

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

SECOND APPEAL NO. 191 OF 2011
WITH
SECOND APPEAL NO. 192 OF 2011

SECOND APPEAL NO.191/2011.

1. Smt. Lalita Panjabrao Phalke,
Aged about 60 years,
 2. Shri Panjabrao Mohanji Phalke,
Aged about 65 years,
 3. Shri Nitin Panjabrao Phalke,
Aged about 43 years,
 4. Shri J.N.Chavne,
Aged about 50 years
 5. Shri Murlidhar B. Nigot,
Aged about 60 years
 6. Smt. Nilima Murlidhar Nigot,
Aged about 50 years
 7. ~~Smt. S.M.Phalke,~~
~~Aged about 40 years~~
- All 1 to 7 R/o. Telkamptee, Tahsil:
Kalmeshwar, Dist. : Nagpur

.... APPELLANTS

// VERSUS //

1. Shri Jeevan Tulshiram Phalke,
Aged about 55 years
 2. Shri Dnyaneshwar Manikrao Nigot
Aged about 50 years
 3. Smt. Shakuntala Madhukar Phalke,
Aged about 55 years
- All 1 to 3 R/o. Telkamptee, Tahsil :
Kalmeshwar, Dist. Nagpur

.... RESPONDENTS.

WITH
SECOND APPEAL NO. 192/2011

Shri Panjabrao Mohanji Phalke (Dead)

1. Smt. Lalita Panjabrao Phalke
Aged about 73 years.
2. Shri Nitin Panjabrao Phalke
Aged about 50 years
3. Shri Janrao Nilkanthrao Chavne
Aged about 61 years
4. Murlidhar Bhaiyyaji Nigot
Aged about 57 years
5. Smt. Nilima Murlidhar Nigot,
Aged about 48 years

All Applicant Nos. 1 to 5 Residents of
Telkamptee, Tah. Kalmeshwar, Dist.
Nagpur.

// VERSUS //

Shri Jeevan Tulshiram Phalke,
Aged about 55 years, R/o. Telkamptee,
Tahsil: Kalmeshwar, District: Nagpur.

.... RESPONDENTS.

Shri Sunil V. Manohar, Sr.Advocate a/b. Shri A.A.Naik, Advocate and Shri Y.N.Sambre, Advocate for the appellants.
Shri B.H.Shambharkar, Advocate & Shri S.D.Chande, Advocate for Respondents.

CORAM : ANIL S. KILOR, J.
DATED : MAY 03, 2023.

ORAL JUDGMENT :

1. Leave to amend the prayer clause of Second Appeal No.191 of 2011 is granted. The amendment be carried out forthwith.

2. Heard.

3. The present appeals arise out of the decision allowing the Change Report No.1176 of 2003 and rejecting the Change Report No.788 of 2000 of a Trust viz. Chandrakant Shikshan Sanstha, Telkamptee, District : Nagpur, which was established in the year 1968.

4. Under Section 41D of the Maharashtra Public Trusts Act, 1950 (hereinafter referred to as the “Act of 1950”) a proceeding came to be initiated for suspension, removal and dismissal of President and Secretary of the above referred trust.

5. In the said proceedings namely Application No.6 of 1995 the Joint Charity Commissioner passed a judgment and order on 30/08/2003 holding that the charges against the trustees namely Punjabrao Phalke and Madhukarrao Phalke, Secretary and President, respectively, have not been proved and therefore, the application under Section 41D of the Act of 1950 was dismissed. However, it was directed to enroll new general body members by calling applications by making paper publication.

6. The above referred directions to enroll members, came to be challenged in Writ Petition No.946 of 2004 and in the meantime the paper publication was made, in response to which 44 applications were received and accordingly membership of 41 members was confirmed.

7. Thereafter, elections were held, in which new managing body was elected. Accordingly, the Change Report No.1176 of 2003 was filed.

8. The another Change Report No.788 of 2003 was filed as Shri M.M.Phalke, Shri M.A. Suke and Sau. S.M.Phalke tendered

their resignations which were accepted and as Shri Gawali had expired, the vacancies occurred because of the same, were filled in by passing a resolution in general body meeting dated 24/02/2002.

