

MANU/MH/1340/2008

Equivalent Citation: 2008(5)ALLMR366, 2009(1)BomCR179

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 5732 of 2008

Decided On: 09.09.2008

Appellants: **Vijay K. Mehta and Anr.**
Vs.

Respondent: **Charu K. Mehta and Ors.**

Hon'ble Judges/Coram:

A.M. Khanwilkar, J.

Counsel:

For Appellant/Petitioner/Plaintiff: Dinyar Madan, Sr. Cou., Sanjay Jain and Kunal Vajani, Advs.,i/b., Wadia Ghandy and Co.

For Respondents/Defendant: Aspi Chinoy and Nawroz Seervai, Advs., i/b. Thakore Jariwala and Associates for respondent No. 1 and Janak Dwarkadas and J.N. Shahi, Advs.,i/b., Daru Shah and Co. for respondent No. 2 and Akhil Sibal, Adv.i/b., Rupesh K. Bobade, Adv. for respondent No. 9, Pranav Badhekar, Shane Sapelo and Nooruddin Dhillia, Advs.,i/b., Hariani and Co. for respondent Nos. 10 and 11, S.K. Chinchalikar,A.G.P. for respondent No. 17

Case Note:

Trust and Societies - Mismanagement of Trust - Framing of Charges - Section 41-D of the Bombay Public Trust Act, 1950 - Present writ petition has been filed against order by which Joint Charity Commissioner (JCC) framed charges against petitioners-trustees of trust by holding that there is prima facie evidence against them of mismanagement of Trust and misuse of Trust funds - JCC further directed petitioners that they shall not take any policy decision and shall not enter into any financial transactions with regard to trust without prior approval of administrators - Held, impugned order is essentially an "ad interim order" passed by JCC during pendency of application preferred by respondent No. 1 for suspending petitioners during consideration of charges framed against them - Although JCC framed charges has not passed any final order on said application - Indeed, having regard to sweep of Section 41-D of Act, it was open to JCC to pass that order contemporaneously at time of framing of charges itself - However, JCC deferred passing of order of suspension on specious reasoning that till he was able to identify able persons to be appointed as trustees to replace concerned trustees against whom charges have been framed, he would permit said trustees including petitioners to continue as trustees but by imposing fetter on them of not to take any policy decision and enter into any financial transaction with regard to Trust without prior approval of Administrators appointed by Apex Court - Direction issued by JCC requiring petitioners and other charged trustees not to take policy decision and more particularly not to enter into any financial transaction with regard to trust without prior approval of administrators appointed by Apex Court is completely opposed to scheme of not only Section 41-D of Act but to

cardinal principle of conducting affairs of trust which necessarily is prerogative of trustees themselves - Hence, that part of order is set aside - Writ petition is partly allowed - It is directed to JCC to disposed of application filed by respondent no. 1 as expeditiously as possible - Writ petition disposed of

JUDGMENT

A.M. Khanwilkar, J.

1. Heard Counsel for the parties.

2. Rule. Rule made returnable forthwith by consent. Counsel for the respondents waive notice for the concerned respondents. As short question is involved, petition is taken up for final disposal forthwith by consent. During the course of hearing the Counsel for the respondent No. 2 submitted that he would fully support the argument of the petitioners and would pray for transposing respondent No. 2 as petitioner.

3. This writ petition under Articles 226 and 227 of the Constitution of India takes exception to the judgement and order passed by the Joint Charity Commissioner, Greater Mumbai Region, Mumbai dated 23rd July, 2008 below Exhibit-1 in Application No. 17 of 2007. The principal application being No. 17/06 has been filed by respondent No. 1 for initiating action under Section 41-D of the Bombay Public Trust Act, 1950 (hereinafter referred to as "the Act") against the named trustees including the petitioners. The Joint Charity Commissioner (hereinafter referred to as "the J.C.C.") proceeded to pass order on 3rd June 2008 below Exhibit-1 in Application No. 17/06. The purport of the said order is to frame charges against respondent Nos. 1 to 9 in the original application, who are reportedly trustees of Lilavati Kirtilal Mehta Medical Trust (hereinafter referred to as "the Trust"), on the basis of material before him and after giving opportunity to the charged trustees. Besides framing charges against the said trustees (respondent Nos. 1 to 9 in the said application), the J.C.C. by the said order proceeded to issue directions against the respondents before it as also against other trustees to the effect that none of the trustees shall take any policy decision and shall enter into any financial transaction with regard to the Trust, without prior approval of the Administrators Dr. Narendra Trivedi and Hon'ble Justice Shri Halbe, till further orders". In the said order, it is noted by the J.C.C. that as charges have already been framed the same could have been made basis for suspending the trustees in terms of Section 41-D(4) of the Act. However, he (J.C.C.) observed that if the said trustees were to be suspended, it would be necessary to appoint some other fit person(s) to replace the said trustees so that the working of the trust is not affected in any manner. The J.C.C. was of the view that so long as it was not possible to find out appropriate fit person to be appointed in place of the respondents in the said proceedings, it would be appropriate to issue directions to the trustees. That view was on the basis of overall view taken by the J.C.C. in the context of material available with him.

