

(1996) 09 BOM CK 0064

Bombay High Court

Case No: First Appeal No. 701 of 1994

Smt. Virbala K. Kewalram and
Others

APPELLANT

Vs

Shri Ramchand Lalchand and
Others

RESPONDENT

Date of Decision: Sept. 10, 1996

Acts Referred:

- Bombay Public Trusts Act, 1950 - Section 19, 70A
- Bombay Public Trusts Rules, 1951 - Rule 7

Citation: (1997) 1 BomCR 414

Hon'ble Judges: V.H. Bhairavia, J

Bench: Single Bench

Advocate: G.K. Vora, for the Appellant; C.R. Dalvi and L.S. Krishnamurthy for respondent Nos. 1 to 7 and A.S. Gadkari, A.G.P., for the Respondent

Judgement

V.H. Bhairavia, J.

This appeal is filed against the judgment and order passed by the City Civil Judge dated 15th April, 1994 in Charity Application No. 35/93, dismissing the application and confirming the order of the Charity Commissioner passed u/s 70-A of the Public Trusts Act.

2. The proceedings were initiated under the Public Trusts Act before the Deputy Charity Commissioner by the respondents herein by filing an application invoking the revisional jurisdiction u/s 70-A of the Bombay Public Trusts Act and sought order for change report for registration of immovable property bearing C.T.S. No. 400 admeasuring 703 sq. yards. The Trust Deed alleged to have been executed by one Kumbhandas Kewalram, registered at Serial No. 1609 on 31st May, 1963 in the office of Sub-Registrar of Assurance, Bombay on 1st October, 1963, settled the properties mentioned therein admeasuring 1399 sq.yards comprising of C.T.S. No. 400 and

C.T.S. No. 401 admeasuring 588 and 582 sq. mts. respectively. The settler of the Trust Deed Mr. Kumbhandas Kewalram has created a Trust by name "Kewal Baug Trust" and under the said Trust Deed, he has appointed the trustees for execution of the Trust and to carry out the objects of the Trust. The application for registration of the Trust under the Bombay Public Trusts Act was filed in the office of the Charity Commissioner bearing Application No. 147/63 on 22nd June, 1963 but as the details of the properties described in the Trust Deed were not given alongwith that application, the same was not registered and numbered till 1965. In the meantime, the settlor of the Trust Deed Kumbhandas died on 26-7-1964. It reveals that thereafter the Trustees have moved with a Deed of Rectification on 27th September, 1965 declaring that out of the two properties mentioned in the Deed of Trust by the settlor, one property bearing C.T.S. No. 400 admeasuring 703 sq. yards has been wrongly mentioned. Accordingly property bearing C.T.S. No. 400 was deleted from the said schedule of the Trust property. Thereafter, the Trustees executed the Trust Deed as per the wish of the settler and the Trust property was entered in the record in the month of December, 1965. It reveals that the successors of the old trustees moved with a change report being change report No. 56/91 and 894/91 requesting the Dy. Charity Commissioner that the properties mentioned in the Trust Deed are true properties but only one property has been registered as Trust property. Thereafter, the property being C.T.S. No. 400 admeasuring 703 sq.yards which was deleted by the original Trustees came to be included in the schedule of the property of the said Trust. It also reveals that both the change reports came to be dismissed by order dated 18-11-1991 by the Deputy Charity Commissioner holding that the Trust was having only one immovable property as the Public Trust Property. It reveals that after the dismissal of the application for change report, the present respondents-Trustees challenged the order passed in Application No. 147/65 dated 22-11-1965 before the Charity Commissioner being Application No. 6/93 u/s 70-A of the Bombay Public Trust Act. Under the revisional power, the learned Charity Commissioner has modified the order passed by the Deputy Charity Commissioner in Application No. 147/65 dated 22nd November, 1965, by his speaking order dated 25th August, 1993 and both the properties were ordered to be entered in the schedule of the trust property.

3. The present appellants who are the heirs of the deceased Kewalram have challenged that order by filing application bearing Charity Application No. 35/93 in the City Civil Court at Bombay. The said application came to be dismissed by the Judgment and order dated 15th April, 1994. Hence this appeal against that order.

4. The learned Counsel Mr. G.K. Vora appearing for the appellants, contended that the power exercised u/s 70-A of the Bombay Public Trusts Act by the Charity Commissioner, modifying the order passed by the Deputy Charity Commissioner as back as in 1965, is without jurisdiction and barred by lapse of time. The second contention of the learned Counsel that the order passed by the Charity Commissioner under the revisional power is in violation of the mandatory provisions

of section 19 r/w. Rule 7, 7(a) of the said Act. In support of his arguments, the learned Counsel Mr. Vora relied on several authorities as under :---

17 G.L.R. 285,

[Kanbi Manji Abji and Others Vs. Kanbi Velji Manji and Others](#) ,

KEKR Pestonji Jamdar v. Rodabai Khodardad 74 Bom.L.R. 198 ,

[Kuberbhai Shivdas and Another Vs. Mahant Purshottamdas Kalyandas and Others](#) ,

