IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6142 OF 2014
WITH
CIVIL APPLICATION NO. 779 OF 2015 In WP/6142/2014

1.S.M.Pasha and Ors. Petitioners
Vs
1. State of Maharashtra and Ors. .. Respondents

Mr. Virag V. Tulzapurkar, Senior Advocate i/b Kalpesh Joshi, Advocate for Petitioners.

Mr. G.W.Mattos, A.G.P. for respondent No.1-State.

Mr. Ravi Kadam, Senior Advocate, a/w Mr. V.M.Parshurami, Advocate for Respondent No.2.

Ms.Vaishali Nimbalkar, A.G.P, for Respondent No.3.

Mr. M.M.Vashi, Senior Advocate for Respondents No.4, 6 to 18.

Mr. N.H.Seervai, Senior Advocate a/w Ms Sudeshna Guha Roy and Mr. Chinmayee Pendse i/b Vidhi Partners, Advocates for Respondent No.5.

Mr. S.U.Kamdar, Senior Advocate i/b Mr. Abhijeet Marathe, Advocate for Applicant in C.A. No.779/2015.

CORAM : R.G.KETKAR,J.
RESERVED ON: 14/09/2015
PRONOUNCED ON: 17/10/2015.

ORDER:

1. Heard Mr. Virag V. Tulzapurkar, learned senior counsel for the petitioners, Mr. G.W.Mattos, learned A.G.P. for respondent no1-State, Mr. Ravi Kadam, learned senior counsel for respondent no.2, Ms. Vaishali Nimbalkar, learned A.G.P. for respondent no.3, Mr. M.M.Vashi, learned senior counsel for respondents no.4, 6 to

18, and Mr. N.H.Seervai, learned senior counsel for respondent no.5 and Mr. S.U.Kamdar, learned senior counsel for Applicant in Civil Application No.779 of 2015, at length.

2. By this Petition under Articles 226 and 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 18.12.2013 passed by the learned Charity Commissioner, Maharashtra State, Mumbai (for short, 'Charity Commissioner') in Misc. Applications No.47 of 2013 and 52 of 2013. By that order, the Charity Commissioner dismissed the applications instituted by the petitioners herein under the Maharashtra Public Trusts Act, (for short, 'Act'). The relevant and material facts, giving rise to the filing of the present petition, briefly stated, are as under.

3. Respondent No.4-Aram Nagar Tenants Welfare Association (for short, 'Association') is a society registered under the Societies Registration Act, 1860 and is also registered as a Public Trust under the provisions of the Act. It is divided in two parts, namely, Vibhag-I and Vibhag-II. There are in all 357 tenements, situate on land admeasuring 16 Hectors at Varsova, Mumbai. There are 147 tenements in Vibhag-I and 210 tenements in Vibhag-II. These tenements were earlier used as military barracks before independence and were allotted by respondent no.2 – Maharashtra Housing & Area Development Authority (for short, 'MHADA') to persons on tenancy basis. By Government

Resolution dated 18.5.1987, Government of Maharashtra decided to convert tenancy rights into ownership rights in respect of tenements allotted by MHADA. However, on 21.4.1990 the Government of Maharashtra decided not to extend benefits of the said resolution to the Association as it appears that the Government itself intended to develop the large areas of land. By communication dated 26.7.1991, the Government of Maharashtra declined to grant development rights to MHADA.

4. Association instituted Writ Petition No.3550 of 1991 on the Original Side of this Court on 25.9.1991 challenging the action of the State Government. On 14.9.2004, Executive Committee of the Association passed a resolution not to prosecute the said petition and to appoint respondent no.5 as a developer for development of the land on which the tenements are situate. In pursuance thereof, on 27.9.2004, Agreement was entered into by and between the Association and respondent no.5 for developing Vibhag-II admeasuring 76,625 sq.meters and having 210 tenements. During pendency of this petition, Chamber Summons Nos. 28 of 2005, 43 of 2005 and 74 of 2005 and one Notice of Motion No. 51 of 2005 were taken out. By order dated 1.7.2005, this Court directed the Charity Commissioner to nominate a responsible officer not below the rank of Assistant Charity Commissioner for holding election of the Executive Committee of the Association and complete the entire election process as per

the Rules. In pursuance thereof, the elections were held and newly elected committee took charge on 15.8.2005 for a period of three years.

5. On 11.11.2005, first supplemental agreement was entered into by and between the Association and respondent no.5. On 2.7.2008, second supplemental Agreement was entered into by and between the Association and respondent no.5. On 2.9.2009, Joint Development Agreement was entered into by and between MHADA (respondent no.2), Association (respondent no.4) and Developer (respondent no.5). Writ Petition No.3550 of 1991 was withdrawn on 29.9.2009 on the ground that the Executive Committee of the Association passed a resolution on 14.9.2004 for withdrawal of the petition as tripartite agreement was entered into by and between the Association, the MHADA and respondent no.5. The request for withdrawal of the petition was opposed by the intervenors claiming to be members of the General Body of the Association. It was submitted that these members are taking steps to get the resolution of the Executive Committee cancelled either by competent court of law or by the General Body. They sought two weeks time. After noting the request for withdrawal and opposition of the intervenors, the petition was allowed to be withdrawn reserving liberty to the intervenors to move this Court either in that petition or by a fresh petition in case either the resolution of the Executive Committee for withdrawal of the

petition is set aside by the competent court of law or that the resolution is withdrawn by a resolution of the General Body of Association in accordance with law.