4. The respondents in the said application as well as the other trustees filed two separate writ petitions before this Court questioning the correctness of the view taken by the J.C.C. in the order dated 3rd June, 2008, being Writ Petition Nos. 3849 of 2008 and 3850 of 2008 respectively. Both the writ petitions were heard and disposed off together by the learned Single Judge of this Court on 11th July, 2008. In so far as the opinion recorded by the J.C.C. in his order dated 3rd June, 2008 in relation to framing of charges against the respondents, that has been upheld by the learned

Single Judge of this Court. The learned Single Judge however quashed and set aside the direction issued by the J.C.C. not only against the other trustees who were not respondents in Application No. 17 of 2006 but also at the instance of writ petitioners in Writ Petition No. 3849 of 2008 who had appeared in the proceedings as respondents before the J.C.C.. The respondent No. 1 thereafter moved the same learned Single Judge for clarification of the order, on which praecipe following order came to be passed, on 15th July, 2008.

1. Heard Counsel on the application for speaking to the minutes of order dated 11-7-2008.

2. One of the argument advanced in the aforesaid writ petitions was, pending final decision in respect of nine trustees against whom serious charges have been framed, whether the Joint C.C. was justified in passing an interim order on 3-6-2008, thereby restraining the entire Board of trustees from functioning as trustees against whom there were no allegations made and no charges were framed. As those trustees were not heard before passing the impugned order, by a judgment and order dated 11 -7-2008. the interim order passed by the Joint C.C. was set aside.

3. Thus by the judgment and order dated 11-7-2008 only the interim order passed by the Joint C.C. on 3-6-2008 has been set aside and the order passed by the Joint C.C. in so far as it frames charges against the trustees who were parties to Application No. 17 of 2006 is not affected and the Joint C.C. is accordingly at liberty to proceed further in the matter.

4. In para 28 of the judgment and order dated 11-7-2008, the sentence "The Joint C.C. is directed to pass fresh order in accordance with law' be substituted as "The Joint C.C. is directed to pass fresh interim order in accordance with law'.

5. Application is disposed of accordingly.

(emphasis supplied)

4. Later on, the respondent No. 1 moved application (Exhibit-63) before the J.C.C. on 16th July, 2008 for preponement of the hearing of the application. The J.C.C. however, passed formal order on the said application Exhibit-63 on 19th July, 2008 - that the application be listed on 23rd July, 2008. The J.C.C. also called upon the respondents to file say in the context of letter sent by one of the Administrators Shri Halbe dated 27th June, 2008.

5. The petitioners herein on the other hand, however, questioned the correctness of the view taken by the learned Single Judge of this Court in judgement dated 11th July, 2008 as well as clarificatory order dated 15th July, 2008, by way of Letters Patent Appeal which was filed in this Court on 22nd July, 2008. That appeal is reportedly pending for admission. Be that as it may, when the matter was taken up by the J.C.C. on 23rd July, 2008, application (Exhibit 65) was moved by respondent Nos. 1, 3 and 9 in the original application to adjourn the hearing of the application as the matter was pending in this Court by way of Letters Patent Appeal against the abovesaid decision of the learned Single Judge of this Court. At the same time, request was made by respondent Nos. 2,6 and 7 in the original application to keep back the matter as their advocate was not available. Request to keep back the matter was accepted by the J.C.C. However, in so far as application for adjournment

(Exhibit-65) is concerned, the same was opposed by the original applicant. Instead, the original applicant insisted that appropriate orders be passed against the trustees respondent Nos. 1 to 9 against whom charges have already been framed. That stand taken by the original applicant found favour with the J.C.C. At the same time, the J.C.C. declined to accept the request of the original applicant (respondent No. 1 herein) that the concerned trustees be forthwith suspended in view of the decision of the learned Single Judge of this Court. That has been noted in the last paragraph at page 180 of the paper book. The J.C.C., however, keeping in mind the observations made by Joint Administrator Justice Shri Halbe in his communication that despite the order dated 3rd June, 2008 passed by the J.C.C. and despite his objections, huge payments were made by the trustees towards personal litigations in respect of which say of the trustees was invited. The J.C.C. then proceeded to record that charges are framed against the concerned trustees as there is prima facie evidence against them of mismanagement of the Trust and misuse of the Trust funds. It is further noted that he is empowered to pass order of suspension against the charged trustees but till such order is passed and while allowing the adjournment application, he thought it appropriate to issue directions to respondent Nos. 1 to 9, (the concerned trustees) that they shall not take any policy decision and shall not enter into any financial transactions with regard to the trust without prior approval of the administrators Dr. Trivedi and Justice Shri Halbe, till further orders. The correctness of this decision is put in issue in the present writ petition.