9. The Change Report No.1176 of 2003 was rejected by the Assistant Charity Commissioner, Nagpur vide judgment and order dated 28/04/2008. The same was carried in the appeal under Section 70 of the Act of 1950 by the respondent. The said appeal No.17 of 2008 came to be decided by the Joint Charity Commissioner, Nagpur vide judgment and order dated 30/11/2010, reversing the judgment and order of the Assistant Charity Commissioner, Nagpur dated 28/04/2008 and thereby accepting the Change Report No.1176 of 2003. The appellant then approached to the learned District Judge, Nagpur by filing Regular Civil Application No. 34 of 2010 under Section 72(1) of the Act of 1950. The learned District Judge, vide impugned judgment and order dated 28/04/2011, dismissed the said application confirming the judgment and order of the Joint Charity Commissioner, Nagpur dated 30/11/2010. Second Appeal No. 192 of 2011 is arising out of the said judgment and order dated 28/04/2011 passed by the

District Judge-14, Nagpur in Regular Civil Application No.34 of 2010.

10. Similarly, Change Report No.788 of 2000 was accepted by the Assistant Charity Commissioner, Nagpur vide judgment and order dated 28/04/2008. The same was carried in appeal under Section 70 of the Act of 1950 by the respondent. The said Appeal No.13 of 2008 came to be decided by the Joint Charity Commissioner, Nagpur vide judgment and order dated 30/11/2010, reversing the judgment and order of the Assistant Charity Commissioner, Nagpur dated 28/04/2008 and thereby rejecting the Change Report No.788 of 2000. The appellants then approached the learned District Judge, Nagpur by filing Regular Civil Application No. 32 of 2010 under Section 72(1) of the Act of 1950. The learned District Judge, vide impugned judgment and order dated 28/04/2011, dismissed the said Regular Civil Application No.32 of 2010 confirming the judgment and order of the Joint Charity Commissioner, Nagpur dated 30/11/2010. Second Appeal No. 191 of 2011 is arising out of the said judgment and order dated 28/04/2011 passed by the District Judge-14, Nagpur.

11. After filing of these second appeals the Writ Petition 946 of 2004 came up for hearing and this Court considering the fact that these appeals are pending, passed the following order:

“11. In view of the aforesaid position, it is not a fit case to exercise the jurisdiction under Articles 226 and/or 227 of the Constitution of India to disturb the situation and it is open for the parties to agitate such question in the second appeals.

12. In the result, the writ petition is dismissed. Rule is discharged. No order as to costs.”

12. Thus, this Court while disposing of the Writ Petition No. 946 of 2004 permitted both the parties to raise a challenge to the judgment and order dated 30/08/2003 passed by Joint Charity Commissioner in Application No. 6 of 1995, in these appeals.

13. In these appeals, therefore, a challenge is raised to the common judgment and order dated 28/04/2011 passed on Regular Civil Application Nos. 32 of 2010 and 34 of 2010 passed by the District Judge-14 and Additional Sessions Judge, Nagpur and to the judgment and order dated 30/08/2003 passed by Joint Charity Commissioner in Application No. 6 of 1995.

14. This Court in the present appeals, has framed the following substantial questions of law on 28/01/2013:

- (1) Whether the learned Charity Commissioner has jurisdiction under Section 41A of the Bombay Public Trusts Act, 1950, to issue directions to the Trust to enroll the members in accordance with the provisions of the constitution of the Trust ?
- (2) Whether, in the facts and circumstances of the case, it can be said that the estoppel operates against the appellants, when they have taken some steps to implement the order passed under Section 41A of the Bombay Public Trusts Act ?

Thereafter, this Court vide order dated 17/03/2023 has framed the following additional substantial questions of law :

- (3) Does the Joint Charity Commissioner have any jurisdiction / powers to direct induction of fresh members and holding of a fresh election in a proceeding filed under Section 41(D) of the Bombay Public Trusts Act?
- (4) Have not the learned Court and Authority below failed in performing their statutory obligation under Order 41 Rule 31 of the Code of Civil Procedure by not framing points for determination and also not recording findings on all the points relevant for adjudication?

15. I have heard the learned counsel for the respective parties.

16. Shri Manohar, learned Senior Advocate for the appellant submits that, Section 41D of the Bombay Public Trusts Act, 1950 does not give jurisdiction to the Charity Commissioner to direct the Trust to enroll a new member. Hence, the judgment dated 30th August, 2003 in application No. 6 of 1995, directing the executive body to enroll new general body members, is without jurisdiction.