77 Bom.L.R. 167,

[S.G. Jaisinghani Vs. Union of India \(UOI\) and Others](#) ,

10 G.L.R. 992 SC.

5. Section 70-A of the Public Trust Act reads as under :---

"The Charity Commissioner may in any of the cases mentioned in section 70 (either suo motu or on application) call for and examine the record and proceedings of such case before any Deputy or Assistant Charity Commissioner for the purpose of satisfying himself as to the correctness of any finding or order recorded or passed by the Deputy or Assistant Charity Commissioner and may either annul, reverse, modify or confirm the said finding or order or may direct the Deputy or Assistant Charity Commissioner to make further inquiry or take such additional evidence as he may think necessary or he may himself take such additional evidence:

Provided that the Charity Commissioner shall not record or pass any orders without giving the party affected thereby an opportunity of being heard."

The revisional power exercised by the Charity Commissioner u/s 70-A of the Act has been considered by the High Court. The scope and nature of power u/s 70-A of the Act is a revisional power and it is discretionary power. There is no period of any limitation for invoking the power u/s 70-A of the Act by suo motu or by application. In the instant case, on the application of the respondents-Trustees, the Charity Commissioner has exercised the revisional power u/s 70-A and modified the order passed on 6-1-1965 by the Dy. Charity Commissioner i.e. after 28 years. The learned Counsel Mr. Vora submitted that as it is a discretionary power, it is required to be exercised judiciously on principle of law. In the case of [S.G. Jaisinghani Vs. Union of India \(UOI\) and Others](#) , it has been observed that :---

"The absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be continued within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis or a decision taken in accordance with the rule of law."

6. In [Mohamad Haidar Mujawar Vs. Jamal Haidar Mujawar and Others](#), it is observed that :---

"That the revisionary powers u/s 70-A(i) being discretionary and not as a matter of right as in the case of appeal u/s 70(i)(a) (where limitation applies) are not to satisfy the whims of the litigant in fact the powers are limited."

7. In the case of [Kanbi Manji Abji and Others Vs. Kanbi Velji Manji and Others](#), it is observed that :---

"If even after the Charity Commissioner learns about that order he does not take any action within a reasonable period, which will depend on the facts and circumstances of each case and the nature of the order, it may validly be argued that the Charity Commissioner was not justified in invoking the judicial jurisdiction u/s 70(A) of the Act after a lapse of reasonable time, but no hard and fast rule can be laid down as to what should be considered a reasonable period within which the Charity Commissioner should Act u/s 70(A) of the Act because reasonable period would have to be considered in the context of the facts and circumstances of each case and the nature of the order sought to be revised."

8. In view of the above observations it could not be said that the learned Charity Commissioner has no power to invoke the revisional jurisdiction u/s 70(A). The power conferred to the Charity Commissioner u/s 70(A) can be invoked suo motu and it is not barred by law of limitation. However, it is a revisional jurisdiction conferred on the Charity Commissioner and it is a discretionary power. It is to be exercised not arbitrarily but judiciously and within the reasonable time. Once it is held that order under challenge or review is inherently bad-in-law and without jurisdiction, such order could be reviewed and revised under the revisional jurisdiction of the Charity Commissioner and it will not be barred by law of limitation.

9. In the instant case, a Deed of Trust was executed on 31st May, 1963 and application u/s 18 was submitted to the office of the Charity Commissioner on 25th June, 1963. It reveals from the record that this application came to be processed after the settler of the Trust died on 26-7-1964. Thereafter, the Trustees had entered in the same Trust Deed by Registered Deed of Rectification dated 27-9-1965 declaring that the properties described in the Trust Deed, by mistake one of the properties bearing C.T.S. No. 400 admeasuring 703 sq.yards has been included in the Trust Deed i.e. to be deleted from the Trust Deed as Trust Property. Accordingly, enquiry under sections 18 and 19 came to be passed on 22nd November, 1965 and the properties entered into the schedule as a Trust property as per the property described in Columns 2 and 7(a). Admittedly, the properties intended to be given by the settler are two properties under the Trust Deed but after some time, the Trustees by Deed of Rectification, deleted one property and released in favour of the widow and the daughters of the deceased-settler and the Dy. Charity Commissioner

has accepted accordingly. Therefore, the question in the charity proceedings required to be considered whether the Trust created by executing the Trust Deed could be revoked or modified by the Trustees in the absence of express mention in the Trust Deed regarding revocation or modification of the Trust Deed. Admittedly, Trust Deed is silent regarding revocation or modification. The settler of the Trust has also died before the Trust is registered as a Public Trust under the Bombay Public Trust Act and the trustees who were appointed by the settler himself have prepared a Deed of Rectification declaring the property bearing C.T.S. No. 400 is wrongly mentioned in the Trust Deed by the deceased-Settler and therefore, it is deleted and released in favour of widow and the daughters of the deceased-settler.

10. In the case of [Radhika Mohan Nandy Vs. Amrita Lal Nandy and Another](#), it is held that :---

"A dedication of property to a deity is irrevocable, and the rules, if any, laid down by the founder at the time of dedication regulating succession to the office of the shebait should be deemed to be irrevocable also unless the power of revocation is reserved by the grantor. The condition relating to the rule of succession of shebaitship forms an integral part of the dedication itself."

