before granting an injunction, give notice of the facts brought to his notice to the trustee, or the person concerned.

(3) After hearing the trustee or person concerned and holding such inquiry as he thinks fit, the Charity Commissioner may confirm, discharge or vary or set aside the order of injunction or pass any other appropriate order.

(4) In case of disobedience or breach of any injunction, any of its terms or any order passed under this section, the Charity Commissioner may apply to the Court, which may, after hearing the Charity Commissioner and the party affected, order the property of such person, guilty of such disobedience or breach to be attached and may also order such person to be detained in jail for a term not exceeding six months. No attachment under this sub-section shall remain in force for more than one year; at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds, the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the person entitled thereto, and thereupon, the temporary injunction granted, or any order passed, by the Charity Commissioner, under this section, if in force shall stand vacated, or as the case may be cancelled.

(5) A trustee or a person against whom the order of injunction or any other order under this section is passed may, within ninety days of the date of communication of such order, appeal to the Court against such order.

(6) The order of the Court attaching the property of such person or detaining such person in civil prison shall be a decree appealable to the High Court.

(7) The order of the Charity Commissioner shall, subject to any order of the Court or in appeal, be final. ",

would show that not a single ingredient of section 41E can be said to be available or even referred to as would be required and under the circumstances, the application could not at all be proceeded with invoking powers of the charity commissioner.

11. Mr. Gunale further submits that application for appointment of *ad hoc* committee to administer the trust is not permissible under section 41E. Section 41E is meant for issuing injunction to protect property of trust and that being not the purpose under application bearing no. 32 of 2015, rather purpose is only to harass the persons in management and not to allow them to administer the trust, this aspect deserves to be considered at the threshold before forcing the petitioner to participate in the proceedings.

12. He submits, the charity commissioner has observed that the Act does not provide for treating anything as preliminary although it may ostensibly appear to be so, however, since the provisions and the rules referred to in the order, do go to suggest that a proper procedure can be evolved in a deserving case.

13. He, thus, submits that impugned order deserves to be set aside with further direction to the charity commissioner to decide applications at Exhibits 17, 30 and 33 questioning maintainability of application no. 32 of 2015, at an early date rather than along with the application, obviating unnecessary harassment of petitioners in the proceedings which are in abuse of process of law.

14. Countering aforesaid submissions, learned counsel Mr. Dahiphale appearing on behalf of respondent no. 1 submits that the charity commissioner has taken stock of the situation and has found that maintainability of the application cannot be decided at threshold and is to be decided upon letting opportunity to the parties to lead evidence. He further submits that, the charity commissioner has found the subject - matter involved in the application no. 32 of 2015 and the objections thereto at the behest of present petitioner and others would require detailed consideration and as such it may not be in the interest of justice to decide such objections to maintainability of application no. 32 of 2015, as preliminary ones. He, therefore, supports impugned order.

15. Learned counsel Mr. Thombre, however, vehemently submits that writ petition is an abuse of process of law. He submits that conduct of the petitioner shall be appreciated which intends to procrastinate the proceedings and prolong decision in main application. He submits that as soon as application no. 32 of 2015 had been lodged and even before anything further could be done, an application had been moved by the petitioner to transfer of proceedings. He submits that thus, the intention of the petitioner is writ large not to allow decision making in the main application and to obstruct the same on one pretext or the other. He submits that the charity commissioner in his order has considered the objections taken to maintainability of the application and has further considered that hearing on them would be required to be deferred having regard to the contentions raised. He submits that issue with regard to membership as raised may not be germane for decision under section 41E of the Act, however, that also has received due consideration and the charity commissioner has found that the same cannot be decided at the threshold and evidence may be required to be led.

16. With regard to objections to application no. 32 of 2015 pursuant to rule 25AA of the Bombay Public Trusts Rules, Mr. Thombre submits that there are at least three groups at loggerheads fighting against each other over management and administration of trust. Lot of contesting change reports are pending and in the circumstances, the same as well has been deferred to hearing of main application.

17. He submits, so far as objection with regard to requirements under section 41E of the Act is concerned, that is a matter to be considered on merits in the application itself and may not be subject-matter to be decided as preliminary objection.

18. Mr. Thombre further reverts and lays emphasis on the conduct of the petitioner and urges not to interfere with the impugned order which, in his estimate, does not prejudice the petitioner in any way.

19. Learned Assistant Government Pleader Mr. Bharaswadkar appearing on behalf of respondent no. 6 has submitted that the charity commissioner cannot be faulted with on observation that provisions under the Maharashtra

Public Trusts Act do not provide for hearing certain issues as preliminary ones particularly pointing out section 76 and definition of 'court' under sub-section (4) of section 2 thereof. He submits that since section 76 relates to application of Civil Procedure Code to matters before the court, it may not be said that there is any error in the observations occurring in the impugned order.

20. During the course of hearing, learned counsel for the petitioner Mr. Gunale went on to develop an argument that looking at the nature of relief claimed under application no. 32 of 2015, it can be with certainty said that charity commissioner would not have jurisdiction to grant any such relief in proceedings under the Act, save and except, in certain contingencies under section 41A. He submits that present proceedings are not at all referable to section 41A. As such, the charity commissioner does not have jurisdiction and the question with regard to issue of maintainability of application would boil down to authority to grant relief. Applications Exhibits – 17, 30 and 34, thus, are analogous to applications according to section 9A of the Code of Civil Procedure, 1908 and should be given treatment accordingly.