6. Writ Petitions no. 2086 of 2010 and 2202 of 2010 were instituted on Original Side of this Court, inter alia, praying for direction to the Association to hold General Body Meeting of the Association; for direction to MHADA to implement Government Resolution dated 18.5.1987 for granting ownership rights to tenants of the Association; to quash and set aside Joint Development Agreement dated 2.9.2009 and consequential Notice dated 12.7.2010 issued by MHADA in terms of the Joint Development Agreement; for direction to the State Government to initiate action against the members of the Executive Committee of the Association for alleged irregularities in the matter of development agreements which were entered into in the years 2004-05 and 2008-09.

7. By order dated 7.10.2010, the petitions were rejected. Review Petition No.1 of 2011, Review Petition (L) No.14 of 2011 and Review Petition (L) No.47 of 2012 were taken out seeking review of the order dated 7.10.2010. By order dated 25.2.2013, Review Petitions were dismissed. Aggrieved by these orders, the matter was taken to the Apex Court. By order dated 12.7.2013, the Apex Court dismissed Special Leave Petition by observing that the reasons assigned by the High Court for declining relief to

the petitioners were legally correct and the impugned orders did not suffer any patent legal infirmity warranting interference under Article 136 of the Constitution. Liberty was given to the petitioners and other Members of the Association to approach the Charity Commissioner for annulment of Resolution dated 14.9.2004 or any other resolutions which may have been passed by the Executive Committee of the Association for facilitating redevelopment of the plot in question. The Charity Commissioner was directed to decide the application/petition as early as possible, but latest within a period of three months from the date of receipt/production of copy of the order without being influenced by the reasons recorded by the High Court for dismissing the writ petitions and review petitions.

8. In pursuance of the liberty granted by the Apex Court, Misc. Applications were filed before the Charity Commissioner, inter alia, praying for declaration and order that the Association or Executive Committee cannot dispose of or transfer immovable property of the Association by way of grant of development rights without prior consent of the Charity Commissioner in accordance with Section 36 of the Act; for declaration that the Resolutions dated 18.2004 and 14.9.2004, Agreements dated 27.9.2004, 11.11.2005, and 2.7.2008 and Joint Venture Agreement dated 2.9.2009 are invalid, inoperative and not binding on the Association or its members and consequently all the

amendments whatsoever carried out to the Memorandum and Rules and Regulations of the Association be declared as invalid, inoperative and not binding on the Association or its members; to annul, cancel, quash and set aside the Resolutions dated 1.8.2004 and 14.9.2004, Agreements dated 27.9.2004, 11.11.2005 and 2.7.2008 and Joint Venture Agreement dated 2.9.2009 and all other resolutions, agreements, documents and writings executed by the Executive Committee in the name of the Association in relation with the redevelopment scheme and consequently all the amendments whatsoever carried out to the Memorandum and Rules and Regulations of the Association also be annulled, cancelled, quashed and set aside; to initiate necessary action, (civil and criminal), against the opponents therein for breach of Memorandum of Association and the Rules and Regulations framed thereunder and for prejudicing and jeopardizing the rights and properties of the members of the Association.

9. Opponent no.1-Shri Vivek Vichare, the erstwhile President of the Association, opponent no.3-Nitin Mavani, the erstwhile General Secretary of the Association, opponent no.14-Association filed their written statement at Exhibit 15 in Misc. Application No.47 of 2013 and Written Statement at Exhibit 27 in Misc. Application No.52 of 2013 resisting the application. Opponent no.2, opponents no.4 to 13, the erstwhile office bearers of the

Association, filed purshis Exhibit 16 in Misc. Application No.47 of 2013 and Purshis Exhibit-28 in Misc. Application No.52 of 2013 adopting the written statement. MHADA filed Written Statements at Exhibit 17 in Misc. Application No.47 of 2013 and at Exhibit 29 in Misc. Application No.52 of 2013. The Developer filed Written Statements at Exhibit-18 in Misc. Application No.47 of 2013 and at Exhibit-30 in Misc. Application No.52 of 2013. Applicants in Misc. Application No.47 of 2013 filed their rejoinder at Exhibit 20 to the Written Statement filed by respondent no.5-herein Developer and rejoinder at Exhibit 19 to the Written Statement of remaining opponents in Misc. Application No.47 of 2013. After considering the material on record, by the impugned order the Charity Commissioner dismissed the applications on 18.12.2013. It is against this decision, the petitioners have instituted the present petition under Articles 226 and 227 of the Constitution of India.