6. Indeed, upon issuance of notice, respondent No. 1-original applicant has filed reply Affidavit to oppose this petition. In the said Affidavit, several aspects have been highlighted. The petitioners in terms of order passed by this Court was expected to file rejoinder Affidavit before specified date. However, such Affidavit was not filed in time. Instead attempt was made by Counsel for the petitioners to tender the said Affidavit across the bar when the matter was being heard. That request was turned down. Indeed, Counsel for the petitioners made a point that the respondent No. 1 in the reply Affidavit has made allegations which if remain unrefuted may affect the merits of the case and cause serious prejudice to the petitioners. However, I have permitted the petitioners to proceed on the basis of denial without taking the rejoinder Affidavit on record. More so because the issue that is required to be addressed in the present petition is very limited for which it is not necessary for this Court to go into every factual aspect of the matter which both the parties wanted this Court to consider.

7. Having considered the rival submissions at length, I shall now proceed to first deal with the preliminary objection raised by the Counsel for respondent No. 1 about the maintainability of the present writ petition. According to respondent No. 1, the present writ petition is in relation to subject-matter which has arisen wholly within the Greater Mumbai area. In that, the Trust has its registered office in Mumbai; the proceedings under the said Act are pending before the J.C.C. at Mumbai. The petition, therefore, arises in respect of matters substantially within the area of Greater Mumbai. If it is so, no writ petition under Article 226 of the Constitution of India can be entertained on the Appellate Side of the Bombay High Court. This submission is founded on the purport of Rule 636 of the Bombay High Court (Original Side) Rules read with Rule 1, 4 and Rule 18 of Chapter 17 of the Bombay High Court (Appellate Side) Rules, 1960. The relevant extract of the said Rules read thus:

Rule 636. Application for Writ, etc. under Article 226 of the Constitution - (1)
(a) Application under Article 226 of the Constitution, other than an Application for a writ of Habeas Corpus, in matters arising substantially

within Greater Bombay out of:

- (i) the orders passed under the Bombay Municipal Corporation Act, 1888;
- (ii) the orders passed under the Maharashtra Housing and Area Development Act, 1976, and under the enactments repealed by the said Act;
- (iii) the orders passed under the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971
- (iv) the orders passed under the Industrial Disputes Act, 1948;
- (v) the orders made in applications under the Bombay Industrial Relations Act, 1946;
- (vi) the orders passed under the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 (Act XIV of 1975)
- (vii) the orders passed under the Maharashtra Co-operative Societies Act, 1960;
- (viii) the orders passed under Chapter VI and VII of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971;
- (ix) the orders passed under the Payment of Gratuity Act, 1972 (Act No. 39 of 1972)
- (x) the orders passed under the Workmen's Compensation Act, 1923;
- (xi) the orders passed under the Payment of Wages Act, 1936;
- (xii) the orders passed under the Minimum Wages Act, 1948;
- (xiii) the orders passed under the Bombay Prohibition Act, 1949;
- (xiv) the orders passed the Maharashtra Land Revenue Code, 1966;
- (xv) the orders passed under the Maharashtra University Act, 1994
- (xvi) the orders passed under the Bombay Stamp Act, 1958;
- (xvii) the orders passed under the Bombay Police Act;
- (xviii) the orders passed under the Bombay Shops and Establishments Act, 1948;
- (xix) the orders passed under the Bombay Port Trusts Act, 1879;
- (xx) the orders passed under the Bombay City (Inami and Special Tenures) Abolition and Maharashtra Land Revenue Code (Amendment) Act, 1969;
- (xxi) the orders passed under the Banking Corporation (Acquisition

and Transfer of Undertakings) Act, 1970;

(xxii) the orders passed under the Displaced Persons (Compensation) Rehabilitation Act, 1964;

(xxiii) the order passed under the Electric (Supplied) Act, 1948;

(xxiv) the orders passed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952;

(xxv) the orders passed under the Employees' State Insurance Act, 1948;

(xxvi) the orders passed under the Factories Act, 1948;

(xxvii) the orders passed under the Indian Railways Act, 1890;

(xxviii) the orders passed under the Indian Electricity Act, 1910;

(xxix) the orders passed under the Motor Vehicles Act, 1939;

(xxx) the orders passed under the Major Port Trust Act, 1963;

(xxxi) the orders passed under the Merchant Shipping Act, 1958;

(xxxii) the orders passed under the Registration Act, 1908;

(xxxiii) the orders passed under the Wireless, Telegraphy Act, 1933;
AND

(xxxiv) the orders passed under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1971;

may be heard and finally disposed of by a Single Judge to be appointed in this behalf by the Chief Justice.

Provided when the matter in dispute or relates to the challenge to the validity of any statute or any rules or regulation made thereunder and arising substantially within Greater Bombay shall be heard and disposed off by a Division Bench to be appointed by the Chief Justice.

Rule 1 of Chapter 17 of Appellate Side Rules.

1. (i) Applications for issue of writs, directions, etc. under Article 226 of the Constitution - Every application for the issue of a direction, order of writ under Article 226 of the Constitution shall, if the matter in dispute is or has arisen substantially outside Greater Bombay, be heard and disposed of by a Division Bench to be appointed by the Chief Justice. The application shall set out therein the relief sought and the grounds on which it is sought. It shall be solemnly affirmed or supported by an affidavit. In every such application, the applicant shall state whether he has made any other application to the Supreme Court or the High Court in respect of the same matter and how that application has been disposed of.

