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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1217 OF 2017

IN

WRIT PETITION NO.14224 OF 2016

Abdul Aziz A. Shakoor & Anr.

...Applicants

In the matter between :

Yusuf Suleman Baugwala

...Petitioner

vs

The Charity Commissioner & Ors.

...Respondents

.....

Mr. R.R. Paranjape, for the Applicants/Original Respondent Nos. 3 and 4.

Mr. Sanjeev M. Gorwadkar, Senior Advocate, i/b. Sujay Gangal, for the Petitioner.

Mr. S.D. Rayrikar, AGP, for Respondent Nos. 1 and 2.

Mr. Sachindra Sheteye, i/b. Niranjan Mogre, for Respondent No.5.

Ms. Vrishali R. Raje, for Respondent Nos. 6 and 7.

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CORAM : S.C. GUPTE, J.

DATED: 13 NOVEMBER, 2017

P.C. :

. Heard learned Counsel for the Petitioner and learned Counsel for Respondent Nos. 3 and 4.

2. This petition challenges an order passed by the Deputy

Charity Commissioner on an application of the Petitioner and others for appointment of trustees of a public charitable trust registered with the Charity Commissioner by the name of Hazarat Bawa Bahauddin Durgah Trust. The application was on the footing that the trust was to be administered by a minimum number of three trustees and that as of the date of the application, there was no single trustee in respect of the subject trust, and hence, the Deputy Charity Commissioner, under the relevant clause of the scheme of the trust, namely, clause 9, should appoint new trustees.

3. In the year 1975, a scheme for management of the subject trust was sanctioned by the Charity Commissioner. Under this scheme, the trust was to be administered by not less than three or more than five trustees. Clause 9 of the scheme, which is relevant for our purposes, provides for the mode or manner of appointment of new trustees. It is in the following terms:

“9. Mode of manner of appointing new trustees:

Whenever any of the trustee either original or substituted under the scheme shall die or be absent for six consecutive months from India without leave of absence from the Dy. Charity Commissioner, Gr. Bombay Region, Bombay or be convicted of criminal offence involving moral turpitude or discharged from or released or becomes unfit or incapable to act as a trustee or trustees, the surviving or continuing trustees for the time being, shall appoint any other person or persons trustee or trustees, in the place of trustee or trustees so dying or being convicted as aforesaid or desiring to be discharged or refusing or becoming unfit or incapable to act as aforesaid, nevertheless, the number of trustees shall not

be less than three or more than five. If any such vacancy occurs and no appointment in writing of a new trustee or trustees shall be made within three months from the happening of such event, it shall be lawful for the Dy. Charity Commissioner, Gr. Bombay Region at any time after the expiration of such period by writing to appoint a new trustee or trustees of this trust as he may think fit and proper.”

4. The trust was, accordingly, administered since the inception of the scheme. The first three trustees were named in the scheme. These trustees were to submit names of three other suitable persons to the Deputy Charity Commissioner. Similarly, names of three persons were to be submitted by the opponents to the scheme application. The Deputy Charity Commissioner was to nominate two trustees from out of these two lists so as to reach the maximum number of five trustees. Thus, the three trustees named in the scheme, along with the two nominated by Deputy Charity Commissioner, totaling five in all, formed the first board of trustees under the scheme. There were changes in the board of trustees from time to time. It is borne out by the record that in January 1996, there were four trustees of the trust, namely, (i) Tayab Abdullah, (ii) Abdul Aziz Abdul Shakoor (Respondent No.3 herein), (iii) Jan Mohammed T. Jaffrani (Respondent No.4 herein), and (iv) Salim Jan Mohammed Abdulah.

5. On 20 January 1996, Tayab Abdullah died. One Abdul Qayyum N. Rajani was appointed in his place as a trustee on 3 April 1996. A change report was filed before the Charity Commissioner's Office, bearing CR No.3514 of 1996, for deletion of the name of Tayab Abdullah and insertion of the name of Abdul Qayyum Rajani as a trustee.