10. In support of this Petition, Mr. Tulzapurkar strenuously contended that the Charity Commissioner totally misdirected in holding that Section 36 of the Act does not apply. The Charity Commissioner held that the land and tenements are owned by MHADA and that the Association has no interest in the property. He submitted that the Executive Committee could not have passed the resolution on 14.9.2004 as its tenure was over way back in the year 2003. He submitted that on 16.7.2004 the

notice was issued for convening Annual General Body Meeting of the Association on 1.8.2004. One of the items of Agenda of the meeting was to appraise the members the present status of the proposed redevelopment plans, amongst others. On 1.8.2004, the General Body, after considering pros and cons, empowered the Association to process redevelopment plan of Vibhag-II and complete/finalise all the necessary formalities relating to the said issue and enter into necessary tripartite agreement between MHADA, Association and Developer. He submitted that the resolution dated 1.8.2004 was only in respect of Vibhag-II and not Vibhag–I. By that resolution, the Executive Committee was not empowered to process the redevelopment plan of Vibhag-II. It was only the Association, namely the General Body who was authorised to process the redevelopment plan, that too, of Vibhag-II.

11. Mr.Tulzapurkar submitted that the Charity Commissioner did not properly consider the documents/agreements that are produced on record and did not go into this aspect effectively. He submitted that on 14.9.2004 the Agreement was entered into by and between the Association and the developer. Paragraph 3 thereof shows that the Executive Committee received offers from as many as four builders showing their interest for redevelopment of Vibhag-II. As far as respondent no.5-developer is concerned, offer was made by letter dated 10.9.2004. Within

four days, the Executive Committee considered the offers and appointed respondent no.5 as a developer in respect of Vibhag-II admeasuring 76625 sq.meters. The Executive Committee could not have decided merits and demerits of the offer of respondent no.5 in such a short span of 4 days. The Executive Committee also did not consider financial capacity, amongst others, of respondent no.5 to develop Vibhag-II. He submitted that as the tenure of the Executive Committee expired in the year 2003, it had no authority to pass the resolution. He submitted that the development rights were given by the Association and not by the MHADA. The Executive Committee was not authorised to enter into Development Agreement for giving development rights to respondent no.5-Developer. In fact, the members of the Executive Committee know difference between the Executive Committee and the General Body and still the Executive Committee usurped powers of the General Body.

12. Mr. Tulzapurkar submitted that before entering into the Agreement on 27.9.2004 with respondent no.5-developer, terms were not discussed with the members. No informed consent of these members was taken. Respondent no.5-developer was not selected by the General Body but by the Executive Committee without any authority. It is also clear from the material on record that the members were also not shown the terms and conditions on which the Association entered into the Development

Agreement with respondent no.5-developer.

13. Mr. Tulzapurkar submitted that out of 357 members, only 73 members were present in the Annual General Meeting convened on 1.8.2004 which is not as per corum prescribed under Bye-law 119. The resolution dated 1.8.2004 was also not passed as per Agenda dated 16.7.2004. While entering into Development Agreement on 27.9.2004, even consent of the 70% members of Vibhag-II was not obtained. He submitted that after new Executive Committee was elected on 15.8.2005 immediately supplemental agreement was entered into with respondent no.5 on 11.11.2005 in respect of Vibhag-I. No consent in respect of Vibahg-I was obtained. On 2.9.2009, the tripartite agreement was entered into by and between the MHADA, Association and respondent no.5-developer in respect of Vibahg-I and Vibhag-II. He submitted that in terms of regulation 33(5) of the Development Control Regulations, incentive F.S.I. is made available to the society. F.S.I. is an immovable property for which permission of the Charity Commissioner under section 36 is absolutely necessary. He submitted that admittedly in the present case, permission of Charity Commissioner under section 36 is not obtained. He submitted that concept of duel ownership is recognised in India. In support of this submission, he relied upon Section 3(26) of General Clauses Act, 1897 which defines the expression 'immovable property' as also following decisions:

1. Vinayak Gopal Limaye Vs Laxman Kashinath Athavale, AIR 1957 Bombay 94;

2. Narayana Das Khetry Vs Jatindra Nath Roy Chowdhry, AIR 1927 PRIVY COUNCIL 135;

3. LaxmIpat Singhania Vs. Larsen and Toubro Ltd, A.I.R.1951 Bombay 205.

He further submitted that the resolutions and the agreements are void as they were passed and entered into by the Executive Committee after its tenure was over. In support of this submission he relied upon the following decisions:

4. Sandeep Ram Meghe Vs Pundlikrao Balaji Gohad (dead) and Ors, 2013 (4) Mh.L.J. 703; and in particular paragraphs 24 and 25;

5. Madhukar Vs Shriram Zinguji Bhalavi, 2010(1) Mh.L.J. 775 and in particular paragraphs 13 to 15.

14. Mr. Tulzapurkar submitted that the informed consent of the members was not obtained. Even consent of 70 % members was also not obtained. In support of this submission, he relied upon following decisions:

1. Mangal Milan Co-op.Housing Society Vs Sudhir Shah and Ors, 2014 SCC OnLine Bom. 1732 and in particular paragraphs 29,31,33 and 36;

2. New Woodland Co-op. Hsg Society Vs. State of Maharashtra, (2006) 5 Bombay CR 74 and in particular

paragraphs 37,45,47,48 and 55.