17. It is further submitted that, Article 19(1)(c) confers right on all citizens to form association or union and the petitioner society is constituted in exercise of that right. It is submitted that Charity Commissioner cannot foist any member on the Trust. Whereas, the right to become a member is to be determined by the Managing Committee in accordance with bye-laws. It is submitted that issuance of such directions to make any person as member is in contravention of provisions of Article 19(1)(c) of the Constitution of India. For this purpose, he has placed reliance on the judgments of the Hon'ble Supreme Court of India in the case of *Smt. Damyanti*

Naranga Vs. The Union of India and others, reported in **AIR 1971 SC 966** and the judgments of this Court in the case of *Karvenagar Sahakar Grisha Rachana Sanstha Maryadit, Pune and another Vs. State of Maharashtra and others*, reported in **AIR 1989 Bom. 392**, and in the case of *Rajaram Bapu Patil Sahakari Sakhar Karkhana Ltd. Vs. Commissioner of Sugar*, reported in **2006(5) Bom.C.R. 537**.

18. It is submitted that since the Joint Charity Commissioner has exceeded his jurisdiction while exercising powers under Section 41D of the Act of 1950, the judgment and order dated 30/08/2003 is nullity in the eyes of law and therefore, in this case estoppel will not operate against the appellants for the reasons that the appellants have taken some steps in implementation of impugned judgment and order dated 30/08/2003.

19. It is further submitted that the Courts below failed to frame points for determination as mandated under Order 41 Rule 31 of the Code of Civil Procedure, hence, the impugned judgment and order passed by the District Judge vitiates.

20. On the other hand, Shri Shambharkar, learned counsel for the respondents supports the impugned judgment and order and draws attention of this Court to the various findings recorded by the learned District Judge while passing the impugned order.

21. It is submitted that the Joint Charity Commissioner has recorded the reasons pointing out necessity to issue directions to enroll members. He, therefore, submits that no illegality has been committed by the Joint Charity Commissioner in directing to enroll the members.

22. He further submits that the action taken pursuant to direction by the Joint Charity Commissioner, Nagpur dated 30th August, 2003, cannot be termed as illegal, hence, there is no illegality committed by the Courts below in accepting the change reports submitted by the respondents and rejecting the change report submitted by the appellants. He, accordingly, prays for dismissal of the present appeals.

23. In light of rival contentions, I proceed to examine the controversy involved in the present appeals along with the validity of

judgment and order dated 30/08/2003 passed by the Joint Charity Commissioner, Nagpur under Section 41-D of the Act of 1950.

24. Bare perusal of the impugned judgment and order dated 30/08/2003 would reveal that it leaves no element of doubt that the application under Section 41D of the Act of 1950 was dismissed with the findings that the charges have not been proved against the trustees namely, Punjabrao Mahanji Phalke and Madhukarrao Mahanji Phalke. However, while dismissing the said proceedings, the learned Joint Charity Commissioner issued directions for enrollment of members by calling application by making paper publication.

25. It is necessary to reiterate here that, to form an association is guaranteed under Article 19(1)(c) of the Constitution of India. It is a settled law that the right to form an association necessarily implies that the persons forming the association have also the right to continue to be associated with only those whom they voluntarily admit in the association. In this regard, I am supported by the following authorities.

26. The Hon'ble Supreme Court of India in the case of *Smt. Damyanti Naranga v. Union of India*, reported in AIR 1971 SC 966, while dealing with an issue about the right to form association, has observed thus :

“6. It was argued that the right guaranteed by Article 19(1)(c) is only to form an association and, consequently, any regulation of the affairs of the Association, after it has been formed, will not amount to a breach of that right. It is true that it has been held by this Court that, after an Association has been formed and the right under Art.19 (1)(c) has been exercised by the members forming it, they have no right to claim that its activities must also be permitted to be carried on in the manner they desire. Those cases are, however, inapplicable to the present case. The Act does not merely regulate the administration of the affairs of the Society; what it does is to alter the composition of the Society itself as we have indicated above. The result of this change in composition is that the members, who voluntarily formed the Association, are now compelled to act in that Association with other members who have been imposed as members by the Act and in whose admission to membership, they had no say. Such alteration in the composition of the Association itself clearly interferes with the right to continue to function as members of the Association which was voluntarily formed by the original founders. The right to form an association, in our opinion, necessarily implies that the persons forming the Association have also the right to continue to be associated with only those whom they voluntarily admit in the Association. Any law, by which members are

