

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****SPECIAL CIVIL APPLICATION NO. 8465 of 2013****With****SPECIAL CIVIL APPLICATION NO. 8491 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE G.B.SHAH**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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KOMALKANT F SHARMA &amp; 1....Petitioner(s)

Versus

MANSUKHBHAI K SHAH TRUSTEE &amp; 23....Respondent(s)

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Appearance:

M/S KAMAL B TRIVEDI, SAURABH SOPARKAR, BHARAT NAIK,  
 SR.ADVOCATES with MR BHARAT T RAO, ADVOCATE for the Petitioner(s)  
 No. 1 - 2

M/S S.N.SHELAT, MIHIR THAKOR, NIRUPAM NANAVATI, K.S.NANAVATI,  
 SR.ADVOCATES WITH MR MITUL K SHELAT, ADVOCATE for the  
 Respondent(s) No. 1

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**CORAM: HONOURABLE MR.JUSTICE G.B.SHAH**

**Date : 10/05/2013**

**ORAL JUDGMENT**

1. Rule. Learned advocates waives service of notice of rule on behalf of the respective respondents. With the consent of learned advocates for the respective parties, the matter is taken up for final hearing.

1.1 Heard learned senior advocates M/s Kamal B.Trivedi, Saurabh Soparkar, Bharat Naik and also learned advocate Mr.Bharat Rao for the petitioners as well as supported by newly appointed trustees of the trust who are on record, also heard learned senior advocates M/s S.N.Shelat, Mihir Thakor, Nirupam Nanavati and K.S.Nanavati for respondent No.1 as well as supported respondents on record.

1.2 The present petitions have been preferred challenging the order passed by learned Additional District Judge, Bhavnagar in Regular Civil Appeal No.24 of 2013 below Exh.5 dated

1.5.2013 whereby mandatory injunction has been granted against newly appointed trustees.

2. The brief facts of the case are as under.

2.1 Shri Khushaldas J.Mehta T.B.Hospital was originally registered under the Societies Registration Act, 1860 in the year 1952 and thereafter the said Shri Khushaldas J.Mehta T.B.Hospital Trust has been registered under the provisions of the Bombay Public Trusts Act, 1950 (hereinafter referred as "the Act" for short) vide registration No.F/28 Bhavnagar by the Deputy Charity Commissioner, Rajkot Area, Rajkot. The said hospital and the trust has been settled in Saurashtra region at Sihor for cure of T.B. in approximately 190 acres of land which has been donated by the then Maharaja of Bhavnagar State at the token of Rs.1/-. The activities of the trust became dormant from the year 2000 onwards.

2.2 It is alleged that all of a sudden, the trustees have decided to dispose off the trust

and come into contact with respondent No.1 who is running self financed medical college at District Vadodara in the name and style of Sumandeep Vidhyapith which is deemed university. It is further alleged that it is very controversial trust which runs the college at Pipaliya, Taluka Vaghodia, District Vadodara.

2.3 The provisions of the Bombay Public Trusts Act, 1950 have not been followed by the trustees and hence some of the beneficiaries and enlighten citizens of Bhavnagar had submitted the application under section 41-A of the Act and certain directions were passed by the Charity Commissioner and financial restrictions were imposed, but in spite of that, meetings were not convened and the trustees have surreptitiously entered into the agreement with respondent No.1 of Sumandeep Vidhyapith and appointed family members of respondent No.1.

3. Referring page Nos.39 to 120, it is alleged by the petitioners herein regarding

controversial conduct of respondent No.1 related to merger of trust, permission granted to the medical college was cancelled and the trust property was mortgaged to the State Bank of India, Vadodara branch without seeking prior permission of the Charity Commissioner under section 36 of the Act.

