

CASE NO.:
Appeal (civil) 5682 of 1999

PETITIONER:
ABID HATIM MERCHANT .

Vs.

RESPONDENT:
JANAB SALEBHAI SAHEB SHAIFUDDIN & ORS.

DATE OF JUDGMENT: 03/02/2000

BENCH:
U.C.Banerjee, A.P.Misra

JUDGMENT:

BANERJEE, J.
L.....I.....T.....T.....T.....T.....T.....T...J

The issue before the Court in this Civil Appeal against the judgment of the Bombay High Court is rather short, to wit, whether the avowed object with which Sir Adamji Peerbhoy the great Philanthropist founded the trust for Dawoodi Bohra Community in 1883 A.D. needs a change of object under Cypres doctrine having regard to constitutional parameters so as to make the Trust truly secular in nature since the situation of the early 19th century may not suit the purpose in the 21st century. The respondent Trust contended that the preamble to the Constitution itself declares India to be secular and as such what was possible in 1883 may not be proper and in line with lofty ideas of our Constitution since the constitutional mandate is to be obeyed in its observance rather than in its breach and it is this concept which is said to have prompted the Trustees of Sir Adamji Peerbhoy Sanatorium Trust to move the City Civil Court for variation and amendment to the scheme of the Trust as sanctioned by the Court in 1931. Incidentally, be it noted that the expression Cy-pres in common English acceptation means and implies as near as possible (to testators or donors intentions when these cannot be precisely followed).

In Halsburys Laws of England (4th Ed. Vol.5B) cy pres doctrine has been referred to as below: The cy-pres doctrine: Where a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed, but the law will substitute another mode cy-pres, that is, as near as possible to the mode specified by the donor.

An application cy-pres results from the exercise of the courts ordinary jurisdiction to administer a charitable trust of which the particular mode of application has not been defined by the donor. Where he has in fact prescribed a particular mode of application and that mode is incapable

of being performed, but he had a charitable intention which transcended the particular mode of application prescribed, the court, in the exercise of this jurisdiction, can carry out the charitable intention as though the particular direction had not been expressed at all.

The primary rule to be observed in the application of the cy-pres doctrine is that the donors intention must be observed as far as possible. Thus, if the donor names a particular object which is capable of taking effect, any application cy-pres that becomes necessary must be restricted within the limits of that object, and the mode of application must as far as possible coincide with his wishes.

A charity may by cy-pres to the original object even though it seems to have no trace of resemblance to it, if no other can be found which has a nearer connection, but objects nearer the donors intention will always be selected in preference to those more remote.

The doctrine of Cy-pres as noticed by this Court in *Ratilal vs. State of Bombay* (AIR 1954 SC 388) and as developed by the Equity Courts in England stands adopted by our Indian Courts since a long time past. B.K. Mukherjea, J. (As His Lordship then was) speaking on behalf of Bench stated:- When the particular purpose for which a charitable trust is created fails or by reason of certain circumstances the trust cannot be carried into effect either in whole or in part, or where there is a surplus left after exhausting the purposes specified by the settler the court would not when there is a general charitable intention expressed by the settler, allow the trust to fail but would execute it cy pres, that is to say, in some way as nearly as possible to that which the author of the trust intended. In such cases, it cannot be disputed that the court can frame a scheme and give suitable directions regarding the objects upon which the trust money can be spent.

Subsequently, this Court in *N.S. Rajabathar Mudaliar vs. M.S. Vadivelu Mudaliar and Ors.* (1970 (1) SCC 12) observed:

The cy-pres doctrine applies where a charitable trust is initially impossible or impracticable and the Court applies the property cy-pres, viz., to some other charities as nearly as possible, resembling the original trust.

Having dealt with the situation for the applicability of the doctrine cy- pres and before adverting further in the matter, however, certain factual details ought to be noticed at this juncture. The records depict that the Collector of Bombay on 8th May, 1886 as per the request of Sir Adamji Peerbhoy granted lease of a plot of land at Queens Road, Bombay for a period of 99 years commencing from July, 1884. The lease deed itself contained an option to the lessees to renew the lease for a further period of 99 years. A social benefactor, as Sir Adamji was, however, used the land for the purpose of a mosque and also constructed a building having three wings for charitable purposes. Incidentally, Sir Adamji after his death was buried within the compound of leasehold land whereupon a tomb was erected. Records further depict that on September 22, 1927, a suit was filed (Suit No.960 of 1927) in the High Court at Bombay, for

