

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

WRIT PETITION NO. 6671 OF 2013

SHANKAR GURULINGAPPA ZADE AND OTHERS
VERSUS
UMBRAO AMBADAS NAIKWADI AND OTHERS

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Advocate for the Petitioners : Shri N P Patil Jamalpurkar.
Advocate for Respondents 1 and 2 : Shri M.B.Kolpe.
Special Counsel for Respondent 3 : Shri S.K.Tambe.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 30th July, 2018

Per Court:

1 The Petitioners are aggrieved by the order dated 23.02.2012 passed by the District Court in Miscellaneous Civil Appeal No.280/2011 by which, the direction of the Joint Charity Commissioner at clause 2 in the order dated 27.09.2011 has been modified.

2 I was called upon by the Petitioners to deal with the contentions of the litigating sides even when it was put to the Petitioners as to whether, they would prefer to file a first appeal under Section 41-D(6), rather than pressing this Writ Petition. Since the learned Advocate for the Petitioners desired an order to be passed on this Writ Petition, I have dealt with their submissions and have recorded my conclusions.

3 I have considered the strenuous submissions of the learned

Advocates for the respective sides and I have gone through the petition paper book with their assistance.

4 The Petitioners have relied upon the judgment of the Division Bench of this Court in the matter of *Mohd. Abdul Rasheed and another vs. Deputy Charity Commissioner and others, 2009 (6) Mh.L.J. 545 : 2009 (4) ALL MR 263.*

5 It would be apposite to reproduce the operative part of the order dated 27.09.2011 passed by the Joint Charity Commissioner in Enquiry Application No.10/2001 (Old No.15/1997) as under :-

- "1. *The application Exh.44 filed by the non applicants is allowed. The proceeding 10/2001 (old No.15/1997) u/s 41-D of BPT Act in the matter of Shri Sant Goroba Kaka and Shiv Mandir, Ter Tq. & Dist.Osmanabad against the non applicants No.1, 3 and 7 stands disposed of and the non applicant No.2, 4, 5, 6 and 8 are discharged.*
2. *The Non Applicant No.1, 3 and 7 shall not be entitled to become trustee or office bearer of the trust in question in future.*
3. *The Fit Persons appointed by this authority shall continue to function till further order."*

6 The Respondents approached the District Court under Section 41-D(5) of the Maharashtra Public Trusts Act (for short "the said Act") challenging clause 2 of the above reproduced order. By the impugned order dated 23.02.2012, the District Court has passed the following order under Section 41-D(5) of the said Act :-

"Application is partly allowed.

Clause No.2 of the order below Exhibit 44 in application enquiry No.10/2001 (Old No.15/1997) is hereby quashed and set aside. Clause No.3 of the order will remain as it is.

Applicants may approach the Joint Charity Commissioner as regards appointment of fit persons vis-a-vis present trustees pending change reports."

7 Shri Patil, learned Advocate for the Petitioners, contends that clause 2 reproduced from the order dated 27.09.2011 is an interim order. I find that if this submission is to be accepted, it would be a self defeating contention because the final order disqualifying a person from becoming a trustee or an office bearer of the Trust for a lifetime, can never be an interim order.

8 Shri Patil then submits that the interim order has been challenged by the Respondents before the District Court under Section 41-D(5) of the said Act and which is prohibited in view of the judgment delivered in ***Mohd.Abdul Rasheed (supra)***. This Court in ***Mohd. Abdul Rasheed (supra)*** has observed in paragraphs 9 and 10 as under :-

"9. *As per para 13 it was argued before the court that by the Maharashtra Act VIII of 1985, the Legislature has introduced Sections 41A to 41E of the Act of 1950. These Sections empower Charity Commissioner with certain drastic powers. Then Sections 41C, 41D and 41E were discussed and it is observed that it was argued that Section 41D of the Act of 1950 empowers Charity Commissioner to suspend, dismiss or remove trustee on the basis of satisfaction of requirements of the provisions of Section 41D (1) (a) to (f) of the Act*

of 1950. It was also argued that whether it is an order pending disposal of the charges framed against a trustee to be passed under sub-section (3) or it is an order to be passed at final stage, in substance such a former order is also under sub-section (1) of Section 41D of the Act of 1950. At the end of para 13 it is observed that order of suspension on one hand and removal or dismissal on the other; once having accepted that there is no difference between consequence, there cannot be any difference in regard thereto. On the other hand, it was argued before court that it is stretching too much to hold that the order under sub-section (3) is an order under sub-section (1) of Section 41D of the Act of 1950. After considering said arguments in para 15 and after considering Section 41D it is observed in para 16 as under :