3.1 Under the above circumstances, the enlighten citizens and public spirited citizens have taken recourse under the relevant provisions of the Act and the Joint Charity Commissioner, Rajkot after registering the scheme, necessary order has been passed and recorded prima facie subjective satisfaction as to why the scheme is required to be framed with regard to the above referred trust and after issuing the notice to all the trustees and after the advertisement in the local daily newspaper and following due procedure under the Act and giving all the opportunities to respondent No.1 and rest of the trustees who have also submitted the written submissions and after considering the entire

record produced before the Joint Charity Commissioner by the proposers of the scheme, objectors to the scheme, the Joint Charity Commissioner, Rajkot passed the detailed order framing the scheme on 25.4.2013 and also framed the new constitution of the said trust.

3.2 On 26.4.2013, the newly appointed trustees i.e. petitioners and rest of the newly appointed trustees pursuant to the order dated 25.4.2013 of the Joint Charity Commissioner, Rajkot have taken over administration of the trust in the presence of the Sarpanch and Talati of village, police people and also in the presence of the Administrator of the trust who was the man of respondent No.1. The panchnama, intimation to the Police Inspector, DSP, Collector, Mamlatdar, Sihor and all the banks where the trust is having accounts and the medical officer of K.J.Mehta Hospital Trust were informed regarding taking over the charge of the management and also got done photography and videography of the entire process and the said

documents are at page Nos.240 to 287.

4. Being aggrieved and dissatisfied with the order of the Joint Charity Commissioner, Rajkot dated 25.4.2013 sanctioning the scheme, respondent No.1 through his advocate filed an appeal on 29.4.2013 in the court of District Judge, Bhavnagar under section 72 of the Act which was numbered as Regular Civil Appeal No.24 of 2013 and along with the memo of appeal, respondent No.1 also filed the application for injunction Exh.5 and also produced various documentary evidence in support of the said appeal.

4.1 The petitioners herein had filed the caveat and appeared through the advocate and filed detailed reply along with the list of documents. It is submitted that on 29.4.2013 and on 30.4.2013, the Appellate Court had heard learned advocates for the parties and on 1.5.2013, though in the operative order below Exh.5, it is stated that it is ad-interim order,

in paragraph 13 of the impugned order, last two lines, learned Judge has observed as under.

"Hence, it is just and proper to pass the following final order in the interest of justice :

: O R D E R :

1. The ad interim injunction is granted in favour of the applicant in the interest of justice.

2. It is hereby ordered to stay the implementation of the scheme, passed by the learned Charity Commissioner, Rajkot as introduced in the impugned order till the next date.

3. Notice to the concerned opponents on the payment of necessary process fee.

4. No order as to costs.

Pronounced in the open Court today on this 1<sup>st</sup> day of May, 2013."

5. Being aggrieved and dissatisfied with the impugned interim order dated 1.5.2013 passed below Exh.5 by learned Additional District Judge,



Bhavnagar in Regular Civil Appeal No.24 of 2013, the petitioners herein have challenged the same before this Court under Articles 226 and 227 of the Constitution of India.

5.1 Learned senior advocates for the petitioners have mainly submitted referring the impugned order that, from bare reading of the same, it appears that learned Appellate Judge had heard learned advocates for the parties related to Exh.5 in the said appeal on the facts as well as on law at length as has been observed by learned Appellate Judge in paragraphs 1 to 8 and 9 of the impugned order. Referring paragraph Nos.10 and 13, learned senior advocates for the petitioners have then submitted that three golden principles enumerated in Order 39, Rule 1 and 2 or in Order 41, Rule 5 of the Code of Civil Procedure, 1908 have not been considered in spite of the fact that learned Appellate Judge has satisfactorily heard all the concerned and has suo motu decided that he is not to decide the entire application Exh.5 on merits because he is only to

consider the aspect of granting stay against implementation of the impugned order under challenge. Hence, the main submission for the petitioners is that the order granting blanket injunction or stay without entering into the merits and without in any way looking at the principles of the Code of Civil Procedure, 1908 is patently without jurisdiction and arbitrary and it is nothing but abuse of the jurisdiction and without entering into the merits of the case, the Court cannot go with the philosophy which has been narrated in the order. Lastly, it is submitted by the petitioners that the Appellate Court is duty bound to touch prima facie case, balance of convenience and irreparable injury which has not been touched by the Court concerned and hence, the impugned order is not maintainable for a second.