introduced in the voluntary Association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association. If we were to accept the submission that the right guaranteed by Art. 19(1)(c) is confined to the initial stage of forming an Association and does not protect the right to continue the Association with the membership, either chosen by the founders or regulated by rules made by the Association itself, the right would be meaningless because, as soon as an Association is formed, a law may be passed interfering with its composition, so that the Association formed may not be able to function at all. The right can be effective only if it is held to include within it the right to continue the Association with its composition as voluntarily agreed upon by the persons forming the Association. This aspect was recognised by this Court, though not in plain words, in the case of G.K.Ghosh and Another v. E.X. Joseph (1963) Supp 1 SCR 789 = (AIR 1963 SC 812) ...".

27. This Court in the case of *Karvenagar Sahakari Griha Rachana Sanstha Maryadit ..vs.. State of Maharashtra*, reported in **AIR 1989 Bombay 392**, and in the case of *Rajaram Bapu Patil Sahakari Sakhar ..vs.. Commissioner of Sugar*, reported in **2006(5) Bom.C.R. 537**, has followed the judgment in the case of *Smt. Damayanti Naranga (supra)*.

28. From the above referred observations, it is evident that the Joint Charity Commissioner cannot foist any member on the trust because the right to become a member is to be determined by the managing body of the trust in accordance with the constitution of the trust otherwise it would alter the composition of the trust itself. The result of such change in composition would that the trustees who formed the trust are compelled to act in that trust with other trustees who have been imposed as trustees and in whose admission to membership they had no say.

29. It is further evident that right to form an association necessarily implies that a persons forming the association have also the right to continue to be associated with only those whom they voluntarily admit in the association. Any law, by which members are introduced in the voluntary association without any option being given to the members to keep them out or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association.

30. Furthermore, it is necessary to appreciate at this stage that, Section 47 of the Act of 1950 deals with power of Charity

Commissioner to appoint, suspend, remove or discharge trustees and to vest property to new trustees. Sub-section (3) of Section 47 deals with the factors to be considered by the Charity Commissioner while appointing a new trustee under sub-section (2) of Section 47 of the Act of 1950.

31. The relevant factors, which the Charity Commissioner shall have regard are (a) to the wishes of the author of that trust, (b) to the wishes of the person, if any, empowered to appoint a new trustee, (c) to the question whether the appointment will promote or impede the execution of the trust.

32. Thus, it can be seen that the Charity Commissioner cannot appoint any trustee under Section 47 of the Act of 1950 without giving regard to the above referred factors stated in sub-section (3) of Section 47 of the Act of 1950. The said provision amply makes it clear again that no trustee can be foisted on the trust by the Charity Commissioner and wishes of the author of the trust or a person empowered to appoint a new trustee are to be taken into consideration with a question whether the appointment will promote or impede the execution.

33. In the above referred backdrop, I revert back to the facts of the present case.

34. In the present matter, the Joint Charity Commissioner vide judgment and order dated 30/08/2003 issued the following directions :

“(1) ...

(2) The present Executive Body on Sch. I headed by Shri M.M.Falke and the non-applicant No.1 as the Secretary of the Trust are hereby directed to enroll new General Body members as per the current Constitution of the Trust, by following the due procedure prescribed thereunder.

(3) The applicants and other teaching and non-teacher staff of the schools run by the Trust and the general public will be at liberty to make the application to the non-applicant no.1 giving necessary details and biodata for being admitted as the members of any of the categories prescribed under the Constitution and by making payment of the necessary subscription.

(4) The non-applicant No.1 is further directed to issue a paper publication in the daily ‘Lokmat’ calling the applications from the willing persons to be enrolled as the General Body Members of the Trust.

(5) It is made clear that the application of a particular person should not be rejected simply because he is from adverse group and cogent reasons should be recorded if a decision is taken to reject his enrollment.

(6) The process of enrollment of new members should be completed by the end of 31-10-2003 commencing from 1-10-2003 and thereafter by appointing suitable Election Officer, fresh election for new Executive Body should be held by the end of 31-12-2003.

(7), (8), (9), (10)”

35. From the above referred directions it can be seen that the Joint Charity Commissioner not only directed to enroll the new general body members but also directed that application of a particular person should not be rejected because he is from the adverse group and cogent reasons should be recorded if a decision is taken to reject his enrollment.