The change report was filed by Abdul Shakoor (Respondent No.3), who was at that time the chairman of the trust. CR No.3514 of 1996 was not available at the relevant time in the record of the charity authorities. Another change report was, therefore, filed, being CR No.4130 of 2000, covering the change reported in CR No.3514 of 1996. This later change report was filed by Jan Mohammed Jaffrani (Respondent No.4 herein), who was by that time the chairman of the trust.

6. During the pendency of this change report, a fifth trustee, namely, one Rizwan Merchant, was appointed on the trust on 17 April 2000. A change report in respect of this change was filed before the Charity Commissioner, being CR No.3031 of 2000.

7. Thereafter, during the pendency of these two change reports, Salim Janmohammed Abdullah, who was one of the trustees, resigned from the trust, and in his place, one Firoz Amiwala was appointed as a trustee on 13 June 2000. A change report pertaining to this change was filed before the office of the Charity Commissioner, being CR No.3055 of 2000.

8. During the pendency of these three change reports, the present application was filed by the Petitioner and others, claiming inter alia that out of the trustees of the trust referred to hereinabove, the three trustees, who were originally surviving as of January 1996, i.e. after the death of Tayyab Abdullah, namely, (i) Abdul Aziz Abdul Shakoor, (ii) Jan Mohammed T. Jaffrani and, (iii) Salim Jan Mohammed Abdullah, had resigned and that there was no trustee, who could administer the trust.

That was also the basis on which the three change reports referred to above were opposed by the Petitioner and others (“Applicants”). The Applicants, in the premises, submitted a list of six individuals proposed for trusteeship on the board of the trust and applied to the Deputy Charity Commissioner for appointment of five trustees from out of the list of six on the board of the subject trust. The Deputy Charity Commissioner in his impugned order held that there was no proof on record as to the resignations of the three trustees, as indicated by the Applicants. The Deputy Charity Commissioner *inter alia* held that at all material times, there were a minimum number of three trustees administering the subject trust. After accepting the material produced by the trustees in support of the three change reports, by separate orders passed around the same time, the Deputy Charity Commissioner accepted all three change reports.

9. In the premises, the present controversy is brought before this Court by way of this writ petition. Mr. Gorwadkar, learned Senior Counsel appearing for the Petitioner, makes the following three submissions :

(i) Firstly, it is submitted by learned Counsel that appointments made by the trustees, as noted above, in 1996 as well as in the year 2000, are in breach of clause 9 of the scheme of the trust. It is submitted that under clause 9 of the scheme, the remaining or surviving trustees must appoint a trustee so as to fill up a vacancy in the board of trustees within a period of 90 days. If the remaining or surviving trustees do not so appoint a trustee, they lose their authority to appoint such trustee

and, as per the mandate of clause 9, it is only the Deputy Charity Commissioner, who can thereafter exercise power to appoint a trustee.

(ii) Secondly, it is submitted that the change reports in respect of the resignations and appointments, as noted above, were submitted beyond the period of 90 days provided for reporting such change under Section 22 of the Maharashtra Public Trusts Act. It is submitted that as a result, the appointments or resignations, as the case may be, do not take effect and that there is, accordingly, no compliance with the minimum number of trustees required to administer the subject trust.

(iii) Thirdly, it is submitted that the Deputy Charity Commissioner has improperly disregarded the evidence led by the Applicants concerning the resignations of the three trustees originally surviving as noted above. Learned Counsel submits that in view of this evidence, no formal permission for leading of secondary evidence was necessary and that the Deputy Charity Commissioner ought to have accepted or rejected the evidence after hearing the parties before him and decided the controversy.