6. Learned senior advocates for respondent No.1 and for the newly appointed trustees have drawn attention of this Court on the documents at pages 240 to 287 and submitted that the entire

conduct of the enlighten and public spirited citizens i.e. newly appointed trustees i.e. petitioners herein has depicted from the same which clearly shows that hot haste has been carried out by the petitioners that too deliberately, intentionally, knowingly and with mala fide and also in collusion with the Joint Charity Commissioner, Rajkot. In short, the newly appointed trustees who are claiming themselves enlighten and public spirited citizens have adopted the procedure on 26.4.2013 and onwards which is not known to the law in a civilized society and the said procedure adopted by the newly appointed trustees was nothing but de hors the law which has promoted the learned Appellate Judge to pass the impugned order and after putting the newly appointed trustees on the equal footing, the Court has thought it fit to proceed with the hearing which is just and proper and as there is no jurisdictional error, this Court should not interfere with the said impugned order.

7. Under the above circumstances, the question to be decided is whether the Appellate Court can pass the impugned order in a way in which it has been passed and whether the same is maintainable in law ?

7.1 I have considered the above referred rival submissions made by learned senior advocates for the parties and in light of the same, I have carefully gone through the impugned order. Referring paragraphs 1 to 8, it appears that enough opportunity of hearing has been given to learned advocates for the parties and the Appellate Court has heard the arguments submitted by them in vehemence related to facts as well as law at length. Paragraph 9 of the impugned order reads as under.

"I have heard the learned advocates of the respective parties at length. Read the application, Appeal memo and relevant case papers. I have also gone through the documentary evidences and the citations, produced by the

respective parties in the matter."

7.2 Referring the above referred paragraph 9 of the impugned order, it is clear that as narrated by learned Appellate Judge, he has heard learned advocates for the respective parties at length and read the application, appeal memo and relevant case papers. He has also gone through the documentary evidence and the citations produced by the respective parties in the said appeal. Thus, it is clear that subjective satisfaction of the dispute related to the case has been arrived at by the learned Appellate Judge. Referring paragraph Nos. 10 and 13 of the impugned order, as mentioned therein, learned Appellate Judge has noted that at this juncture, he has not to decide the entire application i.e. Exh.5 on merits because, he has only to consider the aspect of granting the stay against the implementation of the impugned order under challenge. It is important to note at this juncture that, as mentioned by the petitioners on page No.14 of the petition being Special Civil

Application No.8465 of 2013 that on 25.4.2013 order was pronounced in the open court by the Joint Charity Commissioner and when the order was pronounced, respondent No.1's advocate was not present and the advocate for the proposers (i.e. petitioners - newly appointed trustees) was present and copy of the order has been given to the advocate for the said proposers on 25.4.2013. It is also averred that neither the respondent No.1 nor his advocate nor his representative were present before the Joint Charity Commissioner and requested for stay of the aforesaid order and then further averred that the office of the Charity Commissioner has on the very next day i.e. on 26.4.2013 dispatched the copy of the order to all concerned advocates. Referring to rojkam at Annexure R/12 at pages 453 to 455, it appears that after 8.3.2013 or after 22.3.2013 or after 18.4.2013 the date of pronouncement of order related to scheme was not fixed by the Joint Charity Commissioner in advance and hence, it cannot be said that on 25.4.2013 neither

respondent No.1 nor his advocate nor his representative were present before the Joint Charity Commissioner and not requested for stay of the aforesaid order. Referring the document at Annexure-R-11 page 451, letter in form of opinion written by advocate Piyush P.Pandya dated 25.4.2013, addressed to Lilavati Fakirchand Sharma Charitable Trust, C/o Komalkant F.Sharma (petitioner No.1 of Special Civil Application No.8465 of 2013). It appears that since 11.4.2013 or prior to it, the calculative move has started by the newly appointed trustees who are claiming themselves as enlightened citizens, regarding taking over the charge of trust immediately after the order related to scheme be passed. Now, the question to be decided is whether the impugned order passed by the Appellate Judge under the above referred circumstances is maintainable in the eye of law. At this juncture, it is important to note that impugned order, though interim order at the initial stage, but the same was not ex parte one but is a bipartite order as

the petitioners herein have filed the caveat and all were heard.

