IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

942 WRIT PETITION NO.6315 OF 2022

BHAUSAHEB KISAN NAIKWADI AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA THROUGH ITS SECRETARY AND OTHERS
...
Advocate for Petitioners : Mr. Nagargoje Ankush N.
AGP for Respondent/State : Mr. S. N. Morampalle.
Advocate for Respondent Nos. 2 to 6 : Mr. K. N. Shermale.

CORAM	:	**MANGESH S. PATIL, J.**
DATE	:	**22.06.2022.**

PER COURT :

Learned advocate Mr. Shermale who appears for respondent Nos. 2 and 4 submits that he has instructions to appear even on behalf of respondent No. 5 and 6. He also informs that the respondent No. 3 is no more.

2. Leave is granted to the petitioners to correct the title of petition to be carried out immediately.

3. Heard.

4. Rule. The Rule is made returnable forthwith. At the joint request of both the sides the matter is heard finally at the stage of admission.

5. The petitioners are the complainants who invoked the powers of the Assistant Charity Commissioner contained in Section 41-B of the Maharashtra Public Trust Act, 1950 (hereinafter 'the Act'), raising several issues regarding the alleged mismanagement. During the course of enquiry they submitted application (Exh. 16) seeking a direction to one Laxman Maruti Dange whose affidavit was filed by the respondent Nos. 2

to 4 in support of their stand, to be called for facing cross-examination at the petitioners' instance. By one of the two orders under challenge, the learned Assistant Charity Commissioner rejected that application.

6. Again, the respondent No. 6 who is the auditor and has no direct nexus with the Trust in question having been made a party to the enquiry, submitted his response *inter alia* pointing out that he was merely an auditor and had audited the accounts of the Trust on the basis of the record that was made available to him. By moving application (Exh. 17) the petitioners solicited a direction from the learned Assistant Charity Commissioner calling upon the respondent No. 6 to furnish the record of the Trust which was made available to him and on the basis of which he had audited the accounts. The learned Assistant Charity Commissioner rejected this application simply by observing that in view of the rejection of the application (Exh. 16) refusing to call Laxman Maruti Dange for cross-examination, even this application (Exh. 17) deserved to be rejected.

7. Both these orders are under challenge in this writ petition.

8. I have heard the learned advocates of both the sides. There cannot be any dispute as to the nature of the enquiry to be undertaken by the learned Assistant Charity Commissioner under Section 41-B of the Act. It contains various provisions as to the manner in which the enquiry should proceed. The provision reads as under :

> "41-B- Power to institute inquiries :
>
> (1) On receipt of a complaint in writing from any person having interest in respect of any public trust or *suo motu* the Charity Commissioner or Deputy or Assistant Charity Commissioner may institute an inquiry with regard to charities, or a particular charity

or class of charities either generally, or for particular purposes.

(2) The officers aforesaid may either hold the inquiry themselves, or entrust such inquiry to the officer authorised under sub-section(1) of section 37.

(3) For the purpose of any such inquiry, the officer holding the inquiry may, by notice, require any person to attend at a specified time and place and give evidence or produce documents in his custody or control which relate to any matter in question at the inquiry.

(4) For the purpose of any such inquiry, evidence may be taken on oath and the person holding the inquiry may for that purpose administer an oath under the Indian Oaths Act, 1873, or may instead on administering an oath, on solemn affirmation require the person to make and subscribe a declaration of the truth of the matters about which he is examined.

(5) The necessary expenses of any person of his attendance to give evidence or produce documents for the purpose of the inquiry shall be paid in the manner prescribed.

(6) After the completion of the inquiry, the person holding the inquiry (not being the Charity Commissioner) shall submit his report to the officer who entrusted such inquiry to him.

