

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL No.1064 OF 2017
WITH
CIVIL APPLICATION NO.2961 OF 2017**

Shri Kashyap Odhavji Thakkar ... Appellant

Vs.

Shri Chandrakant R. Ganatra & Ors. ... Respondents

Mr.G.S. Godbole i/b D.S. Jadhav for the Appellant

Mr.A.Dholakia i/b N.A. Dholakia for the Respondent Nos.1 to 4

Mr.A.R. Patil, AGP, for Resp. Nos.5 & 6

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: AUGUST 16, 2018

ORAL JUDGMENT:

1. This First Appeal is directed against the judgment and order dated 6.3.2017 passed by the learned Adhoc Judge, City Civil Court at Bombay in Charity Application No.37 of 2016 wherein the order of the Joint Charity Commissioner in Appeal No.3 of 2016 setting aside the order of the Deputy Charity Commissioner dated 14.12.2015 is confirmed.

2. By this order, I am deciding only the point of maintainability in respect of the appeal proceedings filed before the Joint Charity Commissioner u/s 70 of the Mumbai Public Trust Act and I am not touching the merits of the case as pleaded in the First Appeal. The appellant initially did not raise any objection on the point of maintainability of the proceedings which were filed before the Joint Charity Commissioner and the City Civil Court. But by way of amendment, he raised this issue and the said amendment was allowed on 10.10.2017.

3. The appellant is a registered reporting trustee of the Trust, namely, Thakkar Keshavji Damjee Hirji and Thakkar Chanahai Peraj Na Matushree Laxmibai Dispensary and Accouchery Trust (for short, hereinafter referred to as 'the Trust'). The appellant trustee filed application for change report u/s 22 of the Mumbai Public Trust Act (for short, hereinafter referred to as 'the Act') on 4.11.2011, bearing C.R. No.4590 of 2011. In the said report, the respondents, being the persons having interest in the Trust, filed application for intervention u/s 73A of the Act. The said application was opposed by the present applicant and after hearing the same, the Deputy Charity Commissioner rejected the said application by

order dated 14.12.2015. The respondents u/s 70 of the Act, challenged the said order of rejection before the Joint Charity Commissioner in Appeal No.3 of 2016 which was allowed by order dated 21.10.2016. The present applicants, therefore, challenged the said order u/s 72 of the Act before the City Civil Court in Charity Application No.37 of 2016. The learned Judge of the City Civil Court dismissed the said application on 6.3.2017 and allowed the original application of the respondents to appear in the said change report. Intervention application was allowed in the change report bearing No.4590 of 2011, against which the present appeal is filed.

4. In this appeal, the following issue is raised:

“Whether the order passed by the Deputy Charity Commissioner in the proceedings u/s 73A of the Mumbai Public Trust Act is appealable under section 70 of the Mumbai Public Trust Act?”

5. At the outset, it is made clear that the findings given by the Assistant Charity Commissioner or the Deputy Charity Commissioner u/s 22 of the Act are appealable and challenged u/s 70 of the Act. The issue revolves around only the distinction

between the meaning and connotation of two words, namely, 'finding' and 'order' as contemplated u/s 70(1)(b) of the Act.

6. Mr.Godbole, learned Counsel for the appellant, opened his arguments with the proposition of law that the maintainability is a legal issue, it may be raised at any point even at the appellate stage, for the first time. He admitted that the point of maintainability was not raised by the appellant before the Joint Charity Commissioner when the order of Deputy Charity Commissioner was challenged, first time by the respondents, which could have been done at that stage itself. He submitted that there should be a provision of appeal in the Act and in the absence of such provision, no appeal can be filed. He explained the scheme of the enquiry for registration u/s 19 and the finding given by the Assistant Charity Commissioner or Deputy Charity Commissioner after enquiry, is to be recorded u/s 20 and accordingly, the entries are to be made in the register which is supposed to be maintained by the office of the Charity Commissioner. He argued that if at all, there is application for change moved by the trustees or the persons having interest in the property in the trust, then, that change report is to be decided by

the Assistant Charity Commissioner or Deputy Charity Commissioner. Those findings given by the concerned authority u/s 22 only are appealable u/s 70 of the Act. He submitted that everywhere, the word used is 'finding' and not an 'order'. He argued that the application for intervention is necessarily filed by the respondents u/s 73A of the Act which is not findings but it is an order by which the Deputy Charity Commissioner has dismissed the said application. The learned Counsel submitted that under the said circumstances, the Joint Charity Commissioner ought not to have entertained the application filed u/s 70 of the Act challenging the order of rejection of intervention application. He submitted that the order passed by the Joint Charity Commissioner thus, is illegal, devoid of jurisdiction and in fact, is to be set aside.