15. Mr. S.U.Kamdar appearing on behalf of the applicants in Civil Application No.779 of 2015 adopted the submissions advanced by Mr. Tulzapurkar.

16. On the other hand, Mr. Vashi appearing on behalf of the Association has supported the impugned order. He submitted that the petitioners have been set up by rival builder – Oberoi Builder. He submitted that this Court will not exercise its extra ordinary powers under Articles 226 and 227 of the Constitution of India if two views are possible. He submitted that Misc. Applications were filed by petitioners no.1 to 6, herein. Petitioners no.7 to 16 did not make any application before the Charity Commissioner. In other words, petitioners no. 7 to 16 were not party before the Charity Commissioner. He further submitted that out of 357 members of the Association, only petitioners no. 1 to 6 made application challenging the resolutions passed by the Executive Committee. The State Government was not impleaded as a party before the Charity Commissioner and is impleaded for the first time in this petition.

17. On 18.5.1987, the Government of Maharashtra passed resolution converting tenancy rights into ownership rights in the tenements allotted by MHADA. As the said benefit was not extended to the Association, Association instituted Writ Petition No.3550 of 1991 on the Original Side of this Court on the ground

that it violated Article 14 of the Constitution of India. Interim order was passed in the petition restraining the respondents therein from demolishing the tenements. On 29.9.2009, the Division Bench of this Court permitted withdrawal of the Writ Petition reserving liberty to the intervenors to move this Court either in that petition or by a fresh petition, in case either the resolution of the Executive Committee for withdrawal of the petition is set aside by the Competent Court of law or that the resolution is withdrawn by a resolution of the General Body of Association in accordance with law.

18. Mr. Vashi submitted that Writ Petitions no. 2086 of 2010 and 2202 of 2010 were instituted on Original Side of this Court, inter alia, praying for a direction to Association to act on requisitions submitted by the tenants/occupants and to hold general body meeting of the respondent-association; for directions to MHADA to implement Government Resolution dated 18.5.1987 to grant ownership rights to tenants of Aaram Nagar; to quash and set aside the Joint Development Agreement dated 2.9.2009 executed between MHADA, Association and respondent no.5-Developer and the consequential notice dated 12.7.2010 issued by MHADA in terms of the aforesaid Joint Development Agreement; for direction to the State of Maharashtra to initiate action against the members of the Executive committee of Association for alleged irregularities in the matter of

development agreements which were entered into in the years 2004-05 and 2008-09.

19. Those Petitions were dismissed by this Court on 7.10.2010. In paragraph 17, the Court, after noting order dated 29.9.2009, observed that instead of four weeks, the petitioners did not move any Competent Court of law even for 44 weeks for getting the resolution dated 14.9.2004 set aside and, therefore, this was not a fit case for exercising extra ordinary discretionary jurisdiction. In paragraph 18, the Court considered Sections 5 and 16 of the Societies Registration Act, 1860 and observed in paragraph 19 that prima facie the Court found considerable substance in the submission made on behalf of the respondents that the Executive Committee is vested with the power to take decisions regarding the management of the properties of the Association.

20. Review Petitions No.1/2011, (L) No.14/2011, (L) No.47/2012 were instituted for review of the order dated 7.10.2010. By order dated 25.2.2013, Review Petitions were dismissed by this Court. In paragraph 5 of that order, the contentions raised by the review petitioners were noted. In paragraph 15, the Court dealt with requirement of consent of 70% members. It was observed therein that DCR No.35(5)(7) requiring consent of 70% members came into force on 6.12.2008, but long prior thereto the Association had passed the resolution on 14.9.2004 and appointed

respondent no.5- as a developer, after considering offers made by other developer. The same was followed by MHADA's resolution dated 22.11.2007, State Government's approval dated 8.5.2008 and Agreement dated 2.7.2008 between respondent no.2–MHADA, respondent no.4-Association and Respondent no.5 -Developer. The Court also noted the finding recorded in the order dated 7.10.2010 to the effect that “otherwise also consent of 75% tenants was verified on 4.6.2009”. It was also noted that the grievance that consent of 70% of the members was not taken, has been made even now only by 14 members of the Association. In paragraph 19, this Court also dealt with resolution dated 14.9.2004 and noted that the Association was ready to give up its claim that members of the Association should get not only constructed property but also ownership rights over the land and upon giving up such a stand, the MHADA allowed Association to enter into Development Agreement with it and the Developer and that the Association could not have awarded the development rights to respondent no.5-Developer without accepting stand of the State Government and the MHADA.