10. Insofar as clause 9 of the scheme of the trust is concerned, what it plainly implies is that it is for the remaining or surviving trustees, so long as their number does not fall below the number of minimum trustees or coram, to fill up any vacancy in the board of trustees; if such vacancy is not filled in within 90 days, it is lawful for the Deputy Charity Commissioner to fill in the same by appointing a new trustee. There is nothing to suggest that in the event the Deputy Charity Commissioner

does not proceed to appoint any new trustee or trustees after the expiry of the period of 90 days, the remaining or surviving trustees, as the case may be, are not empowered to appoint new trustee or trustees so as to fill up the vacancy or vacancies. It cannot possibly be suggested that after the expiry of the period of 90 days, the remaining or surviving trustees forfeit their right under the scheme to appoint a new trustee or trustees, as the case may be.

11. Mr. Gorwadkar relies on a judgment of our Court in the case of **Waman Vyankatesh Deshpande vs. Atul Pandurang Alshi (Dr.)**¹ where the relevant clause for appointment of new trustees was on similar lines. Relying on this judgment, learned Counsel submits that there was clear authority under the scheme to the Deputy Charity Commissioner (as in the case of **Waman Vyankatesh**) to appoint a trustee, in case the vacancy was not filled in within the stipulated period and that even if the case was not covered under Section 47 of the Maharashtra Public Trusts Act, under this authority, the Charity Commissioner had the power to appoint a trustee. It is submitted that Section 47 of the Act is not the only repository of the power of the Charity Commissioner to appoint a trustee. A scheme framed by the Charity Commissioner under Section 50-A of the Act may also contain a clause empowering the Charity Commissioner to appoint trustee/s in case of a vacancy/vacancies. In the present case, we are not really concerned with the power of the Deputy Charity Commissioner to appoint trustees under the scheme of the trust. No doubt, the Deputy Charity Commissioner has such power and this power is over and above the power of the Charity Commissioner to appoint trustees in case of eventualities provided for under Section 47 of

¹ 2005(1) Mh.L.J. 133

the Act. The whole point is that, evidently, before the Charity Commissioner could exercise any such power, the remaining or surviving trustees themselves had made the subject appointments. As I have noted above, merely because it is lawful for the Charity Commissioner to appoint new trustee/s after expiry of 90 days, the remaining or surviving trustees do not forfeit their power to appoint a trustee under the scheme of the trust. Since these appointments were made and accepted by the Deputy Charity Commissioner under the relevant change reports filed in respect thereof, there was no occasion for the Deputy Charity Commissioner to exercise his powers either under the scheme or under Section 47 of the Act.

12. As far as the change reports are concerned, the change reports have been accepted by the Deputy Charity Commissioner and the acceptance orders passed thereon are subject matter of appeals pending before the Joint Charity Commissioner. We are not here directly concerned with the question of limitation raised by learned Counsel for the Petitioner insofar as these change reports are concerned. That forms the subject matter of the pending appeals before the Joint Charity Commissioner. Mr. Gorwadkar, however, submits that insofar as the authority of the trustees to appoint a new trustee so as to fill up the vacancy is concerned, we are even in the present case concerned with the question of limitation in filing the change reports. Learned Counsel relies on a judgment of Nagpur Bench of this Court in the case of **B.J. Wahane vs. Kamlesh Gangaram Kanoje**². Relying on this case, it is submitted that the period of 90 days provided for reporting any change

² 1997 2 MHLJ 158

under Section 22(1) of the Act cannot be construed as directory but must be held to be mandatory, so that if an application for change report is not filed within 90 days, the same would not be entertained by the Charity Commissioner or his delegate. Learned Counsel accepts that in case of any delay, the trustees are entitled to take recourse to the general law of limitation for condoning the delay, and it would be in the discretion of the charity authorities to accept or reject such application. Learned Counsel, however, submits that in the present case, no such application for condonation of delay was filed by the trustees concerned, and that, in the premises, the change reports could not have been entertained by the Deputy Charity Commissioner. Once again, as I have noted above, this issue does not directly bear on the controversy in the present petition. It is not even relevant as suggested by Mr. Gorwadkar for our purpose for determining the authority of the surviving or remaining trustees to appoint a new trustee. The entire application of the Petitioner and others is conspicuously silent on this particular subject. There is no averment in the original application or any pleadings filed in support of the application that the change reports were filed beyond the statutory period of 90 days and, accordingly, the appointments reported by the trustees did not take effect. This is a mixed question of law and facts and a foundation must be laid in the pleadings of the parties for raising such an issue. There is no scope for any inquiry unless such foundation is laid.