declaration that the entire property cannot but be dealt with as a trust property and the High Court in June, 1931 passed a decree by way of a sanctioned scheme and the Trust since then came to be known as Sir Adamji Peerbhoy Sanatorium Trust. It appears that in 1944, the third wing or wing C of the property was requisitioned under the Defence of India Rules, 1935 for Polish Red Cross Hospital and after the departure of the Polish Red Cross Hospital, a Society called Saifee Hospital Society came to be registered with an object to give medical help to the members of the Dawoodi Bohra Community and started running a hospital in wing C with however, the infra structural facility, available through purchase, as was existing with the Polish Red Cross Hospital. It is since then the hospital is being run till this day by the Saifee Hospital Society and later registered as Saifee Hospital Trust on and since 1st January, 1973. On records therefore we do find at this juncture the existence of Sir Adamji Peerbhoy Sanatorium Trust as also the Saifee Hospital Trust. Needless to record here that all proper authorisations from the appropriate statutory agencies were obtained to run the hospital by the Saifee Hospital Trust. The establishment of Saifee Hospital Trust, however begins the era of litigation: Application before the court wherein change of objects and also sanctions were sought on the ground that what was possible a century ago cannot possibly be restricted in the manner as it was and Saifee Hospital Trust is rather firm in its conviction that in 21st century question of restricting a super speciality hospital to a particular community of a particular religion may not sub-serve the need of the hour and call of the day for the country. The Saifee Hospital Trust has been contending that the constitutional parameters cannot but be adopted so as to make it a true secular State, as professed in the Constitution. Cypres doctrine for the change of objects was sought and such a change was granted. The matter went from court to court without however any variation in favour of the change of objects. The High Court in no uncertain terms recorded that the judgment of the learned Judge of the City Civil Court does not warrant any interference on any of the findings and as such dismissed the appeal. Before coming to the findings of the City Civil Court be it noted that during the course of the hearing of the appeal before the High Court several civil miscellaneous applications came up for hearing and in one such application the High Court observed as below:-

It is quite obvious from the character of this litigation that the appellants do not desire to allow it to be concluded and this is just one more ploy at a hopelessly late stage to have the entire proceedings reopened before the Trial Court were asking for an additional issue which inevitably means additional evidence etc. This is one of the litigations where every conceivable aspect of the matter has not only been agitated by the parties but has already been decided by the Trial Court. After hearing this appeal on merits for a considerable period of time, we are of the view that it is impermissible to grant this application. The Civil application accordingly fails and stands dismissed.

Coming back to the findings of the Court on the Cypres issue, records depict that by a judgment and order dated 5th August, 1991 the Bombay City Civil Court granted the application filed for variation and amendment to the scheme

of Adamji Peerbhoy Sanatorium Trust framed in terms of the order of the High Court in 1931 as noticed above. The appellant herein however, by reason of being aggrieved moved the High Court in First Appeal bearing No.1078 of 1991 but the same was summarily rejected and subsequently Letters Patent Appeal came to be filed before the High Court and the same was also rejected as noticed above and hence this Special Leave Petition against the order of rejection of the Letters Patent appeal, before this Court. After considerable hearing of the matter we also had a feeling that the appellant is not very keen to have the proceedings concluded at this juncture. But our apprehensions were allayed by the learned Advocate appearing in support of the appeal when certain proposals were considered to be otherwise reasonable and as a matter of fact this Court records its appreciation for all round efforts of the learned Advocates appearing for the parties including that of the added respondent, namely, the Jamat in coming to a very reasonable amicable solution as detailed hereinbelow and in this subsequent factual backdrop, we are thus not called upon to embark upon an enquiry as to applicability of the Cypres doctrine in the contextual facts.

Incidentally, the State Government being a primary party in the matter of resolution of disputes by reason of the lease spoken of earlier, this Court thought it fit to issue notice to the State Government and the State Government as per the directive of this court did make certain submissions which we will immediately refer to hereinbelow, but before so doing the agreed minutes of the Order are placed below:-

1. The Orders of the City Civil Court at Bombay in Charity Application No.18 of 1976 dated 5.8.1991 and 22.10.1991 as modified by the Order of the Bombay High Court dated 15.7.93 in Letters Patent Appeal No.103 of 1991 are confirmed save and except as modified by the following directions: 2. 30 (Thirty) beds in the proposed Saiffee Hospital shall be reserved for treatment of members of the Dawoodi Bohra Community free of charge (inclusive of 20 beds as provided in the Order of the City Civil Court, Bombay mentioned above). Such beds and treatment to be provided to economically needy Dawoodi Bohras regardless of whether they have taken the Oath of Allegiance (Misaq) or not, and regardless of whether they have been excommunicated or not. The criterion of economic need shall be as determined by the Maharashtra Government for other charitable hospitals from time to time. 3. Wings A and B of the Adamji Peerbhoy Sanatorium Trust property shall not be demolished unless and until a sum of Rs.1 crore (inclusive of Rs.50 lakhs ordered by the City Civil Court at Bombay) is deposited by the Trustees of Saiffee Hospital Trust in a separate Bank Account to be opened for this purpose. The utilisation of the said sum of Rs.1 crore shall be in accordance with the Orders referred to in Clause 1 above. It is placed on record that a sum of Rs. 1 crore has already been deposited by the Saiffee Hospital Trust on 23rd November, 1999.