36. Such conditions therefore, amount to foisting members on the trust and thereby infringing the rights to form and continue the association and to determine who shall be member of such association. It is thus, evident that the Joint Charity Commissioner by issuing such directions, has forced the new members on the trust and such compulsion clearly amounts to infraction of the fundamental rights guaranteed under Article 19(1)(c) of the Constitution of India.

37. It is interesting to note that while issuing such directions the only reason given by the Joint Charity Commissioner is that, he was informed that there are only 7 members of the executive body which is also a general body and no new members have been enrolled as per the amended constitution. The Joint Charity Commissioner at the same time failed to appreciate that since inception of the trust there were 7 members in the executive body and general body. Therefore, the said ground cannot be termed as a valid ground to compel the trust to enroll new members.

38. Now, I am moving to the important question i.e. Whether under Section 41D of the Act of 1950, the Joint Charity Commissioner can issue such directions to enroll the members?

39. At this juncture therefore, it is necessary to refer to Section 41D of the Act of 1950, which reads thus:

“41D. Suspension, removal and dismissal of trustees. -

(1) The Charity Commissioner may, either on application of a trustee or any person interested in the trust, or on receipt of a report under section 41B or suo motu may suspend, remove or dismiss any trustee of a public trust, if he,-

(a) makes persistent default in the submission of accounts report or return;

(b) wilfully disobeys any lawful orders issued by the Charity Commissioner under the provisions of this Act or rules made thereunder by the State Government;

(c) continuously neglects his duty or commits any mal-feasance or misfeasance, or breach of trust in respect of the trust;

(d) misappropriates or deals improperly with the properties of the trust of which he is a trustee; or

(e) accepts any position in relation to the trust which is inconsistent with his position as a trustee;

(f) if convicted of an offence involving moral turpitude.

(2)(a) When the Charity Commissioner proposes to take action under sub-section (1) the Charity Commissioner may issue notice to the trustee or the person against whom the action is proposed to be taken only when he finds that there is prima facie material to proceed against the said person.

(b) The trustee or person to whom a notice under clause (a) is issued shall submit his reply thereto within fifteen days from the date of receipt of notice.

(c) If the person fails to give reply to the notice issued under clause (a) or the Charity Commissioner finds that the reply is not satisfactory, the Charity Commissioner shall frame charges against the said person within fifteen days of the filing of the reply or the default in the filing of reply, as the case may be, and give the said person an opportunity of meeting such charges and after considering the evidence adduced against him and in his favour, may pass order regarding suspension or removal or dismissal within three months from the date of framing of charges. If it is not practicable for the Charity Commissioner to issue notice, frame charges and

pass final order within stipulated time, he shall record reasons for the same.

(d) The order of suspension, removal or dismissal shall state the charges framed against the trustee, his explanation, if any, and the finding on each charge with reasons therefor.

(3) Pending disposal of the charges framed against a trustee the Charity Commissioner may place the trustee under suspension.

(4) Where the Charity Commissioner has made an order suspending, removing or dismissing any trustee and such trustee is the sole trustee or where there are more than one trustee and the remaining trustees, according to the instrument of trust, cannot function or administer the trust without the vacancy being filled, then in that case the Charity Commissioner shall appoint a fit person to discharge the duties and perform the function of the trust, and such person shall hold office only until a trustee is duly appointed according to the provisions of the instrument of trust.

(5) [xxx]

(6) An appeal shall lie to the Court against the order made under sub-section(1) as if such decision was a decree of a district court as a court of original jurisdiction from which an appeal lies, within sixty days from the date of the order.

(7) The order of the Charity Commissioner shall, subject to any order of the Court or in appeal, be final.”

40. Section 41D of the Act of 1950 can be summarized for the purpose of the controversy involved in this case, in a way that the said provision is for suspension, removal of trustees on an

application of the trustee or any person interested in the trust or on receipt of a report under Section 41D or *suo motu* on the grounds mentioned in sub-section (1)(a) to 1(f) of Section 41D of the Act of 1950. The Charity Commissioner can appoint a fit person to discharge the duties and perform the function of the trust in case of suspension, removal or dismissal of any trustee. Such appointment, however, shall be only until a trustee is duly appointed according to the provisions of the instrument of the trust.

41. Thus, bare reading of Section 41D does not give any authority or power to issue direction to the trust to enroll new members, except appointing a fit person to discharge the duties and perform the function of the trust in case of suspension, removal or dismissal of any trustee, until a trustee is duly appointed.