13. As far as the evidence of resignations is concerned, it is firstly important to note that even if the Petitioner's case of resignation of the two trustees, namely, Respondent Nos. 3 and 4, as of the year 2001 is accepted, the number of trustees would not fall below the minimum

number of three. In any event, as rightly observed by the Deputy Charity Commissioner, the originals of the alleged resignation letters were not produced before him. The Deputy Charity Commissioner not only noted that the original resignation letters were not produced, but that there was no mention about the manner in which the Applicants came into the possession of the copies of the resignation letters. The Deputy Charity Commissioner also noted that there was no permission sought for sending admitted as well as disputed signatures to the handwriting expert for his opinion, when the matter was pending before the Deputy Charity Commissioner, and there was no credible evidence to prove the resignation letters. Merely because as an additional point the Deputy Charity Commissioner has referred to the issue of want of permission under Section 65 of the Evidence Act to lead secondary evidence for proving the resignations, the impugned order of the Deputy Charity Commissioner cannot be faulted. In other words, after having regard to the material on record, what the Deputy Charity Commissioner essentially held was that the factum of resignation of trustees was not proved by the Applicants before him. This is essentially a question of fact. The decision of the Deputy Charity Commissioner is based on the material on record. It cannot be said that any irrelevant or non-germane material was used by the Deputy Charity Commissioner in this behalf or that any relevant or germane material was disregarded to arrive at the conclusion. In the absence of the original record and, in the absence of any explanation for not being able to submit the original record, the refusal by the Deputy Charity Commissioner to accept secondary evidence cannot be said to be vitiated. The conclusion of the Deputy Charity Commissioner in this behalf is clearly within the realm of

possibilities and cannot be termed as impossible or perverse. In the premises, no interference of the Writ Court under Articles 226 or 227 of the Constitution of India is called for in this behalf.

14. In the premises, there is no merit in the Writ Petition. The Writ Petition is dismissed.

15. It is clarified that this order will be subject to the result of the writ petition, being Writ Petition No.6536 of 2017, filed by Respondent Nos. 6 and 7 herein, challenging inter alia the authority of the Deputy Charity Commissioner to hear and decide the present application, namely, Application No.716 of 2001 as well as the three change reports decided by him simultaneously. That writ petition, which is pending before a Division Bench of this Court, concerns the authority of the Deputy Charity Commissioner as a delegate to hear and decide the matters.

16. Mr. Gorwadkar applies for stay of the impugned order of the Deputy Charity Commissioner. Since originally the stay order was passed considering that the text of the impugned order was not available before the Court at that time, and now that the petition has been fully heard, the stay granted by the Court initially cannot be continued. Besides, by the impugned order, the Deputy Charity Commissioner rejected the Petitioner's application for appointment of new trustees. No purpose shall be served if that order is stayed.

17. Mr. Gorwadkar, however, submits that there are several interim orders, including the order of 26 September 2002, which

restrains the present trustees from spending trust funds without taking a prior permission of the Charity Commissioner and which has been in operation for the last fifteen years, and at least this order may be continued for a reasonable period of time to enable the Petitioner to test the present order. On this application, the restraint order dated 26 September 2002, which has been continued from time to time and operates till date, is continued for a further period of six weeks from today.

18. In view of the disposal of the writ petition, the Civil Application does not survive and the same is disposed of.

(S.C. GUPTE, J.)