8. Recourse to justice is recourse to a civilized means. As soon as the court is approached with a dispute or question, its very first duty is to do justice for justice by deciding whether the party or parties are entitled to justice in the context of whole relevant four corners of law. Thus, justice initially needs to be done and accordingly the court may continue or discontinue the proceedings. A situation may be, in great need of justice, but that itself is not enough to activate the judicial process, keeping the merits of the case aside.

8.1 In the legal system, the courts are created and entrusted with functions and responsibilities to administer justice and for that, are vested with necessary power and authority. But, in my view, the Court cannot be bestowed with the luxury of complete discretion



in its functioning disregarding the essential characters of Order 39, Rule 1 and 2 or Order 41, Rule 5 of the Code of Civil Procedure, 1908 and also the purpose and responsibility. The Court is a Court having its own "judicial discipline" and striking the "judicial balance", it must perform its essential function. The Court as a Court of justice must not project itself as a Court of "no justice" by not entering into the merits of the case, when there are no good reasons as the parties have been heard at length on facts as well as law to decline justice at the threshold. The power, function and responsibility of the Court are inter-linked which limit the freedom of the Court whose commissions and omissions cannot just be suo moto or arbitrary. Considering the deficiency / short comings / conduct of both the sides, the Court has to decide on merits of the case that which way lies the truth; and the less dust there is about the better. A Judge is impartial administrator of law and the "Judicial Balance" is a mark of his

authority and a source of respect to Judicial System. I am also of the view that justice needs to be thoroughly done throughout the whole proceedings in order to reach ultimately to the correct result. Any stage devoid of justice would make the whole judicial process defective and the final judgment or opinion would go wrong. Golden principles of justice need to be used as a means or instrumentality to achieve the end or objective of justice. Justice - objective needs to be achieved through justice way i.e. to decide the dispute entering into the merits of the case, more particularly, when the dispute be resolved or adjudicated upon after bipartite hearing. Why does justice carry a balance in her hand with lifted scales ? This is plain - simple. It needs no justification. The balances have always been the symbol of even-handed justice.

9. Thus, the Appellate Court is expected to discuss the merits of the matter, more particularly, when the entire documentary evidence has been forthcoming on the record and

all the advocates for both the parties have been heard at length on facts as well as law. It is altogether a different thing that the order of the Joint Charity Commissioner may stand or fall. It goes without saying that if the order is good, it will stand and if the order is bad, it will fall. Under the circumstances, in my view, granting ad-interim injunction without entering into merits and without in any way looking at the three golden principles of the Code of Civil Procedure, 1908 is nothing but abuse of jurisdiction.

10. Under the circumstances, these Special Civil Applications are allowed. The interim final order dated 1.5.2013 passed by learned Additional District Judge, Bhavnagar below Exh.5 in Regular Civil Appeal No.24 of 2013 is hereby set aside for the reasons referred hereinabove with a clarification that the petitioners and newly appointed trustees are permitted to continue with the management in light of the order dated 6.5.2013 passed by this Court till Exh.5 in

Regular Civil Appeal No.24 of 2013 be finally heard and the same is directed to be decided finally on merits. The Appellate Court concerned is directed to dispose of Exh.5 in Regular Civil Appeal No.24 of 2013 on or before 31<sup>st</sup> May, 2013. It is needless to say that learned advocates for the parties will render all cooperation in hearing, if at all any, to the Court concerned.

11. At this juncture, I thought it fit to clarify that by allowing these petitions, this Court is not endorsing any act or conduct of the parties and the observations made in these petitions are the prima facie one and the Appellate Court shall decide the dispute only in accordance with law, on its own merits and without in any way being influenced by the said observations. Direct service is permitted today.

(G.B.SHAH, J.)

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