21. Mr. Vashi submitted that aggrieved by orders dated 7.10.2010 dismissing Writ Petitions and 25.2.2013 dismissing Review Petitions, S.L.Ps were instituted before the Apex Court. While dismissing the S.L.Ps on 12.7.2013, the Apex Court observed that the reasons assigned by the High Court for

declining relief to the petitioners were legally correct and the impugned orders did not suffer any patent legal infirmity warranting interference under Article 136 of the Constitution. In other words, the Apex Court upheld the orders impugned before it and gave liberty to the petitioners and other members of the Association to approach the Charity Commissioner for annulment of the resolution dated 14.9.2004 or any other resolutions which may have been passed by the Executive Committee of the Association for facilitating redevelopment of plot in question.

22. Mr. Vashi has also taken me through the impugned order and submitted that Section 36 of the Act is not attracted as land and the tenements belong to MHADA. Tenements are given on tenancy basis to the members. In short, he submitted that Section 36 will apply only if the immovable property belongs to a public trust. He submitted that as per the Joint Venture Agreement, T.D.R and F.S.I. also go to MHADA. As against authorized existing tenements admeasuring 500 sq.ft, each tenement holder will get flat admeasuring 1230 sq.ft carpet area on ownership basis. The petitioners have not challenged various resolutions passed by the Executive Committee on 21.8.2005, 20.10.2005, 7.11.2005, 30.6.2008 and 12.7.2008. By these resolutions, the new Executive Committee, inter alia, approved the decision taken by the earlier Executive Committee in relation to the development of Aram Nagar and approved appointment of

respondent no.5 as a developer. The new Executive Committee also approved the supplemental agreement to be executed between respondent no.5- Developer and respondent no.4- Association as also tripartite agreement to be executed between MHADA, Association and Developer.

23. Mr.Vashi submitted that in paragraph 65, the Charity Commissioner recorded that the applications are not filed in representative capacity. In paragraph 66, the Charity Commissioner also noted that the applicants did not challenge meetings of the Executive Committee on the ground that the same were not convened and conducted as per Memorandum of Association. He has taken me through the Minutes of the Extra Ordinary General Body Meeting convened on 20.4.2003, resolutions of the Executive Committee passed on 20.10.2005, 7.11.2005, 30.6.2008. He submitted that no case is made out for invocation of powers under Articles 226 and 227 of the Constitution and Petition is liable to be dismissed.

24. Mr. Seervai submitted that basically consent of 70% members is not required and the said requirement was introduced by way of amendment to DCR 33(5) and (7) on 6.12.2008 which has been accepted by the Division Bench of this Court while dismissing Writ Petitions on 7.10.2010 and Review Petitions on 25.2.2013. He, therefore, submitted that it is not open to the petitioners to reagitate the said point again. He

submitted that the petitioners have prayed for issue of writ of mandamus (prayer clause (b)). By prayer clause (a), the petitioners have prayed for issue of writ of certiorari which cannot be claimed under Article 227 of the Constitution of India. Basically, the High Court exercises powers of superintendence over subordinate courts under Article 227 of the Constitution of India. The High Court does not issue writ of mandamus to subordinate courts. He submitted that in the case of K. Shamrao Vs Assistant Charity Commissioner, (2003) 3 SCC 563, the Apex Court has held in paragraphs 16 and 17 that the Assistant Charity Commissioner has not only the trapping of a judicial tribunal but also has power to give a decision or a definitive judgment which has finality and authoritativeness which are essential tests of a judicial pronouncement. The Assistant Charity Commissioner, therefore, possesses all the attributes of a court. Functions of the Assistant Charity Commissioner are predominantly adjudicatory. The Assistant Charity Commissioner has almost all the powers which an ordinary Civil Court has including power of summoning witnesses, compelling production of documents, examining witnesses on oath and coming to a definite conclusion on the evidence induced and arguments submitted. The Assistant Charity Commissioner is a Court for the purposes of Sections 2 and 3 of the Contempt of the Courts Act, 1971.

25. Mr. Seervai also relied upon the decision in the case of

Estralla Rubber Vs. Dass Estate (P) Ltd, (2001) 8 SCC 97 and in particular paragraphs 6 and 7 thereof which deals with the scope and ambit of exercise of power and jurisdiction of a High Court under Article 227 of the Constitution of India. To the same effect, he also relied upon the decision in the case of Ouseph Mathai Vs M. Abdul Khadir, (2002) 1 SCC 319 and in particular paragraphs 4 and 5 thereof as also Sameer Suresh Gupta Vs Rahul Kumar Agarwal, (2013) 9 SCC 374 and in particular paragraph 6 thereof.