42. Section 41A of the Act of 1950 relates to power of Commissioner to issue directions to any trustee of a public trust or any person connected therewith to ensure that the trust is properly administered and income thereof is properly accounted for or duly appreciated and applied to the objects and for the purposes of the trust.

It further empowers the Charity Commissioner to give directions if the property of the trust is in danger of being wasted, damaged or alienated or wrongfully sold, removed or disposed of.

43. It is a settled law that under Section 41A of the Act of 1950 the Charity Commissioner cannot direct to enroll the members or interfere with any matter relating to election.

44. To substantiate this point, I may refer to the judgments of Coordinate Bench of this Court in the case of *Lahudas..vs.. State of Mah.*, reported in **1993 Mh.L.J. 1056** has held thus:

“24. The underlying idea of Section 41-A is that those directions should relate only to administration of the public trust or for proper accounting or for appropriate application of the income to the objects of the said trust. Such directions could be issued only in respect of the matters falling under Sections 32 to 41 of the Act and not beyond that, because whatever loss or damage to the trust is likely to happen, that would be sequel to the breaches under Sections 32 to 41 of the Act. Bombay Public Trusts Act does not envisage any loss or damage beyond these provisions in respect of mismanagement or wrongful accounting. Elections are wholly beyond the purview of those provisions. Section 32 is in Chapter V of the Bombay Public Trusts Act. It provides for maintenance of accounts, auditing of accounts, preparation of balance sheet etc. Sections 32 and 33, therefore, require that the accounts of the society

should be properly maintained in order to ensure that the property or the funds of the society are not wrongly expended away without proper accounting. Under Section 34, auditors are under duty to prepare balance sheet and income and expenditure account. The auditor has to point out irregularities. Under Section 35, the trustees are bound to invest the funds of the trust in the manner indicated in that section. Section 36 relates to alienation of the immovable property of the public trust. Section 36-A is in respect of powers and duties and restrictions on the trustees. It enjoins upon the trustees to exercise powers in respect of properties incidental to prudent and beneficial management of the trust. There is a restriction on borrowings of money by way of mortgage or otherwise except without permission of the Charity Commissioner. Section 36-B requires the public trust to maintain register of all movable and immovable properties and this is subject to audit. Section 37 in Chapter VI of the said Act provides for the powers of the Charity Commissioner, Deputy Charity Commissioner or Assistant Charity Commissioner to carry out inspection and supervision over the trusts. Section 38 calls upon the auditors to prepare reports about the accounts. Section 39 relates to the report to the Charity Commissioner about the complaints relating to gross negligence, breach of trust, misappropriation or misconduct on the part of the trustees resulting in loss to the trust. Section 40 requires the Charity Commissioner to scrutinise those reports and compliance and determine the amount of loss to the public trust because of the negligence, breach of trust etc. on the part of the trustees. Section 41 provides that the amount of loss caused by trustee or any person could be surcharged on that person. Under Section 50 of the said Act, it is provided that the loss caused to the trust could be recovered from the trustee responsible for it by a suit.

25. This would show that the main safeguards that have to be kept in mind by the Charity Commissioner or the Joint Charity Commissioner are in respect of the property and other affairs of society. If there is negligence in the management of affairs of the society, directions could be issued but the scope of Section 41-A would certainly not cover the interference with the process of election and also interference in respect of the members entitled to vote. They are the disputes which can be corrected by filing change reports after the elections under Section 22 of the Act. I, therefore, feel that the Joint Charity Commissioner should not have entertained the application No. 3/92 filed by Halge and Deshmukh. They had the remedy to approach the Assistant Charity Commissioner questioning the change report. Merely because no further action was likely to be taken on the part of the society or others to challenge the voters' list, the Charity Commissioner did not acquire any powers to look into these affairs and rectify them by virtually stalling the election.”