7. Per contra, the learned Counsel Mr.Dholakia, while supporting the orders passed by the Joint Charity Commissioner and by the learned Judge of the City Civil Court, has submitted that the issue of maintainability in fact cannot be entertained at this stage as the appellant himself has submitted to the jurisdiction of the Joint Charity Commissioner and so also, subsequently to the jurisdiction of the City Civil Court by challenging the said order

before the City Civil Court u/s 72 of the Act. He further submitted that the section 73A gives power to the Enquiry Officer to join persons as party to the proceedings. If the section is carefully read, it pertains to the powers given to the Assistant Charity Commissioner to pass orders in any proceedings where such application is made. Thus, the order passed u/s 73A in fact merges in the proceedings of that section. My attention is drawn by the learned Counsel for the respondents to the application filed before the Deputy Charity Commissioner and the order passed therein by the authority. He pointed out that the said order is detailed and reasoned where the Deputy Charity Commissioner himself has after settling the points has given the reasoning under the caption of findings. The learned Counsel has submitted that once the findings are given by the Assistant Charity Commissioner, then, those findings are appealable under section 70 of the Act as it merged in the proceedings of section 22. The learned Counsel submitted that section 70 does not say a final finding but it only states finding and thus, when it is a finding given by the authority; it comes within the sweep of section 70(1b) of the Act.

8. In support of his submissions, the learned Counsel relied on two judgments – **Rajkumar Pundlikrao Zape & Ors. vs. Shantaram Amrutrao Waghmare & Ors.**¹ and of the Nagpur bench of this Court in the case of **Rajendra Somaji Waghade vs. Digamber Bahuddeshiya Apang Kalyan Shikshan Sanstha & Anr.**²

9. In reply, Mr. Godbole has submitted that the ratio laid down in **Rajkumar Pundlikrao Zape & Ors. (supra)** by a learned Single Judge of this Court at Nagpur bench, is not useful in the present case to the respondents but in fact, it supports his submissions. He further argued that the ratio laid down in **Rajendra Somaji Waghade (supra)**, though favours the respondents, it is unfortunately on a wrong footing.

10. In the present case, the application is moved for intervention. The order of allowing the said application or rejecting the said application for intervention does not decide the change report itself. The net result of the rejection of the application for condonation of delay is the dismissal of the appeal but it is not a case of change report where the application for intervention is

1 2008 (6) Bom.C.r. 81

2 2008(6) Bom.C.R. 88 (Nagpur Bench)

allowed or rejected. Thus, the application filed u/s 73A stands on totally a different footing than the application filed for condonation of delay in the change report. Though the application for condonation of delay is a separate application filed under section 5 of the Limitation Act, yet, forms an integral part of the proceedings filed u/s 22, i.e., the change report. However, the application u/s 73A cannot be considered as an integral part of the proceedings u/s 22 of the Act.

11. Section 73A enables person to file application for impleadment as a party to any proceedings under the Act. The said person has to prove his locus and interest in the public trust and then he can be joined as a party to such proceedings, in which he has moved the application. Thus, the section 73A vests similar power as available to a Court under Order 1 Rule 10 of the Civil Procedure Code. The proceedings of application u/s 73A thus, does not merge in parent proceedings under section 22 of the Act. U/s 22, the phrase used is -

“he shall record a **finding** with the reasons therefor to that effect and if he is not so satisfied he shall record a **finding** with reasons therefor accordingly. Any such finding shall be appealable to the Charity Commissioner. The Deputy or Assistant Charity Commissioner shall amend or delete the

entries in the said register in accordance with the **finding** which requires an amendment or deletion of entries and if appeals or applications were made against such **finding**, in accordance with the final decision of the competent authority provided by this Act.”

12. On the point of applicability, section 70 needs to be read:

“70. APPEALS FROM FINDINGS OF DEPUTY OR ASSISTANT CHARITY COMMISSIONER.-

(1) An appeal against the **findings** or **order** of the Deputy or Assistant Charity Commissioner may be filed to the Charity Commissioner in the following cases: -

(a) the **finding and order**, if any, under section 20;

(b) the **finding** under Section 22;

[(b-i) the **findings** under Section 22A;

(c) the **findings** under Section 28;

(d) the **order** under sub-section (3) of Section 54;

(e) an **order** confirming or amending the record under Section 79AA.”

(emphasis applied)

13. In the section 70(1), the words “finding” or “order” are inserted by the Bom. Act 28 of 1953. If further clauses are examined, the intention of the Legislature is unambiguously manifested. In sub-clause (a), both the words i.e., 'finding' and 'order' are used which pertain to section 20 which is appealable. In clause (b), the word 'finding' u/s 22 is mentioned. Then, in sub-clauses (b1) and (c), the words 'findings' u/s 22A and 'findings' and

under section 28 are mentioned. Sub-clause (d) covers the order under sub-section (3) of Section 54 is mentioned and clause (e) states that the order confirming or amending the record under Section 79AA is appealable. Thus, in sub-clauses (a) to (e), the Legislature has used in some places the word 'finding' and in some sub-clauses, the word 'order' is mentioned. Thus, the meaning of 'finding' and the 'order' is undoubtedly different and it is not a synonym and cannot be substituted for each other.