"Whether it is a suspension at the end of the inquiry or whether it is a suspension pending the disposal of the charges framed against a trustee, satisfaction of the considerations is a pre-condition either way. It cannot be even imagined as sought to be contended, that the Charity Commissioner in exercise of powers under Section 41-D sub-section (3) of the said Act, is acting de hors the considerations under Section 41-D sub-section (1) of the said Act. Once this conclusion is reached, there need not be any detaining in the thinking process to reach a conclusion that virtually and also-factually the Charity Commissioner while passing an Order under Section 41-D sub-section (3) of the said Act, passes an order on the basis of doctrine of substance also, an order under Section 41-D sub-section (1) because reading the provisions even on literally basis, this conclusion is inescapable in the sense that it cannot be legitimately thought of that suspension during the pendency of the inquiry not be dependent on satisfaction of the aspects specified in items (a to f) of Section 41-D(1). Once a conclusion is reached at whatever stage, the order is contemplated, the satisfaction of the requirements of Section 41-D sub-section (1) of the Act, is a pre-condition, the application necessarily becomes

maintainable in law in view of provisions of Section 41-D sub-section (5) of the said Act."

10. *While making Reference, the learned Single Judge observed in para 7 that the impugned order under sub-section (3) of Section 41D of the Act of 1950 was preceded by ig a preliminary inquiry by Deputy Charity Commissioner. The power to suspend is available to the authority concerned as and when there is prima facie material to reach a conclusion that drastic action is necessary in order to temporarily stop functioning of some trustee/s in order to ensure that the administration of trust is not impaired. The power to suspend is sine-qua-non of the power to appoint. The trustee can be appointed by the Charity Commissioner. The suspension power under sub-section (1) of Section 41D of the Act of 1950 is of course unbridled. The power to suspend, remove or dismiss a trustee can be exercised only when it is found that the trustee is guilty of lapses or has suffered conviction as enumerated in sub-clauses (a) to (f) appended to sub-clause (1). It is further observed in para 7 that sub-section (3) empowers Charity Commissioner to place trustee under suspension against whom charges are framed. Thus such ad-interim suspension can be ordered only when charges are framed and not prior to that. In para 8 the learned Single Judge differed from view taken by earlier Single Bench that power of suspension is referable to sub-section (1) of Section 41D of the Act of 1950. The learned Judge referred to Section 76 of the Act of 1950 and observed that where there is no specific provision under the Act of 1950 remedy is provided under Code of Civil Procedure and appellate forum thereunder will have to be treated as implicitly available. Under Section 94 of the Act of 1950 appeal against order will be only of Miscellaneous nature i.e. Miscellaneous Appeal against such order. The final order of suspension is not passed at the stage of interim suspension pending the disposal of charges. Obviously it would not be permissible to say that such ad-interim suspension order is covered by sub-section*

(1) of Section 41D of the Act of 1950. Ad-interim suspension cannot be elevated to treat it as on par with the final order under sub-section (1) of Section 41D of the Act of 1950. So as against order passed under sub-section (3) of the Act of 1950 remedy is not under sub-section (5), but filing a review petition before same authority or by way of writ petition, but no Second Appeal is provided."

9 The learned Division Bench has, therefore, concluded that an order passed under Section 41-D(1) after following the due procedure prescribed in Section 41-D(3), will always be an order under Section 41-D(1) and an application necessarily becomes maintainable in law in view of the provisions of Section 41-D(5) of the said Act.

10 Prima facie, it, therefore, appears that the impugned order passed by the District Court dated 23.02.2012 was an order passed under Section 41-D(1) after following the due procedure under Section 41-D(3). In this backdrop, the proceedings initiated by the Respondents were rightly entertained by the District Court under Section 41-D(5) of the said Act.

11 Consequent to the above and keeping in view Section 41-D(6) of the said Act, an appeal would lie before this Court for challenging the order passed under Section 41-D(5). For the present, the amendment in view of the substitution of Section 41-D(6) introduced by MA No.55/2017 would render the Petitioners with a remedy to prefer an appeal to this

Court under Section 41-D(6) as the definition of the “Court” introduced on 01.09.2017 would mean the “High Court of Judicature at Bombay” under Section 2(4) of the said Act.

12 As such, this Writ Petition is disposed of as the Petitioners have a remedy under Section 41-D(6) by preferring an appeal before this Court.

13 In the event of any issue of limitation, provided these Petitioners prefer such an appeal within four weeks from today, the time spent by the Petitioners in this Court from 08.05.2013 till the passing of this order, shall be a ground to be canvassed for seeking condonation of delay.

kps

(RAVINDRA V. GHUGE, J.)