26. Mr. Seervai also relied upon the decision of the Apex Court in the case of Radheshyam Vs Chhabi Nath, (2015) 5 SCC 423, rendered by three learned Judges of the Apex Court. In paragraph 25, the Apex Court held that judicial orders of Civil Court are not amenable to writ jurisdiction under Article 226 of the Constitution of India. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226 and contrary view in Surya Dev Rai Vs Ram Chander Rai, 2003 (6) SCC 675 is over ruled. He has also enumerated various steps taken by respondent no.5-Developer after entering into various agreements.

27. Mr. Ravi Kadam i/by Mr. V.M.Parshurami appearing for respondent no.2-MHADA submitted that MHADA has acted bonafide relying upon the resolutions passed by the Executive Committee of the Association authorising it to enter into Joint Venture Agreement for redevelopment with respondent no.5-Developer and respondent no.4-Association. Any challenge to the

said resolutions ought not to be entertained particularly at this belated stage as MHADA will be put to a great financial loss not only on account of pendency of the proceedings but in the event of the resolutions being set aside. He submitted that MHADA will be getting 4,00,000 sq.ft of built up area without MHADA or the State Government being required to pay any amount to respondent no.5-Developer which will be available for allotment in accordance with the Government policy and for rehabilitation of Project Affected Persons and the said fact is noted by this Court while dismissing the writ petitions on 7.10.2010.

28. Mr. Mattos appearing on behalf of respondent no.1-State submitted that the findings recorded earlier by the Division Bench operate as res judicata. The State Government gave approval on 4.5.2008. MHADA also gave NOC as it is owner of the land. He submitted that no case is made out for invocation of powers under Articles 226 and 227 of Constitution of India. Ms. Nimbalkar supported the impugned order.

29. In rejoinder, Mr. Tulzapurkar submitted that the reliance placed by the respondents on the orders dated 7.10.2010 dismissing the writ petitions and orders dated 25.2.2013 dismissing Review Petitions is wholly misconceived. In fact, while reserving liberty to the petitioners to approach the Charity Commissioner for annulment of the resolutions dated 14.9.2004 or any other resolutions which may have been passed by the

Executive Committee of the Association, the Apex Court directed the Charity Commissioner to decide the applications/petitions without being influenced by the reasons recorded by the High Court for dismissing the Writ Petitions and the Review Petitions. He, therefore, submitted that the Charity Commissioner has to independently consider the applications filed by the petitioners and he is not to be influenced by the reasons given by the High Court. He submitted that the reasons given by the High Court will not amount to res judicata and also they are not binding on the Charity Commissioner.

30. He submitted that by resolution dated 1.8.2004, redevelopment of Vibhag-II was to be undertaken. No resolution was passed by the General Body in respect of Vibhag-I. The Executive Committee clearly exceeded power by entering into agreements and passing resolutions qua Vibhag-I as also in selecting Developer. He submitted that whereas the General Body passed resolution on 1.8.004, respondent no.5-Developer gave offer on 10.9.2004. In other words, offer made by respondent no.5 was not before the General Body. Consequently, the General Body had no occasion to consider the offer and also approve appointment of respondent no.5 as a developer.

31. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. The questions that fall for consideration

are :

1. whether, in the facts and circumstances of the present case, Section 36 of the Act is attracted?
2. Whether the Executive Committee was authorised to pass Resolutions dated 14.9.2004, 20.10.2005, 7.11.2005, 30.6.2008 and also was authorised to appoint respondent no.5-Developer and enter into agreements with respondent no.5 as also Jt. Venture Agreement with respondent no.5 and MHADA?
3. Whether the Executive Committee was justified in entering into the agreements with respondent no.5 with regard to redevelopment of Vibhag-I?
4. Whether consent of 70% members of the Association is required?
5. Whether before passing various resolutions and entering into agreements with respondent no.5, the Executive Committee had appraised its members about the proposed redevelopment in respect of Vibhag-I and Vibhag-II. In other words, whether the members of Association were appraised of redevelopment of Vibhag–I and Vibhag-II so that they can take informed decision about the same?

<u>Re: Question No.1</u>

32. It is not in dispute that the land belongs to MHADA and till date it is not conveyed to the Association. It is also not in dispute

that the tenements belong to MHADA. In other words, the land and tenements do not belong to the Association. These properties are not vested in the Association. Section 36(1) of the Act reads as under:-

> "36. Alienation of immovable property of public trust :
>
> (1) Notwithstanding anything contained in the instrument of trust
>
> (a) no sale, exchange or gift of any immovable property, and
>
> (b) no lease for a period exceeding ten years in the case of agricultural land or for a period exceeding three years in the case of nonagricultural land or a building, belonging **to a public trust,** shall be valid without the previous sanction of the Charity Commissioner. Sanction may be accorded subject to such condition as the Charity Commissioner may think fit to impose, regard being had to the interest, benefit or protection of the trust;
>
> (c) if the Charity Commissioner is satisfied that **in the interest of any public trust any immovable property thereof** should be disposed of, he may, on application, authorise any trustee to dispose of such property subject to such conditions as he may think fit to impose, regard being had to the interest or benefit or protection of the trust."

