

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

FIRST APPEAL NO. 1435 OF 2017

APPELLANT:
(Org. Resp.
No.1)
O. R.A.

1. Shri Bhaurao s/o Krushnarao Bhoyar
(Deleted)

(Org. Resp.
No.2.)
On R.A.

2. Shri Prabhakar S/o Dinbaji Badhe,
Aged about 71 years Occ. Retired,
Resident of C/o Babanrao Thakare, 30,
Near Zingal Bell Convent, Vidya Nagar,
Koradi, Nagpur.

- VERSUS -

RESPONDENTS:
Org. Appellant
on RA)

1. Shri Dyaneshwar s/o Pundlikrao
Lohakare, Aged about 45 years,
Occupation – Private
Resident of village Parseoni,
Tah. Parseoni, Dist. Nagpur.

(Org. Respt. 5 on
R.A.)

2. Shri Dhanaji Tanabaji Lokhare
Aged about 81 years,
Occupation – Agriculturist
Resident of Village Parseoni,
Tah. Parseoni, Dist. Nagpur.

Org. Respt. 3 on
RA)

3. Shri Dyaneshwar Ramraoji Dhote,
Aged about 43 years,
Occupation – Agriculturist
Resident of Karambhad,
Tah. Parseoni, Dist. Nagpur.

Org. Rept. 4 on
RA)

4. Smt. Druvabai Mohanji Barve
Aged about 43 years,
Occupation-Business,
Resident of Karambhad,
Tahsil Parseoni, Dist. Nagpur.

(Org. Resp. 5 on
R.A.)

5. The Joint Charity Commissioner,
Nagpur.

Corrected as per
Court's order dt.
25.6.2021 passed in
CAF No.
1288/2019.
Sd/-R.V.Jalit,
P.A.

Shri A.C. Dharmadhikari, Advocate with Shri S.D. Abhyankar
Advocate for the appellant.
Shri A.S. Mardikar, Senior Advocate with Shri A.P. Thakare,
Advocate for respondent No.1.
Shri R.T. Anthony, Advocate for respondent Nos. 2 and 4.
Shri M.A. Kadu, Assistant Government pleader for respondent
No.5.

CORAM : A.S. CHANDURKAR, J.

DATED : 28th FEBRUARY, 2019.

ORAL JUDGMENT :

1. This appeal has been filed under Section 72 (4) of the Maharashtra Public Trusts Act, 1950 (for short, the said Act) seeking to challenge the judgment dated 24-7-2015 in Regular Civil Application No. 28/2012 whereby the said application filed under Section 72 (1) of the said Act has been allowed and the order passed by the learned Joint Charity Commissioner, Nagpur has been set aside.

2. The facts in brief are that respondent No.1 herein is the reporting trustee who had filed an application under Section

22 of the said Act reporting change that had occurred pursuant to the elections held on 14-4-2005. According to the said reporting trustee, pursuant to directions issued under Section 41A of the said Act, the said elections were held and the body as shown in the Change Report came to be elected. An objection was filed to the said Change Report stating therein that the change as reported was not legal in view of the fact that persons who were not members of the Public Trust had participated in the elections held on 14-4-2005. The said members were defaulters and had not paid the subscription fees but had still participated in the election process. It was thus pleaded that the Change Report was liable to be dismissed.

3. The parties led evidence before the learned Dy. Charity Commissioner and after considering the said evidence by the order dated 4-6-2011 the Change Report came to be accepted. Being aggrieved by the acceptance of the Change Report, the objectors filed an appeal. The learned Joint Charity Commissioner by his order dated 4-8-2012 allowed the said appeal and set aside the order accepting the Change Report. This order was challenged by the Reporting Trustee by filing an application under Section 72 (1) of the said Act and by the impugned judgment the said application has been allowed and the order passed by the learned Dy. Charity

Commissioner has been restored. Hence, this appeal by the original objectors.

4. Shri A.C. Dharmadhikari, learned Counsel for the appellants submitted that the learned District Judge committed an error in upholding the Change Report as filed. He submitted that the members who were defaulters and had not paid the subscription charges had participated in the elections that were held on 14-4-2005. As these members had no right to participate in the said elections, the change that had taken place pursuant to the said elections was illegal. Referring to the provision of Section 15 of the Societies Registration Act, 1860 it was submitted that failure to pay subscription charges rendered the concerned member ineligible to be treated as valid member for participating in the elections. Further referring to the decision of the Hon'ble Supreme Court in *Hyderabad Karnataka Education Society v. Registrar of Societies AIR 2000 SC 301* it was submitted that a notice had been issued to all the concerned members to pay the subscription amount and despite that the same was not paid. The fact that such notice was issued to the members was admitted by the Reporting Trustee in his cross examination and the learned Counsel referred to the deposition of the Reporting Trustee in that regard. He also referred to the by laws of the trust to indicate that

payment of subscription was necessary for being treated as a valid member. It was thus submitted that the impugned order accepting the Change Report was liable to be set aside and the order passed by the learned Joint Charity Commissioner ought to be restored.