11. In the case of Ramkishorilal v. Kamalnarayan, 1963 Mh.L.J. 428, it is observed that :---

"Where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion, the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. An attempt should always be made to read the two parts of the document harmoniously, if possible; it is only when this is not possible, e.g. where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void."

12. In the instant case, the trust created by executing a Trust Deed which was registered under the Registration Act on the same day i.e. on 31st May, 1963 and a Trust came to be registered as a Public Charitable Trust only in November, 1965 and the Trust came to be registered under the Bombay Public Trusts Act, 1950 as a Public Charitable Trust late in November, 1965. It is submitted that before the Trust registered as a Public Charitable Trust, the Trustees by executing a Trust Deed deleted one property out of the two properties in favour of widow and the daughter of the settler of the Trust. Therefore, the question is whether the trustees are competent to do so. In my view, as observed above, "no". The Trust Deed of the settler is like a last wish-will of the settler. Once a Trust is created, it is irrevocable unless it is expressly desired by the settler himself. In view of the admitted fact that two properties mentioned in the Trust Deed were intended to be the Trust

properties and the income out of that properties to be utilised for the purpose of fulfilling the object of the Trust and in another words, as desired by the settler. The source of income of the Trust is only the properties come under the Trust Deed. The Trustees are the custodian of the Trust property and they were required to manage the property as per the wish expressed in the Trust Deed. Therefore, it is held that the previous trustees were not at liberty to change the documents by moving the deed of rectification relating to the properties of the Trust as described in the Trust Deed. Therefore, the amendment in the said deed of Trust properties carried out in pursuance to the said deed of rectification is bad and the order passed by the Dy. Charity Commissioner dated 22nd November, 1965 is bad. Therefore, the Charity Commissioner modified that order while exercising the revisional jurisdiction u/s 70-A after lapse of time, is not in any manner bad-in-law. u/s 70-A, the Charity Commissioner has been conferred even suo motu revisional power and no limitation is there for the purpose of exercising the revisional power.

13. However, while exercising the revisional power, the statutory requirement provided under the Act requires to be followed while passing the order u/s 70-A, directing to include the property in the schedule of Trust property without holding enquiry u/s 19 r/w. Rule 7 and 7(a) of the Act. Procedure u/s 19 r/w. Rule 7 and 7(a) of the Act is mandatory and it must be followed.

14. The learned Counsel Mr. Dalvi, appearing for the respondents, has vehemently submitted that as the enquiry was already held in respect of two properties in 1965, no further enquiry is required. While going through the record and proceedings, I do not find any reference regarding holding the enquiry in respect of the second property in dispute. In the Charity Application made u/s 18 being Application No. 147/65, in Columns 2 and 3(a), two properties have been mentioned, but it reveals from the record that in the last Column 7(a) the details of Trust properties have been mentioned for the purpose of enquiry u/s 19 r/w. Rule 7, 7(a). If that is the position and the revisional order passed after a lapse of time i.e. after 28 years, the learned Charity Commissioner ought to have sent the matter to the Dy. Charity Commissioner for proper enquiry u/s 19 of the Act. As held in the case of Vithoba Babaji Ghodke v. Balkrishna Ganesh Bhalerao 69 Bom.L.R. 31 :---

Order 1, Rule 8---Procedure applicable to inquiries u/s 19 of Bombay Public Trusts Act, What is-Whether Asst. Charity Commissioner, for the purposes of Act-Ambit of power u/s 70-A-Charity Commissioner, whether can call for record to ascertain its correctness-Public notice whether necessary when application under protest made u/s 19. For finding out the procedure applicable to inquiries u/s 19 of the Bombay Public Trusts Act, 1950, the Bombay Public Trusts Rules, 1951, have to be looked to and not section 76 of the Act. Therefore, in an inquiry u/s 19 of the Act in relation to disputed property situated outside the Greater Bombay Region, the procedure to be followed would be the procedure prescribed under Rule 7 of the Rules i.e. as far as possible, the procedure prescribed in the Civil Procedure Code, 1908, by virtue of

section 17 of the Provincial Small Cause Courts Act, 1887."

15. Admittedly, no such procedure has been followed and on the basis of the order passed by the Charity Commissioner, the property has been ordered to be accumulated in the schedule of the trust property. In my view, this is not permissible under the Law. As observed above, the disputed property remained in possession of the appellant for 28 years and today, we do not know what is the factual position of the said property. It is stated that it is a open plot and still it is vacant. Unless it is enquired, the right, title or any transfer pending this proceedings, it could not be ascertained. The object of inquiry u/s 19 is to find out a clear title of the trust property.

16. In the result, the appeal is partly allowed. The order of the Charity Commissioner is set aside and the matter is sent back to the Charity Commissioner with a direction to make enquiry u/s 19 r/w. Rules 7, 7(a) of the Act and thereafter, the necessary change report may be acted upon. In the meantime, both the parties are directed to maintain status-quo in respect of the disputed land.

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