45. Similarly, it would be beneficial to reiterate the law laid down by coordinate bench of this Court in the case of *Gram Vikas Samittee ..vs.. Darshanlal*, reported in **2009(5) Mh.L.J. 457**, which read thus :

“32. As regards the scope of direction under section 41-A of the Bombay Public Trust Act, the decision of this court in 2007 (1) Mh.L.J. 48 = 2007 AIR Bombay R 547 Dattatraya Mahadeo Hiware & Others ..vs.. Arjun Sambhaji Shinde & others may also be referred, wherein in paragraph 15 it has been held thus:

"15. Learned counsel Shri R.N. Dhorde, seeks to rely upon Ramdas Shivaji Sakharam and others ..vs.. Karuji Dago Ambade and others (2002(2) Mh.L.J.304): (2002 AIHC 2328) and Asaram Bhimrao Shinde and others ..vs.. State of Maharashtra and others (2001 (4) Mh.L.J.548). In both these matters, it is held that Section 41-A does not empower the Charity Commissioner to remove or to appoint any new committee for the administration of the trust. The purpose of Section 41-A is to ensure that the administration of the trust is properly carried out and there is no mismanagement. The expression "issue direction to any trustee of a public trust or any person connected therewith" as used in Section 41-A, would show that the directions can be issued only against trustees or the persons connected with the trusts. In the present case, the status of the respondent Nos.1 to 3 as members of the educational trust was seriously disputed. The learned Asst. Charity Commissioner did not enquire about the status of the respondent Nos. 1 to 3 and straightway proceeded to allow their application. This approach of the Asstt. Charity Commissioner is improper and erroneous. Consequently, I have no hesitation in holding that the Asstt. Charity Commissioner cannot appoint a committee and the application could not have been allowed to the extent of such appointment."

When Assistant Charity Commissioner cannot direct the appointment of trustees, he would also not be able to direct to enrol members, hold elections and submit change report under section 41-A of the Act. Any such direction would vitiate, if challenged, for it would be illegal exercise of jurisdiction. The decision of this court in 2001 (4) Mh.L.J. 548 = 2002(3) Bom.C.R. 16 Asaram Bhimrao Shinde & others..vs..State of Maharashtra can also be referred in this regard.

33. Yet another judgment which needs to be referred is judgment of this court in 2007 (1) ALL MR 71 Nawalchand Champalal Chaudhari & another ..vs. Joint Charity Commissioner, Nagpur and another, wherein it has been held:

" In the instant case, it is clear that minimum number of trustees to administer the trust itself were not available. Both the groups made rival claims and enrolled members. In such circumstances, permitting any one of them to hold elections will never result in resolving the issue once for all and dispute will continue. In fact both of them have held elections and filed change reports. If change reports furnished by them could not have been entertained, there is no point in asking any one of them to hold elections again. The Assistant Charity Commissioner ought to have seen that provisions of Section 47 of the Act, have been placed in statute book to take care of such contingencies. Initially, the matter should have been considered to fill in requisite number of vacancies so as to see that minimum members required to administer the trust become available and then only a direction under Section 41-A of the Act could have been issued to such trustees. It is only thereafter that the act of such trustees could have been treated as act of trust. The Assistant Charity Commissioner has overlooked this aspect and also provisions of Section 47 of the Bombay Public Trust Act. This was not a case in which powers under Section 41-A of the Act could have been exercised.

In such circumstances, the Assistant Charity Commissioner ought to have referred the matter to Charity commissioner under section 47 of the Act to appoint adequate number of trustees so that there is valid Executive Committee initially to take care of affairs of Trust. As the quorum for meeting of Executive Committee as per constitution is 7 and

three Executive members/ trustees were already available, the Assistant Charity Commissioner ought to have seen that remaining four are first appointed under Section 47 of the Act. The task of holding elections could have been left to such Executive Committee thereafter. By leaving the task of holding elections only to one of the rival groups in the matter, the Assistant Charity Commissioner has added to the problems instead of resolving it."

In these circumstances, if Assistant Charity Commissioner was of the opinion that fresh members need to be enrolled and elections have to be held, it was for him to refer this matter to the Joint Charity Commissioner for action under section 47 of the Bombay Public Trust Act."

46. Thus, from the above referred observations, it is evident that even under Section 41 A of the Act of 1950 interference with the process of election in respect of the members entitled to vote is not permissible. Similarly, the Charity Commissioner cannot direct the appointment of the trustees or enroll members and if any such directions are issued it would vitiate for illegal exercise of jurisdiction.

47. The provision namely Section 47 of the Act of 1950 has been placed in statute book to take care of a contingency where any person interested in public trust may apply to the Charity

Commissioner for the appointment of new trustees, where the trust cannot be administered until vacancy is filled. However, such appointments have to be made having regard to the wishes of the author of that trust, to the wishes of the person, if any, empowered to appoint a new trustee and to the question whether the appointment will promote or impede the execution of the trust.