14. Mr.Godbole has rightly pointed out that in order to understand the meaning of the word 'finding' as contemplated u/s 22, one needs to refer to go section 19 and 20 also. U/s 18, the registration of the public trust is required. For that purpose, the application for registration is made by persons having interest in the public trust or the Charity Commissioner on its own motion can make enquiry and ascertain the facts which are enumerated u/s 19 and on completion of the said enquiry, the Deputy Charity Commissioner or Assistant Charity Commissioner shall record his findings with reasons and may make an order for payment of registration fee. Thus, the Trust can be registered. The office of the Charity Commissioner is supposed to maintain registers. In

those registers, entries in accordance with the findings are to be made. Under Section 22, if change to be made and that change report can be allowed or refused by the finding given by the Assistant Charity Commissioner or Deputy Charity Commissioner. So, the word 'finding' which is mentioned in sub-clause (b) and clause (b-i) of section 70 necessarily means only the 'finding' u/s 22 and not the orders passed therein.

15. The learned Counsel for the respondents have raised a point that if the application is moved u/s 73A, then, it merges in the original proceedings. In support of his submission, he drew my attention to the impugned order wherein the Assistant Charity Commissioner or Deputy Charity Commissioner himself has used the word “finding” and gave detailed reasons of rejecting the application. The submissions made by the learned Counsel apparently look correct, however, after a close scrutiny of the sections and the legal implications of the words used by the Legislature, I am of the view that those submissions cannot be accepted by the Court. As discussed above, the order passed in application u/s 73A does not entail the final decision of the change report filed u/s 22 of the Act. Thus, though the application u/s 73A

is made u/s 22, still, it cannot be said that it merges in section 22 proceedings. It remains separate like oil in the water. Thus, though it is an order with findings, it cannot be treated as finding as contemplated either u/s 22 or u/s 70 (b) of the Act.

16. In the case of **Rajkumar Pundlikrao Zape & Ors. (supra)**, a Change report in respect of the deletion of one name alongwith an application for condonation of delay was made. The Assistant Charity Commissioner did not allow Shantaram Waghmare and others to lead evidence and rejected the application for condonation of delay. Consequently, he rejected the change report. So, they preferred appeal before the Joint Charity Commissioner, who condoned the delay and remanded the matter to the Assistant Charity Commissioner. The said order of the Joint Charity Commissioner was challenged before the learned District Judge u/s 72 of the Act. The District Judge dismissed the appeal and thereafter, u/s 72 of the Act, second appeal was preferred before the High Court. The learned Single Judge framed the issue as “Whether an appeal lies against the order of the Assistant Charity Commissioner rejecting the delay application in a change report?”.

17. The learned Single Judge in the judgment, while dealing with that issue, has referred to the case and to the evidence given in various cases like **Shyam Sunder Sarma vs. Pannalal Jaiswal**³, wherein it is held that if the delay is not condoned, then, the appeal is dismissed and the dismissal of the appeal for the reason of delay in its presentation is in substance and effect, a confirmation of decree appealed against and therefore, the learned Single Judge held as follows:

“12. Thus, if the above proposition of law is borne in mind, the decision on delay condonation application is a decision under section 22 of the Bombay Public Trust Act and an appeal would certainly lie against such order.”

The learned Judge has further held that -

“11. ... If this analogy is to be applied then order passed on delay condonation application rejecting it and thereby rejecting the application for change is a finding recorded under section 22 of the Bombay Public Trust Act. ... “

18. Thus, the ratio laid down in **Rajkumar Pundlikrao Zape & Ors. (supra)**, in fact, throws light on the converse situation of law i.e., if the fate of the proceedings filed u/s 22 is not decided by the order passed in any application filed in that proceedings, then, that order is not appealable.

3 2005(4) Bom.C.R. (S.C.) 839

19. In the case of **Rajendra Somaji Waghade (supra)**, decided by the learned Single Judge of this Court. In that case, an application for condonation of delay was in fact allowed and against the said order, an appeal was filed u/s 70 of the Act and the same issue came before the learned Single Judge. The learned Judge has taken a view that such order passed condoning the delay is appealable u/s 70. However, the learned Single Judge has entirely relied on the ratio laid down in **Rajkumar Pundlikrao Zape & Ors. (supra)**, which is referred to above wherein the application for condonation of delay was rejected. With respect, I am of the view that the ratio laid down in **Rajkumar Pundlikrao Zape & Ors. (supra)**, cannot be applied by way of analogy. The effect of allowing the application for delay condonation is different than the effect of rejection of the condonation of delay in the appeal.

20. Thus, I answer the issue in para 4 accordingly. The order dated 14.12.2015 passed by the Deputy Charity Commissioner in the Intervention application u/s 73A of the Act which was filed in the proceedings u/s 22 of the Act is not appealable u/s 70 of the Act before the Joint Charity Commissioner.

21. Appeal is allowed accordingly. In the result, the order passed by the learned Joint Charity Commissioner dated 21.10.2016 in Appeal No.3 of 2006 is set aside. In view of the disposal of the Appeal, Civil Application stands disposed of.

22. At the request of the learned Counsel for respondent Nos.1 to 4, this order is stayed till 2nd November, 2018.

(MRIDULA BHATKAR, J.)

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Satyanarayana
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