Thus, in order to attract Section 36(1), the land or building must belong to a Trust. In the impugned order, the learned Charity Commissioner has dealt with this aspect in paragraphs 61 and 62 and held that the Association has no immovable property at all. Clause 22 of the Rules and Regulations of the Association deals with movable and immovable property which can be acquired from the Government, Municipal Corporation and the MHADA

Authorities. The learned Charity Commissioner has held that by no stretch of imagination, the tenements occupied by residents of the Association fall under clause 22 of the Rules and Regulations. The MHADA can dispose of its property on 'as is where is basis' with prior approval of the Government for which the permission of the Charity Commissioner under section 36 is not required. In the present case, the MHADA approved the proposals vide resolution dated 22.11.2007 submitted by the Association for redevelopment. The said proposal was forwarded for approval to the State Government through Housing Department by letter dated 14.12.2007. Accordingly, the Government of Maharashtra granted approval on 6.5.2009. I, therefore, do not find that the learned Charity Commissioner committed any error in arriving at this conclusion. Question no.1 is answered accordingly.

<u>Questions No.2 and 3</u>

33. It is not in dispute that the Association is divided in two parts, Vibhag–I and Vibhag-II. There are in all 357 tenements situate on land, admeasuring 16 Hectors at Varsova, Mumbai. There are 147 tenements in Vibahg-I and 210 tenements in Vibahg-II. These tenements were earlier used as military barracks before independence and were allotted by MHADA to persons on tenancy basis.

34. By Government Resolution dated 18.5.1987, the

Government of Maharashtra decided to convert tenancy rights into ownership rights in respect of tenements allotted by MHADA. However, on 21.4.1990, the Government of Maharashtra decided not to extend the benefits of the said resolution to Association as it appears that the Government itself intended to develop the large areas of land of the Association By communication dated 26.7.1991, the Government of Maharashtra declined to grant development rights to MHADA. In view thereof, the Association instituted Writ petition No.3550 of 1991 on the Original Side of this Court on 25.9.1991. It further appears that by way of interim order, this Court restrained the respondents therein from demolishing the tenements. In that petition, it has come on record that there are number of reservations, such as, (1) Municipal Chowky, (2) playground, (3) extension to playground, (4) recreation ground, (5) Municipal Primary School and (6) fisheries Institute. Apart from that, a large number of tenements would be affected by D.P. Road and details whereof were brought on record. Due to aforesaid reservations, a total number of 257 tenements were likely to be severally affected.

35. During the pendency of that Petition, the Executive Committee had issued Circular on 29.11.2001. In that Circular, it was noted that area was surveyed recently. The outcome of the survey indicated that ownership on 'as is where is basis' would have technical difficulties under three D.C. Regulations of the

Corporation, namely Regulation 17, 23, 29(5). It was also noted that a proposed road (18.30 meter wide) also affects quite a few tenements. Nearly 75% houses are going to be totally affected in the 'as is where is basis' proposal of ownership. As soon as the members of the Association get ownership, the Corporation will start the process of implementing proposal in development plan and will put aside all the houses coming in the way of D.P for shifting which will affect majority of houses. The learned Charity Commissioner has discussed this aspect in paragraphs 38 to 40. From the material on record, it is evident that the redevelopment scheme in respect of Vibhag-I and Vibhag-II was under consideration of the Association right from 2001.

36. On 20.4.2003, the Extra Ordinary General Body Meeting of the Association was convened to transact, amongst others, following business:-

(1) To discuss and deliberate the ownership issue of Aram Nagar Vibhag-I and II in the context of latest development and the meeting with MHADA authorities held with the representatives of the Association to thrash out the above issue.

37. Perusal of Minutes of that meeting shows that Shri R.S.Thakur, Vice President, informed the members present about the MHADA's stand for ownership on 'as is where is basis'. The MAHDA authorities refused to grant the same. Hence, there is no other option left except redevelopment of the colony. It was also

noted that the Government had started allotment of Samaj Mandir Hall and open land to outsiders and if the Association delays in representing the case before the government, it may lose big chunk of land and in turn it will affect the available F.S.I. The association should therefore seek permission to prepare a new scheme. The scheme will be explained in pocket-wise. Shri Thakur informed the members present what had transpired in the meeting with MHADA authorities, local MLA Shri Baba Siddiqui. Shri Siddiqui told them that he will try to his level best for redevelopment if the Association comes out with a viable scheme. Mr. Manmohan Singh informed the members that he had attended the meeting held between Association, pocket representatives and MHADA authorities when MHADA had refused to give tenements on ownership on 'as is where is basis[. The Association is left with no other option but to go for redevelopment scheme. The redevelopment is only way out to get ownership of flats instead of 'as is where is basis'.