4. The Trustees of Saiffee Hospital Trust undertake to this Court and are accordingly directed to complete the construction of the Sanatorium Wing of the proposed building of minimum built-up area of 16,000 square feet within five years from the date of commencement of demolition of Wings A and B of the Adamji Peerbhoy Sanatorium Trust property. The plans annexed to the Affidavit of Mudrekabhai Saheb T.

Zakiuddin dated 8.10.1997 at Volume XIV pages 2237 to 2262 filed in this Court shall be amended to bring the entrance of the Sanatorium Wing to the front of the building facing Maharishi Karve Marg. The cost of the construction of the Sanatorium Wing of the proposed building with the minimum built up area of 16,000 square feet and within the time frame as indicated above shall be borne by the Saifee Hospital Trust. The Trust would also furnish the Sanatorium fully so as to make it a comfortable living and resting place for the Musafirs. It is further clarified that the entire maintenance of the Sanatorium as also Dargah and the open space shall be effected by the Saifee Hospital Trust in the same way and manner as of the Hospital. 5. The open area adjacent to the Mosque and Dargah in the Adamji Peerbhoy Sanatorium Trust property which is shown in green colour in the plan annexed to the Affidavit of Respondent No.11 dated 8.10.1997 at page 2253 of Volume XIV filed herein shall be used exclusively for the purposes of the Mosque and shall always be available to the Mosque for the use of devotees. 6. Upon completion of the project, an openable gate shall be placed on the East and West sides of the newly constructed property for the purpose of distinguishing separately the areas of the Sanatorium, Mosque and Dargah from the area of the Hospital. These gates which shall ordinarily be kept locked shall be designed and placed in a manner so as to facilitate without any obstruction the entry, exit, passage and movement during emergencies of fire brigade vehicles, ambulances and hearses around the property. The gates however shall be under the care and custody of the Saifee Hospital Trust but a set of duplicate keys would be kept with the Caretaker of the Sanatorium for use during any emergency. It is made clear that in the normal course of events, locking arrangement and opening and closure of the gates shall be with the Saifee Hospital Trust excepting however in emergencies as noted above. 7. The gates and entrances to the Sanatorium and Mosque portions of the building shall bear only the name of Sir Adamji Peerbhoy Sanatorium and/or Sir Adamji Peerbhoy Sanatorium Trust. The gates and entrances to the Hospital portion of the building will bear the name of Saifee Hospital and/or Saifee Hospital Trust on the gate posts, and the name of Sir Adamji Peerbhoy Sanatorium and/or Sir Adamji Peerbhoy Sanatorium Trust on the opposite gate posts in letters of equal size and prominence. If the name of Saifee Hospital or Saifee Hospital Trust is put up on any exterior surface of the Hospital Wing then the name of Sir Adamji Peerbhoy Sanatorium Trust shall be placed alongside the same or one after the other with due regard to the Aesthetics of the Building with equal size and prominence. 8. It is placed on record that the State Government is otherwise prepared to renew the lease but by reason of the fact that the State Government is not a party to these agreed minutes. The details and particulars in regard thereto would appear herein below under the head directions. 9. The Trustees of Saifee Hospital Trust undertake that the entire ground rent for the Adamji Peerbhoy Sanatorium Trust property will be paid by the Saifee Hospital Trust for and on behalf of Sir Adamji Peerbhoy Sanatorium Trust. However, in the event of non-payment of such a rent for a period of three months the State Government being the lessor will intimate Sir Adamji Peerbhoy Sanatorium Trust and called the latter to pay the arrears within further period of three months together with the current rate of rents and in the event, however, there is any failure to pay on the part of Sir Adamji Peerbhoy Sanatorium Trust, however, within the period, as aforesaid,

the property lease deed shall stand automatically terminated and the land and constructions thereon shall stand vested on to the State Government excepting however, the area for the Dargah and Mosque and the open land adjacent thereto as earmarked in the plan. In the event, however, on payment by Sir Adamji Peerbhoy Sanatorium Trust by reason of the default of the Hospital Trust, the property shall stand vested on to Sir Adamji Peerbhoy Sanatorium Trust. The forfeiture as above, on both counts however shall be subject to the existing law as regards the relief against forfeiture. 10. Save and except the modifications in the Scheme of the Adamji Peerbhoy Sanatorium Trust as granted by the City Civil Court at Bombay in its order dated 5.8.1991, the original Scheme of the Trust as settled by the Bombay High Court in 1931 stands confirmed and thus shall remain operative and in force in all other respects. 11. The confirmation of Orders as above of the City Civil Court at Bombay and the High Court of Judicature at Bombay by this Court are however without prejudice to the right of the parties to adopt such remedies as are available in law against the concerned Trustees for any malfeasance or misfeasance. 12. All contentions other than those expressly decided by the City Civil Court and High Court and as dealt with hereinbefore in this order by this Court are kept open.