48. In the circumstances, having considered the jurisdiction of the Charity Commissioner under Sections 41A and 41D of the Act of 1950, I have no hesitation to hold that the directions issued by the Joint Charity Commissioner vide judgment and order dated 30/08/2003 directing to enroll the members and not to reject application of a particular person simply because he is from adverse group, are without jurisdiction.

49. The above referred discussion can be summarized by saying that the directions issued by the Joint Charity Commissioner vide judgment and order dated 30/08/2003 are not only without jurisdiction but also in violation of Article 19(1)(c) of the Constitution of India.

50. It is a well settled law that any order passed by a Court without jurisdiction would be *coram non judice* being a nullity and the same ordinarily should not be given effect to as it is non est i.e. non-existent in the eyes of law. Therefore, the plea about its invalidity can be raised in any proceedings and it is not necessary to claim such declaration and that such an order is void. Moreover, any order passed or action taken pursuant to any order which is a nullity or in furtherance thereof, would also be nullities.

51. Change Report No.1176 was filed by the respondent – Jeevan Tulshiramji Phalke. It is important to note that, as per the directions given by the Joint Charity Commissioner in Application No.6 of 1995 vide judgment and order dated 30/08/2003, 41 members were enrolled. They constituted an executive body and by passing resolution new body has been constituted.

52. Thus, it is clear that Change Report No. 1176 of 2003 was filed pursuant to the action taken in compliance with the directions issued by the Joint Charity Commissioner vide judgment and order dated 30/08/2003. As this Court has come to the

conclusion that the said judgment and order dated 30/08/2003 is a nullity in the eyes of law, the consequence of the same would be that the Change Report No.1176 of 2003 would vitiate. Accordingly, the Change Report No.1176 of 2003 needs to be rejected.

53. As far as Change Report No.788 of 2000 is concerned, it was filed as Shri M.M.Phalke, Shri M.A. Suke, and Sau. S.M.Phalke had tendered their resignation and one of the trustees Shri R.K. Gawali had expired. Accordingly, the said vacancies have been filled in by the recorded trustees by passing a resolution in general body meeting on 24/02/2002. Thus, it does not relate to the directions issued by the Joint Charity Commissioner vide judgment and order dated 30/08/2003. Furthermore, the reasons recorded by the Assistant Charity Commissioner while allowing the said Change Report do not suffer from any illegality or irregularity. Accordingly, the judgment and order dated 28/04/2008 passed by the Assistant Charity Commissioner, Nagpur in Change Report No.788 of 2000 needs to be confirmed.

54. Having held that the judgment and order dated 30/08/2003 is nullity, it cannot be said that the estoppel will

operate against the appellants, because they have taken some steps to implement the judgment and order dated 30/08/2003 passed by the Joint Charity Commissioner.

55. Accordingly, I have answered the substantial questions of law 1, 2 and 3. As far as Substantial Question of Law No.4 is concerned, it does not survive in light of the answers recorded by this Court to the Substantial Questions of Law Nos. 1 2, and 3.

56. In light of above referred observations, the present appeals need to be allowed. Accordingly I pass the following order:

- i) Second Appeal No.191 of 2011 and Second Appeal No.192 of 2011 are allowed
- ii) The Common judgment and order dated 28/04/2011 passed by District Judge-14 and Assistant Sessions Judge, Nagpur in Regular Civil Application No. 32 of 2010 and Regular Civil Application No.34 of 2010 is hereby quashed and set aside.
- iii) The judgment and order dated 30/11/2010 passed by the Joint Charity Commissioner, Nagpur in Appeal No.13 of 2008 and Appeal No. 17 of 2008 is hereby quashed and set aside.

- iv) The judgment and order dated 30/08/2003 passed by Joint Charity Commissioner, Nagpur in Application No.6 of 1995 is hereby quashed and set aside to the extent of Clause Nos.(2) to (7) of the operative order.
- v) The judgment and order dated 28/04/2008 passed by Assistant Charity Commissioner, Nagpur accepting Change Report No.788 of 2000 is hereby confirmed and Change Report No.1176 of 2003 is hereby rejected.

Both the Second Appeals are **disposed of** accordingly.

No order as to costs.

Pending Civil Application(s), if any, shall stand **disposed of**.

(ANIL S. KILOR,J)

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