(ii) Applicant to inform Court, if, during pendency of an application, the Supreme Court has been approached-If the applicant makes an application to the Supreme Court in respect of the same matter during the pendency of the application in High Court, he shall forthwith bring this fact to the notice of the High Court by filing an Affidavit in the case and shall furnish a copy of such Affidavit to the other side.

(iii) Hearing may be adjourned pending decision by Supreme Court-The Court may adjourn the hearing of the application made to it pending the decision of the Supreme Court in the matter.

4. Division Bench to dispose of the application; rule nisi may be granted by a Single Judge-Applications under Rule 1 shall be heard and disposed of by a Division Bench; but a Single Judge may grant rule nisi, provided that he shall not pass any final order on the application.

18. Single Judge's powers to finally dispose of applications under Articles 226 and 227. - Notwithstanding anything contained in Rules 1, 4 and 17 of this Chapter, applications under Article 226 or under Article 227 of the Constitution (or applications styled as applications under Article 227 of the Constitution read with Article 226 of the Constitution) arising out of:

)....

)...

) the decrees or the orders passed by any Subordinate Court (or by any quasi Judicial Authority) in any suit or proceeding (including suits and proceedings under any Special or Local Laws), but excluding those arising out of the Parsi Chief Matrimonial Court and orders passed under the Recovery of Debts due to Banks and Financial Institutions Act, 1993; the Administrative Tribunals Act, 1985; and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

May be heard and finally disposed of by a Single Judge appointed in this behalf by the Chief Justice:

(Provided when the matter in dispute is or relates to the challenge to the validity of any statute or any rules or regulations made thereunder, such applications shall be heard and disposed off by a Division Bench to be appointed by the Chief Justice.

Explanation - The expression "order" appearing in Clauses (1) to (41) means any order passed by any judicial or quasi judicial authority empowered to adjudicate under the above-mentioned statutes.

Significantly, Rule 636 of Original Side Rules does not include the enactment of Bombay Public Trusts Act. As a consequence thereof, application under Article 226 of the Constitution of India pertaining to order passed under provisions of Bombay

Public Trusts Act would necessarily proceed only before the Division Bench of the High Court. On the other hand, if similar order passed by the Authority under provisions of Bombay Public Trust Act is challenged on the Appellate Side of the High Court, by virtue of Rule 18 of Chapter 17 the same would proceed before the Single Judge. Relying on this anomaly, it is contended by the respondent No. 1 that the petitioners cannot be permitted to elect the Appellate Side or Original Side merely by giving the label of Article 227 and/or Article 226 r/w Article 227 of the Constitution of India. According to respondent No. 1, the entire grievance of the petitioners in the present petition is one of non compliance of principles of natural justice and that the authority has acted contrary to the legal requirement which grounds are ascribable to Article 226 of the Constitution of India. In such a situation, the petition would necessarily lie on the Original Side of the High Court. It was argued that if the matter was to be taken to the Original Side of the High Court the petition would be heard by the Division Bench being an application under Article 226 of the Constitution of India; whereas by filing the present petition on the Appellate Side, the petitioners have succeeded in moving the matter before the learned Single Judge on the Appellate Side. It was argued that it is preposterous to give option to a party to chose the side of High Court such as Appellate Side or Original Side in respect of the same subject-matter. It was then argued that the attempt of the petitioners is to resort to proceedings which would give them opportunity to file intra Court appeal by way of Letters Patent Appeal against the order to be passed by the Single Judge by treating the application to be one under Article 226 of the Constitution of India.

8. The argument though attractive need not detain us. The fact that the order to be passed on this petition may be amenable to intra Court appeal cannot be the basis to take the view that the petitioners have no remedy on the Appellate Side of the High Court. In my opinion, firstly, the grounds which are pressed into service by the petitioners can be effectively and conveniently addressed in exercise of powers under Article 227 of the Constitution of India. Secondly, neither the original side nor the Appellate Side High Court Rules expressly bar institution of a composite writ petition under Articles 226 r/w 227 of the Constitution. Obviously, there can be no such bar in relation to the constitutional remedy under Articles 226 read with 227 of the Constitution of India. Whereas, the expansive language of Rule 18 of Chapter 17 of the Appellate Side Rules clearly encompasses a composite petition under Articles 226 read with 227 of the Constitution of India. Thirdly, the Original Side Rules do not and obviously cannot envisage a composite petition particularly one ascribable to Article 227 of the Constitution of India- which remedy is available only on the Appellate Side or supervisory jurisdiction. Be that as it may, the nature of relief that I propose to finally grant would be possible only in exercise of powers under Article 227 of the Constitution of India. In that, if the remedy was confined to Article 226 of the Constitution, this Court would only be in a position to quash and set aside the order impugned in the writ petition and no further order could be passed, which however, is possible only in exercise of supervisory jurisdiction under Article 227 of the Constitution.