As noticed above the State Government not being a party in regard to amicable resolution of disputes between the two trusts, but since the presence of the State Government being otherwise necessary due notice was issued to the State Government and upon hearing Mr. Mohta, learned Senior Advocate appearing for the State of Maharashtra and regard being had to the affidavit filed in support thereof, we do feel it expedient to issue the following directives to the State Government. These directions are however in addition to the agreed terms as noticed and not in derogation therewith. Incidentally, be it noted that the directives are however in conformity with the Affidavit filed by Shri Jagdish Kashinath Gharat, Under Secretary to Government of Maharashtra, Revenue and Forest Department and affirmed on 10th January, 2000. The directives are as below:- (i) The orders given under the Government Memorandum No.S- 30/91/211923 CR No.46/J-2, dated 28.2.94 for renewal of lease of the said land in favour of the Trust stands cancelled by this Order. (ii) The Policy laid down under Government Resolution No.LND 1085/134222 CR No.184/J-2, dated 5.10.99 for renewal of the expired Government lease from Greater Bombay is made applicable in this matter as a Special Case and the lease is being renewed from the date 1.7.83 to 31.12.98 in favour of Sir Adamji Peerbhoy Trust. The ground rent at the rate of 1% on the 50% concessional value of the value calculated as per the market value prevailing at the time of expiry of the lease i.e. on the date 1.7.83 shall be charged at the time of the renewal. (iii) The lease of the said land shall be renewed for the further period of 30 years from the date 1.1.1999 and for that purpose, the ground rent at the rate of 1% on the amount arrived at after calculating 50% concessional value of the land at the market rate prevailing on the date 1.1.99 shall be charged as the said land would be used for hospital/religious purpose. (iv) The ground rent rate shall be hiked by 10% after every 10 years. (v) On the expiry of 30 years period of the lease, the period thereof shall be extended and the lease be renewed at the option of the lessee and in the event of failure to exercise the option

above on the part of the concerned Trust (Sir Adamji Peerbhoy Sanatorium Trust) the Sub- lessee (as is spoken of hereinbelow) would have the right to renew the lease and be treated for all intents and purposes the lessee of the land though however, upon receipt of information pertaining to failure to renew the lease sofar as Sir Adamji Peerbhoy Sanatorium Trust is concerned. Further renewal also shall be on the same terms and conditions as regards the quantum of rent to be fixed in the light of the market rate then prevailing on the respective dates of future renewal. (vi) The State Government is hereby directed to accord permission to use the land for Saiffee Hospital and also for the Sanatorium in terms of wishes and desires of Sir Adamji in the building of the Trust as well as to sub-lease the land under the said building to Saiffee Hospital Trust. (vii) The documentation of the said lease shall be prepared by the Government Solicitor and Joint Secretary, Law and Judiciary Department and the cost incurred therefor shall be borne by the Lessee or the Sub-lessee. (viii) 25 beds shall be reserved for Government employees in the Hospital of Saiffee Hospital Trust. (ix) Sir Adamji Peerbhoy Trust and Saiffee Hospital shall take precaution, while carrying out new construction for the Hospital, to see that no, let or hindrance is caused to the religious place as well as the graveyard located there. (x) While renewing the lease of Sir Adamji Peerbhoy Sanatorium Trust due regard be had to the covenant, provisions and stipulations as are available in the lease deed of 1888 excepting, however, the rate of rent as mentioned hereinbefore. The appeal and other miscellaneous applications stands disposed of on the basis of the Agreed Minutes and the directions on to the State of Maharashtra as above with due reservation of right as noticed hereinabove. We once again do record our appreciation for the efforts made by the learned Advocates appearing for the parties herein including Shri V.A. Mohta, learned Senior Advocate appearing for the State of Maharashtra, for the assistance rendered in resolution of disputes between the parties in the manner as above. We do feel it fit and proper to record that needful should be done to see that the solemn objects with which Sir Adamji Peerbhoy Sanatorium Trust was created are respected and in the same way the requirements of the Hospital also be met on essential terms, on the expectation of which this order is passed as above. Parties are directed to bear their own costs.

.J (S.B. Majmudar)