5. On the other hand, Shri A.S. Mardikar, learned Senior Advocate for the respondent No.1 supported the impugned judgment. It was submitted that the Objector No.1 had since expired while the Objector No.2 who was the Headmaster of the School run by the Trust had since retired from service. It was thus submitted that the appeal at the instance of the retired Headmaster was not maintainable. It was then submitted that in proceedings under Section 41A of the said Act, the Objectors had admitted the list of members which was filed at Exhibit-12 in those proceedings. Having accepted the list of members at Exhibit-12 to be valid, the directions to conduct elections that were passed in those proceedings were complied with. At that stage, the Objectors did not raise any grievance that some of the members were in arrears of subscription and in fact participated in the said elections. After losing the elections an objection was now being raised that some of the members who had participated in the elections were defaulters. It was submitted that having participated in the elections and having lost in the same, the

Objectors were precluded from raising any objection to the competence of the said members. In that regard reliance was placed on the decision in Second Appeal No. 315/2009 (*Ghanshyamdas Sanghidas Panpalia vs. Dr. Rajaram Vithoba Kumbhalkar and others*) decided on 22-6-2017 and it was submitted that the Objectors were not permitted to make this grievance. Reference was then made to the proceedings under the Contempt of Courts Act, 1971 and the adjudication therein. It was urged that in Contempt Petition No. 152 of 2004 the appellants herein were arrayed as contemnors. In those proceedings the present appellants had taken a stand that pursuant to the elections of the Society held on 14-4-2005, the present respondent No.1 had taken charge as Secretary and that he was having custody of the entire records. Affidavit to that effect was also sworn by them on 29-8-2006. It was thus submitted that having relied upon the elections that took place on 14-4-2005 it was not now open for the appellants – objectors to contend that those elections were not validly held. On this count it was submitted that the impugned judgment did not call for any interference and the appeal was liable to be dismissed.

6. Shri C.A. Anthony, learned Counsel for the respondent Nos. 2 to 4 besides supporting this submission urged that Regular

Civil Application No.31/2012 was decided along with Regular Civil Application No. 28/12 and both the applications had been allowed. However, the judgment in Regular Civil Application No.31/2012 was not challenged by the appellants herein and that adjudication had attained finality. The learned Counsel referred to the averments in Civil Application No.942/2017 and submitted that on the principles of *resjudiciata* and in view of the decision in *Premier Tyres Limited v.Kerala State Road Transport Corporation AIR 1993 SC 1202*, the present appeal was not maintainable.

In reply to the aforesaid submissions, the learned Counsel for the appellants submitted that as the entire order of the Joint Charity Commissioner was set aside in Regular Civil Application No. 28/12 as well as in Regular Civil Application No.31/2012, nothing was required to be challenged at the instance of the present appellants in so far as Regular Civil Application No. 31/2012 was concerned. The present appeal was therefore maintainable. It was further submitted that even if the list at Exhibit-12 was admitted, it would not mean that the question of arrears could not be agitated. The Objectors had issued a notice for payment of arrears of membership and as per Clause (10) of the bye-laws payment of subscription was necessary for being a valid member. It was submitted that the appeal as filled deserves

to be allowed.

7. In view of aforesaid submissions, the following point arises for determination:

Whether the judgment in Regular Civil Application No. 28/2012 deserves to be interfered and whether the change as reported is valid?