21. For aforesaid purpose, Mr. Gunale purports to place reliance on a clutch of reported decisions. However, it would be suffice to refer to decision of the supreme court in the case of *Foreshore Coop. Housing Society Ltd. v. Praveen D. Desai* reported in (2015) 6 SCC 412, particularly head-notes A and B thereof reading, thus : -

" A. Civil Procedure Code, 1908 – S. 9-A [as amended by CPC (Maharashtra Amendment) Act, 1977] and Or. 14 R.2 – Suits and interim applications in suits – Express mandate of S. 9-A to decide preliminary issue of jurisdiction prior to proceeding with suit or passing any interim order – Contrasted with scheme of Or. 14. 2 – Applicability of provisions of S.9-A to issue of limitation, whether mandatory – Rationale for insertion of S. 9-A, explained – S. 9-A as introduced by the Maharashtra Amendment Act, held, is mandatory in nature, including on issue of limitation – Word "jurisdiction" under S. 9.A is wide enough to include the issue of limitation.

- Therefore, impugned orders of High Court dismissing suit on ground of limitation or not proceeding with other suits or their interim application prior to adjudication of preliminary objection of maintainability on ground of limitation, affirmed – Clarified that mandate of S-9 is a complete departure from Or. 14 R. 2 CPC and takes away the discretion provided in Or. 14. R. 2 with its self-contained scheme, and with the non obstante clause in S. 9-A being approved by President of India as required under Art. 254(2) of the Constitution of India – However, in other cases where suits are governed by Or. 14 R.

2 CPC, court has discretion to decide issue based on law as preliminary issue (Ed.: See Shortnote D for scope and applicability of Or. 14 R.2 CPC in general] – Constitution of India – Art. 254(2) and Sch. VII List III Entry 13 – Law relating to civil procedure, a concurrent subject – State amendment receiving assent of President under Art. 254(2), will prevail in the State concerned.

B. Civil Procedure Code, 1908-S. 9-A [as amended by CPC (Maharash Amendment) Act, 1977] and Or. 14 R. 2-Word "jurisdiction" in S.9-A-Meaning and ambit, discussed and power of courts to decide their own jurisdiction, clarified-Term "jurisdiction" in S.9-A CPC is used in a wider sense and is not restricted only to conventional definition either pecuniary or territorial – Term "jurisdiction" is a term of art, an expression used in variety of senses and draws colour from its context – Therefore, to confine the term "jurisdiction" to its conventional and narrow meaning would be contrary to the well-settled interpretation of said term - Even though no party may raise objection with regard to jurisdiction of court, court still has power to determine its own jurisdiction – However, in a case where court has no jurisdiction, it cannot confer upon itself said jurisdiction by consent or waiver of the parties – Words and Phrases – "Jurisdiction" – Limitation Act, 1963, S.3 "

22. I have heard learned counsel for the parties as aforesaid. While objection to application no. 32 of 2015 is to be considered on the grounds as referred to hereinabove on behalf of the petitioner, what may appear to be germane to be considered is, as to whether having regard to the grounds

on which the objection is taken, it would be proper to defer hearing on the same to hearing of the main application.

23. The ground which has been taken with regard to the maintainability of application no. 32 of 2015 as has been filed, according to petitioner, the application does not qualify to be an application pursuant section 41E of the Act basically for the reason that the prayers are wide apart from the purpose, section 41E provides for.

24. Powers under section 41E are to be exercised in the events as are referred to therein. It relates to powers of charity commissioner to pass orders of restraint. Whether in such a case relief claimed by applicant can be granted pursuant to the provision, may better be examined before getting exhausted in whole proceedings. The charity commissioner would have done well to apply mind to said objection, lest at the end of effort it may be found that the whole exercise having been futile and redundant. The provisions which have been reproduced hereinbefore suggest that its focus and purpose is to achieve certain object.

25. However, order impugned depicts that the charity commissioner has examined neither the provisions of section

41E of the Act nor the contents or prayers made under the application. This is a single circumstance which may make the court to consider that the order may be ostensibly elaborate one, however, to this particular aspect there has been no application of mind. If object or purpose is specified in provisions with reference to a category of contingency and relief claimed is outside the scope of provision, then it may not be appropriate to defer the same to the hearing of the main application itself.

26. Objection with reference to rule 25AA of the rules, since rule ordains that the proceedings need to be in tune with rule requiring the trustees to be made parties, better not be deferred to the hearing of the main application itself.

27. In any case, it appears to be conducive and in the interest of parties and the trust that the objections taken on aforesaid two counts viz; section 41EA Rule 25AA which have been pending over a period more than a year could have by now been decided in-stead of deferring the same as has been ordered.

28. Applying mind to such objections may avoid unnecessary loss of time, labour and expense.

29. The civil procedure code is stated to not strictly apply to the proceedings before the charity commissioner, however, looking at the peculiar circumstances, an analogy could have been drawn from the relevant provisions and could have been borrowed and applied to present proceedings and application could have been given treatment accordingly.

30. As has been observed in the series of cases under section 9A whereunder questions of jurisdiction are treated as preliminary issue and the parties are allowed to lead evidence in respect the same, as such, such a consideration would not hinder consideration of objections under applications Exhibits 17, 30 and 33.

31. Petitioner has contended that respondents no. 1 and 2 are not members of the trust. So far as objection with regard to membership is concerned, if application no. 32 of 2015 passes through aforesaid tests, its relevance and significance could be deferred to hearing of the application by letting the parties an opportunity to lead evidence.

32. In the circumstances, impugned order dated 28-06-2016 passed by the Joint Charity Commissioner, Later, on applications bearing Exhibits no. 17, 30 and 33 in application no 32 OF 2015 stands set aside. The charity commissioner to decide applications Exhibits 17, 30 and 33 as expeditiously as possible, preferably within a period of three months from the date of receipt of writ of this order.

33. Writ petition stands allowed. Rule made absolute accordingly.

SUNIL P. DESHMUKH,
JUDGE

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