

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****WRIT PETITION (ST) NO. 19077 OF 2018**

1. Shaikh Mohd. Nadim)
 S/o. Gulam Abbas Alli,)
 Age : 43 years, Occu.: Service and)
 Social Work, R/o. House No.1/10/25))
 Near Chhoti Masjid, Jaisingpura,)
 Aurangabad – 431 004)

2. Patel Shaikh Imran)
 S/o. Shaikh Usman,)
 Age : 39 years, Occu.: Social Work,)
 R/o. New S.T.Colony, Plot No.86,)
 Katkat Gate, Aurangabad,)
 Dist.Aurangabad)

..... Petitioners**VERSUS**

1. The Assistant Charity Commissioner,)
 Maharashtra State, Mumbai)

2. Mrs.Fatema Rafiq Zakaria,)
 Age : 85 years, Occu.: Journalist,)
 R/o : 3, Sealand, Cuff Parade,)
 Mumbai – 400 005)

..... Respondents

Mr.P.D.Bachate, a/w. Mr.S.B.Kulkarni for the Petitioners.

Mr.Rajan S. Pawar, A.G.P. for the Respondent no.1.

Mr.Harish Khedkar, i/b. Vis Legis Law Practice for the Respondent no.2.

CORAM : R.D. DHANUKA, J.

DATE : 13th AUGUST, 2018

JUDGMENT

By this petition filed under Article 227 of the Constitution of India, the petitioners have impugned the order dated 26th April, 2018 passed by the respondent no.1 below Ex.24 in the change report filed by the reporting trustee of the respondent no.1. The petitioners are admittedly allowed to intervene in the change report submitted by the reporting trustee. One of the witness has filed affidavit in lieu of examination in chief in the proceedings filed under section 22 of the Maharashtra Public Trust Act, 1950. The said change report is heavily contested by the petitioners. The petitioners accordingly made an application before the learned Assistant Charity Commissioner for seeking permission to cross examine the said witness being examined in support of the change report filed under section 22 of the Act. The learned Assistant Charity Commissioner however rejected the said application under Ex.24 by an order dated 26th April, 2018 on the ground that the petitioners who were allowed to intervene in the said proceedings under section 22 has no direct concern for the outcome of the said change report filed under section 22 of the Act.

2. Mr.Bachate, learned counsel appearing for the petitioners invited my attention to the proviso to section 73 of the Maharashtra Public Trust Act, 1950 and would submit that the said proviso has been amended by the Maharashtra Public Trust (2nd Amendment) Act, 2017 on 1st September,2017 w.e.f. 10th October, 2017. He submits that the enquiry under section 22 in the change report which is the subject matter of this petition has already commenced much prior to the date

of insertion of the said proviso which came into effect w.e.f. 10th October,2017. In his alternate submission, it is submitted that the Assistant Charity Commissioner could not have refused an opportunity to cross examine the witness proposed to be examined by the respondents and who has filed an affidavit in lieu of examination in chief in the said change report. He submits that the said change report is heavily contested, has to be tried as a civil suit and thus an opportunity to cross examination to the petitioners cannot be refused.

3. Learned counsel for the respondent no.2 on the other hand submits that the petitioners are not at all concerned with the said change report. In his alternate submission it is submitted that it is the discretion of the learned Assistant Charity Commissioner to permit the cross examination of the deponent or not in the facts of each case. He submits that the Assistant Charity Commissioner has exercised his discretion in the matter by refusing to permit the petitioners to cross examine of the deponent in lieu of examination in chief and thus this court shall not interfere with the impugned order.

4. It is not in dispute that in the earlier proceedings filed between the parties, the intervention application filed by the petitioners have been allowed. The petitioners are thus entitled to oppose the said change report filed under section 22 of the Maharashtra Public Trust Act, 1950. The reporting trustee has proposed to examine a witness who has been allowed to file affidavit in lieu of examination in chief.

5. Insofar as the proviso to section 73 of the Maharashtra Public Trust Act, 1950 is concerned, admittedly the said proviso is inserted w.e.f. 10th October,2017 by notification dated 10th October,2017. An enquiry in question has been already initiated under section 22 of the Act much prior to 10th October,2017. In my view the said proviso thus would not apply to the facts at hand.

6. The Assistant Charity Commissioner has permitted the reporting trustee to examine a witness by filing an affidavit in lieu of examination in chief. The Assistant Charity Commissioner thus could not have refused to grant permission to the petitioners to cross examine the said witness. It is not in dispute that the proceedings under section 22 of the Maharashtra Public Trust Act, 1950 are to be tried as a civil suit. The impugned order in my view thus is *ex-facie* contrary to section 73 of the Maharashtra Public Trust Act, 1950.

7. Learned counsel for the respondent no.2 submits that since the application is filed by the petitioners for seeking liberty to cross examine the witness after the proviso is inserted in section 73 and thus the said proviso would be applicable to the facts at hand is concerned, in my view, merely because of application for cross examination is made after insertion of the said proviso w.e.f. 10th October,2017, the fact remains that the enquiry under section 22 of the Maharashtra Public Trust Act, 1950 has already commenced much prior to insertion of the said proviso and thus such application would be governed by the unamended section 73.

8. A perusal of the order passed by the learned Assistant Charity Commissioner indicates that the application is rejected on the ground that the petitioners (intervenors) will have opportunity to lead his own evidence in the form of affidavit. In my view, this observation of the learned Assistant Charity Commissioner is *ex-facie* perverse. It is for the petitioners to decide to lead any further evidence or not only after the cross examination of the witness at hand is completed by the petitioners. An opportunity to cross examine cannot be denied on the ground that the petitioners will have his own opportunity to lead his evidence. The impugned order dated 26th April, 2018 passed by the Assistant Charity Commissioner below Ex.24 is accordingly quashed and set aside. Application at Ex.24 is allowed. The petitioners would be at liberty to cross examine the witnesses proposed to be examined by the reporting trustee in the Change Report No.2114 of 2017.

9. Writ petition is according made absolute in the aforesaid terms. No order as to cost.

10. The parties to act on the authenticated copy of this order.

[R.D. DHANUKA, J.]