9. The parameters of remedy under Article 226 and 227 of the Constitution is no more res integra. The Apex Court in the case of (Surya Dev Rai v. Ram Chander Rai and Ors.) reported in MANU/SC/0559/2003 : AIR2003SC3044 had occasion to deal with this aspect in ex-ten so. In paragraph Nos. 24 and 25 of the said decision, the difference between writ of certiorari under Article 226 and supervisory jurisdiction under Article 227 has been noticed. One of the distinction noted in paragraph No. 25 is that in a writ of certiorari the record of the proceedings having been certified by the Inferior Court or Tribunal to the High Court, the High Court if inclined to exercise

its jurisdiction, may simply annul or quash the proceedings and then do no more. Whereas, in exercise of supervisory jurisdiction, the High Court may not only quash or set aside the impugned proceedings, judgement or order but it may also make such directions as the facts and circumstances of the case may warrant, may be, by way of guiding the Inferior Court or Tribunal as to the manner in which it would now proceed further or afresh as commanded to or guided by the High Court. Keeping this principle in mind, it would necessarily follow that for the nature of directions and consequential order that I propose to pass that could be possible only in exercise of supervisory jurisdiction under Article 227 of the Constitution of India. Thus understood, the objection regarding maintainability of the writ petition on the appellate side against the impugned decision will have to be turned down.

10. Counsel for respondent No. 1 placed emphasis on the dictum of the Apex Court in the case of (Umaji Keshao Meshram and Ors. v. Radhikabai, Widow of Anandrao Banapurkar and Anr.) reported in MANU/SC/0140/1986 : 1986CriLJ1084 . In particular, paragraph Nos. 106 and 107 where the Apex Court has expounded about the purport of non obstante clause in Rule 18 of the Appellate Side Rules. It is observed that the use of the words "be heard and finally disposed of by a Single Judge" in Rule 18 merely clarifies the position that in such cases, the power of the Single Judge is not confined merely to issuing a rule nisi. In Paragraph No. 107 of the said judgement, the Apex Court has held that where the facts justify a party in filing an application either under Articles 226 or 227 of the Constitution and the party chooses to file his application under both these articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. Reliance was also placed on the decision of Special Bench of our Court in (State of Maharashtra v. Kusum Charudutt Bhorma Upadhye) reported in 1981 B.C.I. 9 : (1980) 83 Bom.L.R. 75. The dictum in this decision is restated in Umaji's case {supra}. As aforesaid, the issue of maintainability of this petition cannot be answered on the basis that the party is likely to get remedy of appeal "against the order to be passed in the present petition. Whether such remedy of appeal will be available is a matter that will have to be addressed at the proper stage by the concerned Court. For the time being, I would proceed on the basis that the grounds agitated in the writ petition are indisputably ascribable to supervisory jurisdiction under Article 227 of the Constitution of India. Even the Counsel for the petitioners in all fairness accepts that the said grounds can be considered by this Court in exercise of supervisory jurisdiction under Article 227 of the Constitution of India and are not exclusive to Article 226 of the Constitution. Indeed, this does not mean that the petitioners were giving up their remedy under Article 226 of the Constitution. If it is so, the argument regarding maintainability of the present writ petition will have to be stated to be rejected.

11. That takes me to the merits of the view taken by the J.C.C. in the impugned decision. At the outset, it needs to be noted that the order which is impugned in this writ petition is essentially an "ad interim order" passed by the J.C.C. during the pendency of application preferred by the respondent No. 1 for suspending the petitioners during the consideration of charges framed against them. That application is Exhibit-2 which is filed in the pending Original Application No. 17 of 2006. It is not in dispute that although the J.C.C. framed charges on 3rd June, 2008 has not passed any final order on the said application Exhibit-2. Indeed, having regard to the sweep

of Section 41-D of the Act, it was open to the J.C.C. to pass that order contemporaneously at the time of framing of charges on 3rd June, 2008 itself. However, the J.C.C. deferred passing of order of suspension on the specious reasoning that till he was able to identify able persons to be appointed as trustees to replace the concerned trustees against whom charges have been framed, he would permit the said trustees including the petitioners herein to continue as trustees but by imposing fetter on them of not to take any policy decision and enter into any financial transaction with regard to the Trust without prior approval of the Administrators appointed by the Apex Court.