(7) The Deputy or Assistant Charity Commissioner of the region concerned shall submit his own report or report received by him under this section to the Charity Commissioner or he may proceed under section 38, if necessary, or send a copy of the report to

the Charity Commissioner with his remarks thereon. The Charity Commissioner may, if he is satisfied that there is a *prima facie* case against the trustees, take such steps as are necessary under the provisions of this Act.

(8) The Charity Commissioner may himself also call for the proceedings of any inquiry made under this section for such action as he may think fit."

As can be appreciated, the enquiry contemplates recording of evidence of both the sides and then reaching a conclusion in the form of a report and also provides for the further course to be followed by the learned Assistant Charity Commissioner depending upon the conclusion.

9. Section 73 of the Act lays down that the officer holding an enquiry under the Act will have the same powers as are vested in civil courts in respect of the specified matters as laid down in the Code of Civil Procedure like proof of facts by affidavits, summoning and enforcing the attendance of any person and examining him on oath, ordering discovery and inspection, compelling the production of documents and issuing commission. It reads as under :

"73 **Officers holding inquiries to have powers of civil court**

In holding inquiries under this Act, the officer holding the same shall have the same powers as are vested in courts in respect of the following matters under the Code of Civil Procedure, 1908 in trying a suit -

(a) proof of acts by affidavits,

(b) summoning and enforcing the attendance of any person and examining him on oath,

(c) ordering discovery and inspection, and compelling the production of documents.

(d) issuing of commissions.

Provided that, while holding enquiry under section 22 of the Act, the Assistant or Deputy Charity Commissioner shall record the evidence in the form of affidavits only subject to the cross-examinations of the deponent, if permitted by him in appropriate case.

10. Considering the aforementioned provisions it is apparent that the enquiry under Section 41-B of the Act has to be strictly in accordance with the provisions discussed herein above. It appears that after the petitioners filed a complaint, the replies were filed by the respondents and in support of their stand the respondent Nos. 1 to 4 had submitted the affidavit of Laxman Maruti Dange. It is not that this was the affidavit called for by the learned Assistant Charity Commissioner to be submitted in proof of the facts. It is evident that the respondent Nos. 1 to 4 on their own, to substantiate their contentions in the written statement/say had filed this affidavit. Going by the proviso to Section 73 of the Act, the enquiries under the Act do not contemplate any cross-examination as such in any other enquiry except an enquiry into a change report submitted under Section 22. If really the legislature had intended that there should be examination and cross-examination of the witnesses, it would not have come out with the proviso with such a wording requiring recording of evidence in the form of affidavits subject to the cross-examination of the deponent in only change report enquiries under Section 22. Therefore, apart from the fact that the affidavit of Laxman Maruti Dange was not furnished at the instance or upon the direction of the learned Assistant Charity Commissioner as a proof or otherwise of the facts, there was no question of subjecting him to any cross-examination. No fault can be found with the observations and the conclusions of the learned Assistant Charity Commissioner refusing to oblige the petitioners, permission to cross-examine the witness.

11. So far as the other order under challenge, refusing to entertain the application (Exh. 17) whereby the petitioners had solicited a direction to the respondent No. 6-auditor to furnish the documents, in fact the application has not been decided objectively. The learned Assistant Charity Commissioner has merely refused to pass any order in view of the order passed by him on the application (Exh. 16). To this extent, the order on the application (Exh. 17) is not sustainable in law. When the aforementioned provisions confer upon the learned Assistant Charity Commissioner various powers of a civil court as laid down under Section 73 of the Act, the learned Assistant Charity Commissioner ought to have passed appropriate order on this application instead of summarily rejecting it without recording reasons.

12. The Writ Petition is partly allowed.

13. The petition to the extent putting up challenge to the order passed on application (Exh. 16) is dismissed. However, the order passed by the learned Assistant Charity Commissioner on the application (Exh. 17) is quashed and set aside. The learned Assistant Charity Commissioner shall decide that application on its own merits by extending opportunity to both the sides of being heard.

14. The Rule is made absolute in above terms.

(MANGESH S. PATIL, J.)

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