8. I have heard the learned Counsel for the parties at length and I have also perused the records of the case. After giving due consideration to the respective submissions, in my view there is no case made out to interfere with the impugned judgment and the Change Report is valid. The record indicates that initially proceedings under Section 41A of the said Act were filed by the appellants herein with a prayer that the non-applicants therein be directed not to hold any election on 12-12-2004 and also to restrain the said non-applicants from issuing any notice of meeting in contravention with the bye-laws of the Society. In those proceedings a list of members at Exhibit-12 was placed on record by the present appellants. The parties to the said proceedings did not raise any objection to that list of members and the same was admitted by them. There was a consent given by both the parties that elections would be held from the members as mentioned in the list at Exhibit-12. On that basis the proceedings under Section

41A of the said Act were disposed of on 15-3-2005 and the appellant No.1 was directed to hold elections of the Managing Body as per provisions of the bye-laws within a period of one month. Pursuant to this order, the appellant No.1 issued notice dated 3-4-2005 at Exhibit-27 and convened a meeting of the General Body that was to be held on 14-4-2005. At Exhibit-28 notice issued dated 7-4-2005 to the members as shown in Exhibit-12 which was the list of members. The notices were sent under certificate of posting. Thereafter on 14-4-2005 the said elections were held in which the new body came to be elected.

9. As per the bye-laws of the Society at Exhibit-24, Clause 3 thereof indicates the category of members. Subscribers are required to pay subscription of Rs. 10/- every year. There is no specific Clause in the said bye-laws stipulating the consequence of non-payment of the requisite subscription nor is there any provision which debars the members who are in arrears of subscription from participating in the election. The learned Counsel for the appellant has however, relied upon the provisions of Section 15 of the Societies Registration Act, 1860 as well as the judgment in *Hyderabad Karnataka Education Society (supra)* to urge that a member in arrears of subscription cannot be eligible to continue as a member of the Society. The facts of the said decision

indicate that under the bye-laws of the Hyderabad Karnataka Education Society, Rule 7A requires a member to pay membership fees annually in advance and failure to pay the subscription before the end of the month of March of any year had the effect of putting an end to the membership automatically. While considering the challenge to that Rule, the Hon'ble Supreme Court read down the same and held that though a member was required to pay subscription as prescribed, failure to pay the same would not have the effect of automatically terminating the membership. On the contrary, such member could apply to the Society to point out the reasons for not complying with said Rule 7A and if a valid ground was made out by such member, Rule 7A would not have the effect of dismembering him from membership. In the present case, the bye-laws of the trust do not prescribe that on subscription not being paid, the defaulting member would automatically lose his membership. Thus in absence of any such provision in the bye-laws providing for automatic secession of membership, the ratio of the decision in *Hyderabad Karnataka Education Society (supra)* cannot assist the case of the appellant. Moreover, the present proceedings are under Section 22 of the said Act and not under Section 15 of the Societies Registration Act, 1860.

10. Another aspect of the matter which is found relevant is

that the appellants had accepted the list of valid members at Exhibit-12. It was open for the appellants to have accepted such list subject to the stipulation that the members named therein should not be in arrears of subscription. However, the acceptance of that list was not made conditional. On the contrary, the appellants undertook to hold elections as per that list. Further in the contempt proceedings, the appellants relied upon the elections that were held on 14-4-2005 with a view to exonerate themselves from the charge of being guilty of having committed contempt of this Court. This conduct indicates accepting the membership of the Reporting Trustee and other members when the same suited the interest of the appellants and thereafter disputing the same whenever found convenient. Having accepted the membership as per list at Exhibit-12, it was not open for the appellants to have subsequently taken a stand that some of those members were in arrears of subscription. On the principle of approbate and reprobate, such stand cannot be permitted to be taken. The observations in *Ghanshamdas S. Panpalia (supra)* support the submissions made on behalf of respondent No.1.

11. In so far as the contention that a demand for paying the arrears of subscription was made to the defaulting members, such notice is not placed on record. There is an admission by the

Reporting Trustee as regards issuance of such notice. If the appellants had themselves issued such notice, a copy thereof ought to have placed on record to indicate the manner in which the arrears of subscription were demanded. The same has however not been done. The said admission by itself therefore would not further the case of the appellants in absence of any such consequence being provided in the bye-laws.

12. It is thus seen that the learned Dy. Charity Commissioner as well as the learned District Judge rightly found that the change as reported that took place on 14-4-2005 was valid. The learned Joint Charity Commissioner however erroneously held that the defaulting members were debarred from participating in the said election. In absence of any such bar being stipulated under the bye-laws, the elections held on 14-4-2005 on the basis of the admitted list of members at Exhibit-12 cannot be faulted. I do not find any reason to interfere with the acceptance of the Change Report as done by the impugned order. Though reliance was placed on behalf of the appellants on the decision in *Jagat Narayan Singh Vs. Swarup Singh 1980 Mh.L.J. 372*, there is no material on record to hold that the change as reported was not legal and valid. The point as framed stands answered accordingly.

13. As a result, First Appeal No. 1435/2017 stands dismissed with no order as to costs.

JUDGE

//MULEY//