12. The scheme of Section 41-D postulates that trustee or any person interested in the trust, is free to make application to the Charity Commissioner or on receipt of a report under Section 41-B or suo moto, the Charity Commissioner may suspend, remove or dismiss any trustee of a public trust, if he is found to have indulged in acts of commission or omission covered by Clauses (a) to (f) of Sub-section (1) thereof. Sub-section (2) further obligates the Charity Commissioner to record the explanation and the finding on each charge against the concerned trustee or person for necessitating action under Sub-section (1). Sub-section (3) of Section 41-D enables the Charity Commissioner to place the trustees under suspension until the disposal of the charges framed against the concerned trustees. The question of appointing some other person in place of the suspended or removed trustee would arise only if the trustee against whom such action is taken is the sole trustee or when there are more than one trustees and upon removing more than one trustee the remaining trustees, according to the instrument of trust, cannot function or administer the trust without the vacancy being filled. Unless the J.C.C. was to positively record such a view, the question of deferring the final decision on the application (Exhibit-2) for suspension during the disposal of the charges framed against the concerned trustees was inappropriate. In the event the J.C.C. was to hold that the remaining trustees (except the trustees against whom charges have been framed and who are to be suspended) according to the instrument of trust cannot function or administer the trust without the vacancy of the suspended trustees was to be filled, the JCC would be free rather obliged to pass appropriate consequential order on the application Exhibit-2 whereby the respondent No. 1 had prayed for order of suspension of the trustees during the pendency of the main proceedings against whom charges have already been framed by the J.C.C, which order has been confirmed atleast by the learned Single Judge of this Court. Significantly, it is common ground that the quorum for the Board of Trustees of the present Trust is only three. In that case even the removal of petitioners and other charged trustees, the remaining trustees would be capable of performing their duty to look after the affairs of the Trust.

13. Reverting to the order which is impugned in this petition, the grievance of the petitioners is that the said order has been passed in breach of principles of natural justice. According to the respondent No. 1, the question of giving opportunity of hearing to the petitioners before order of suspension is passed, does not arise. To substantiate this argument, reliance is placed on the unreported decision of Division Bench of our High Court in the case of (Gulabsingh Dipa Chavan and Ors. v. Joint Charity Commissioner) being Special Civil Application No. 1912 of 1976 decided on 18th December, 1978. This very contention was raised even in that case which has however been negated by the Division Bench. It will be apposite to reproduce the relevant extract of the opinion of the Division Bench in paragraph No. 6 which reads thus:

Mr. Dalvi then contended that the petitioners, who are the trustees and were holding the office at the time of the passing of the impugned order, were not served with any notice by the Joint Charity Commissioner. It was urged by the learned Counsel that the Joint Charity Commissioner was in error in passing the order without any notice to the petitioner and thereby the principles of natural justice are violated. Mr. Dalvi, therefore, contends that the interim order passed by the Joint Charity Commissioner should be set aside. It is impossible to accept the contention of the learned Counsel for more than one reason. Firstly, the Act nowhere makes a provision of issuance of a notice prior to the passing of the interim order of suspension under Sub-section (3) or of the appointment of a fit person to discharge duties under Sub-section (4) of Section 41-D of the Act. Apart from that, it must be remembered that the Joint Charity Commissioner exercised the powers of suspension only in the cases where he is satisfied that the trustee or the Board of trustees are mismanaging the affairs of the trust and causing loss to the interest of the trust. In cases of such a serious nature, if the Charity Commissioner issues notice prior to the passing of the order under Sub-sections (3) or (4) of Section 41-D, then obviously, the trustees who are mismanaging the trust would have an opportunity to do away with the trust property and the purpose of enquiry would be defeated. In the case in hand, the allegations made against Jadhav are of such a serious nature that giving an opportunity either to Jadhav or to other trustees who are alleged to be aiding and abetting Jadhav in his acts of misfeasance would really defeat the purpose of making an order of suspension and appointing a fit person to discharge the duties.

14. In my opinion, in the fact situation of the present case, it is more than evident that the order which is impugned in this petition has been passed only by way of "ad interim arrangement" during the consideration of application Exhibit-2 filed by respondent No. 1 praying for suspension of trustees against whom charges have already been framed. Significantly, it is noticed that at the time of framing of charges ample opportunity was given to the concerned trustees (including the petitioners) to produce relevant materials and to file their reply which was already availed by all concerned. It is only after considering that material and the arguments advanced before the J.C.C. at the relevant time, the J.C.C. proceeded to frame charges against respondent Nos. 1 to 9 in the original application. As aforesaid, going by the scheme of Section 41-D of the Act, it was open to the J.C.C. to pass a composite order of not only framing charges but also to suspend the concerned trustees against whom charges were framed.

15. Be that as it may, from the materials on record, the order passed by J.C.C. was only an ad interim order especially to meet the ends of justice while allowing the request for adjournment made at the instance of respondent Nos. 2, 6 and 7 in the original application including the petitioners herein. The J.C.C. in the impugned judgement has noted that the charges are framed against the concerned trustees as there is prima facie evidence against them of the mismanagement of the trust and misuse of the trust funds. The fact that charges have been framed against the petitioners and other trustees respondent Nos. 1 to 9 in the original application is not in dispute. The fact that charges have been framed presupposes that there is prima facie evidence in the context of the charges framed against the concerned trustees. Faced with this situation, the J.C.C. has opined that if the matter is required to be adjourned, that can be done by imposing some restrictions on the charged trustees. That is obviously not only a discretionary order passed but one providing for an ad

interim arrangement in the interest of justice. It will be useful to refer to the exposition of the Apex Court in paragraph No. 39 in the case of Surya Dev Rai (supra) the same reads thus:

If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where "a stitch in time would save nine". At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge.

(emphasis supplied)

16. In the case on hand, especially where only an interim order is passed, this Court in exercise of writ jurisdiction ought to observe restraint. For, it is not as if the impugned directions issued by the J.C.C. are incapable of being corrected at a later stage or that the wrong caused on account of the same, if any, cannot be set right and equities adjusted. Viewed in this perspective, even if the grievance of the petitioners about violation of principles of natural justice was to be accepted, it is not a fit case to invoke writ jurisdiction against the order which is obviously a discretionary one. The writ jurisdiction could have been invoked when the error of the moment may earn immunity from correction.

17. That takes me to the argument of the petitioners that the direction issued by the J.C.C. requiring the petitioners and other charged trustees not to take policy decision and more particularly not to enter into any financial transaction with regard to the trust without prior approval of the administrators appointed by the Apex Court is completely opposed to the scheme of not only Section 41-D of the Act but to the cardinal principle of conducting the affairs of the trust which necessarily is the prerogative of the trustees themselves. It was argued that the Court appointed administrators can neither step in the shoes of the trustees or can be said to be persons interested, so as to compel the trustees to take their prior approval or work under their dictation. According to the petitioners, even the Apex Court while appointing the administrators has therefore, made cautious observation so as to preserve the independence and rights of the board of trustees. The Apex Court in its decision dated 26th March, 2007 in Civil Appeal No. 1575 of 2007 between (Mrs. Charu Mehta v. Lilavati Kirtilal Mehta Medical Trust) 2007 DGLS 2049, while appointing two administrators to be in charge of day to day running of the Hospital and Research Institute, has observed thus:

These two Administrators will take all decisions relating to the administration of the hospital. They shall give a report to the Board of trustees every two weeks and any directions by the Board of trustees are to be issued to these two Administrators only in the form of resolutions and not individual instructions by any Trustee. A copy of the report of resolution shall also be furnished to the appellant and if she is in any way aggrieved by the directions issued by the Board, she would be at liberty to seek appropriate

directions from the City Civil Court, Mumbai where the suit is pending.

(emphasis supplied)

14. Besides relying on the above observation of the Apex Court, reliance is also placed on the view expressed by Justice Oka, in one of the cognate matters between the parties, in his judgement dated 15th February, 2008 in Civil Application No. 5892 of 2007 in First Appeal No. 2667 of 2007. His Lordship has observed thus:

Perusal of the order of the Apex Court shows that the Joint Administrators are made in charge of the day to day running of the hospital and Research Institute and the Joint Administrators will be reported to the Board of Trustees once in every two weeks and thereafter the Board of Trustees has been empowered to issue necessary directions to the Administrator by passing resolutions.

15. On similar lines, Justice Dharmadhikari while considering Civil Application No. 2229 of 2008 in First Appeal No. 2667 of 2007 in his judgement dated 25th April, 2008 has noted as follows:

One time the order of the Hon'ble Supreme Court and this Court does not in any manner supersede the Trust or the trustees, nor does it take away their right to control the same as observed by this Court, prima facie, then, approving and signing the budget for the Trust is something which the trustees can very well discuss and pass appropriate resolution in that behalf. I see no impediment in the same.

16. Relying on the above observations of the Apex Court and two orders passed by this Court, it was also argued that if the order impugned in this petition is allowed to continue, it is clearly in the teeth of the spirit of the arrangement directed by the Apex Court while appointing the two administrators. The above argument though attractive at the first blush does not commend to me. However, instead of making in depth analysis of the issues raised by the Counsel appearing for the parties, at this stage, interest of justice would be met if the respondent Nos. 1 to 9 in the original application-trustees against whom charges have been framed before taking any policy decision and entering into any financial transaction with regard to the trust shall take prior approval of the J.C.C. For, J.C.C. is in seisin of the entire proceedings including the action of removal of the concerned trustees. The argument that the trustees would become subservient to the Administrators will become unavailable. This arrangement ought to continue till appropriate order is passed on the pending application Exhibit-2 filed by respondent No. 1 praying for suspension of the charged trustees during the pendency of the enquiry in the Original Application No. 17 of 2006.

17. Indeed, this arrangement is not an expression of opinion either way on the merits of the contentions available to the parties in the pending proceedings including application Exhibit-2 filed by the respondent No. 1 for suspension of respondent Nos. 1 to 9 in the original application (charged trustees including the petitioners herein). It is also not a reflection in any manner on the two Administrators appointed by the Apex Court or be construed to mean that it is interference with their role assigned to them by the Apex Court.

18. If such arrangement is observed, it will not be open to the petitioners to contend that the J.C.C, has no concern with the affairs of the trust. In that, the Apex Court in

the case of (Saiyad Mohammad Bakar El-Edros- (Dead) by LRs. v. Abdulhabib Hasan Arab and Ors.) reported in MANU/SC/0262/1998 : [1998]2SCR648 has noted the sweep of authority of the Charity Commissioner. The Apex Court in paragraph Nos. 6 to 8 of the said decision has adverted to the various provisions of the Act and noted that the object of the Act, the Charity Commissioner being clothed with sufficient power to deal with all exigencies where a public trust or its trustees stray away from its legitimate path and where the materials are before him or placed before him by the said two persons, then to hold abatement of proceedings on application of any procedural laws not only would amount to the curtailment of his power but make him spineless and helpless to do anything in the matter of a public trust eroding the very object of the Act. It is further observed in the said decision that a procedural law is always in aid of justice, not in contradiction or to defeat the very object which is sought to be achieved. A procedural law is always subservient to the substantive law. Nothing can be given by a procedural law what is not sought to be given by a substantive law and nothing can be taken away by the procedural law what is given by the substantive law.

17. Applying this principle and keeping in mind the dictum of the Apex Court in Surya Dev Rai's case (supra) in exercise of supervisory jurisdiction under Article 227 of the Constitution, in my opinion, the proper course is to only modify the operative order passed by the J.C.C. which is impugned in this petition to the limited extent as referred to above.

18. According to the respondent No. 1, the direction issued by the J.C.C. was a lesser order passed instead of order of suspension which was legal and proper. To support this submission, reliance was placed on the decision in the case of (Atau Rehman v. State of Madhya Pradesh) reported in MANU/MH/0163/1951. Reliance was also placed on the decision of the Apex Court in the case of (Atma Ram v. State of Punjab and Ors.) reported in MANU/SC/0019/1958 : AIR1959SC519 . Reliance was also placed on another decision of the Apex Court in the case of (L.V.A. Dixitulu and Ors. v. High Court of Andhra Pradesh and Ors.) reported in MANU/SC/0416/1978 : [1979]1SCR26 . However, for the reasons already recorded, it is unnecessary to dilate further on this aspect.

19. While parting, it needs to be clarified that the questions that may have to be answered in application (Exhibit-2) pending before the J.C.C. will have to be decided on its own merits keeping in mind the parameters to be applied for passing order of suspension during the pendency of enquiry on the basis of charges framed against the trustees. All aspects in that behalf will have to be decided on its own merits uninfluenced by the observations in the impugned judgement or for that matter, the present order. It is expected that the J.C.C. will not pass a mechanical order of suspension solely on the ground that charges have already been framed against the concerned trustees. All questions in that behalf are left open to be considered on its own merits in accordance with law.

20. In so far as the second part of the direction issued by the J.C.C, there is additional reason as to why I am inclined to continue the same; In the first place, it is common ground that the petitioners are not authorised signatories of the trust. The petitioners are merely discharging the role of trustees of the trust. The day to day expenses to be incurred on behalf of trust is a matter which is at the level of the Administrators of the trust and at best by the Joint Administrators appointed by the Apex Court. Besides, no material is produced as to on what crucial matter the Administrators have declined to approve the decision of the trustees. Moreover, it is

common ground that in the last about four months only one meeting of the Board of trustees has been convened and it is unlikely that in immediate near future any meeting of the Board of trustees will be held to consider the policy matters of the trust or to authorise the petitioners or other charged trustees to enter into any financial transaction with regard to the trust. Even for this reason, it is unnecessary to interdict the discretionary ad interim order passed by the J.C.C. during the pendency of application Exhibit-2.

21. The appropriate direction that needs to be passed in the fact situation of the present case is to direct the J.C.C. to ensure that application Exhibit-2 filed by respondent No. 1 is proceeded as expeditiously as possible. The petitioners will be free to file additional documents or pleadings in the said application within one week from today. The opposite parties including the respondent No. 1 will be free to file her further affidavit or additional documents in the said application Exhibit-2 within one week thereafter. The J.C.C. would then proceed with the hearing of the said application while ensuring that the same is finally disposed of on merits in accordance with law keeping in mind the observations made in the earlier part of this order as expeditiously as possible and in any case not later than 10th October, 2008.

22. Counsel appearing for the parties inform that besides application Exhibit-2 the respondent No. 1 has filed another application praying for almost similar relief being Exhibit-68.

23. However, in my opinion, the appropriate course is to first proceed with the hearing of the application Exhibit-2 which is already ready for hearing. In the event the relief as asked by the respondent No. 1 in application Exhibit-2 is to be granted, it would be unnecessary to consider the controversy raised in application Exhibit-68 praying for same or similar relief.

24. Accordingly, this petition is partly allowed. Rule is made absolute on the following terms.

(i) The operative part of the first paragraph of the impugned decision will now read thus:

respondent Nos. 1 to 9, the trustees shall not take any policy decision and shall not enter into any financial transaction with regard to the trust without prior approval of the J.C.C. till further orders

(ii) Rest of the order remains as it is.

(iii) The J.C.C. shall dispose off the application Exhibit-2 filed by respondent No. 1 praying for suspension of the respondent Nos. 1 to 9 - The Charged trustees during the pendency of Original Application No. 17 of 2006 as expeditiously as possible and not later than 10th October, 2008. The said application be decided on the basis of observations made hitherto.

(iv) Counsel appearing for both the parties have assured that they shall not request the J.C.C. either to keep back the matter or to adjourn the matter on any count and shall extend full co-operation to the J.C.C. for early disposal of application Exhibit-2. That assurance is accepted.

(v) Petition disposed off on the above terms. No costs.

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