38. On 16.7.2004, notice was issued for convening Annual General Body Meeting of the Association. One of the items of Agenda of the meeting was to apprise the members the present status of the proposed redevelopment plans, amongst others. Perusal of the Minutes of the meeting of 1.8.2004 shows that the Minutes of Extra-Ordinary General Body Meeting held on 20.4.2003 was read out. One of the members present in the

meeting Shri Bhagchandani stated that the constitution was formed in the year 1988. At that time, they were trying to get colony on ownership basis on the grounds of 'as is where is basis'. The MHADA authorities were not ready to implement G.R. of 1987. Hence, court case was filed. MHADA authorities had refused to give Association on 'as is where is basis' verbally. He further stated that, as explained earlier in the Extra Ordinary General Body meeting, the Association had prepared the proposed plans for redevelopment and the same was extended to the members in the pocket meetings held earlier. The Association has shown the proposed layout on Sunday, 25^{th} July, 2004 to the members. He further explained the members that the Association has processed the issue of redevelopment scheme and also reached the required target of 70 percent of total tenants of Association Vibhag-II. It has now become necessary to pass resolution to that effect. After considering the pros and cons, the General Body Meeting empowered the Association to process the redevelopment scheme, complete/finalise all necessary formalities relating to the said issue and enter into necessary tripartite agreement i.e. between MHADA, Association and builder/developer accordingly.

39. Thus, the process of redevelopment was originated after the survey was carried out by MHADA. The Association had issued Circular on 29.11.2001 explaining the hurdles coming in

the way of converting tenancy rights into ownership rights as also the proposal of D.P Road in the development plan affecting quite a few tenements (70%) if the Association insists for conversion of tenements from tenancy rights into ownership rights. The said issue was discussed in the Extra Ordinary General Body meeting on 20.4.2003. In the Annual General Meeting held on 1.8.2004, old clause 2(4) was amended to the effect to initiate necessary dialogue with the authorities to get tenancy rights converted into ownership basis and to form society or societies of tenants as per convenience. Clause 11(6A) was added to the effect that in the event of any contingency and/or urgency, the Executive Committee by majority vote was empowered to assist in discharging its duties and functions. Perusal of the record, therefore, shows that the question about redevelopment of only Vibhag-II of Association was not under consideration but right from 2001, the redevelopment of Vibhag-I and II was under consideration of the Association.

40. Mr. Tulzapurkar submitted that the Resolutions dated 14.9.2004, 20.10.2005, 7.11.2005, 30.6.2008 passed by the Executive Committee were without jurisdiction as it is only the General Body who is competent authority can approve the redevelopment scheme and appoint developer. It is not possible to accept this submission. As stated earlier, Circular was issued on 29.11.2001 elaborately discussing pros and cons of

redevelopment scheme. On 20.4.2003, the General Body also transacted the business of development as regards Vibhag-I and Vibhag-II. One of the items of Agenda dated 16.7.2004 was also to apprise the members present status of the present redevelopment plans amongst others. On 1.8.2004, the decision was taken to process the redevelopment scheme, complete/finalise all necessary formalities relating to the said issue and enter into necessary tripartite agreements, i.e. between MHADA, Association, Building/Developer. It is also evident from the record that on 14.9.2004 the Executive Committee passed resolution and the said resolution is outcome of the detailed information provided to the members of the Association way back in the year 2001. Apart from that, pocket meetings were also held earlier for that purpose. The learned Charity Commissioner has exhaustively dealt with this aspect in paragraphs 39 to 44 of the impugned order. Mr Tulzapurkar submitted that the tenure of the Executive Committee expired in 2003 and, therefore, the resolutions passed by the Executive Committee are without any authority of law. It is also not possible to accept this submission as in view of the order dated 1.7.2005 passed by this Court in Chamber Summons, referred earlier, the elections were held and on 15.8.2005 the new Executive Committee took the charge. The decision taken on 14.9.2004 was ratified in subsequent resolutions passed on 20.10.2005 and

7.11.2005. In pursuance thereof, on 11.11.2005 the Executive Committee entered into supplemental agreement with respondent no.5-developer by which the agreement dated 27.9.2004 was amended for going ahead with the composite redevelopment scheme of the Association. On 2.7.2008 second supplemental agreement was entered into by and between the Association and respondent no.5. On 2.9.2009, Joint Development Agreement was entered into by and between MHADA, Association and developer (respondent no.5).

41. Perusal of the order dated 12.7.2013 passed by the Apex Court shows that the petitioners were given liberty to approach the Charity Commissioner for annulment of resolution dated 14.9.2004 or any other resolutions which may have been passed by the Executive Committee of the Association for facilitating the redevelopment of the plot in question. Perusal of the prayers made in Misc. Applications shows that apart from challenging the resolution dated 14.9.204, the petitioners have challenged Agreements dated 27.9.2004, 11.11.2005, 2.7.2008 and Joint Venture Agreement dated 2.9.2009. In short, the petitioners enlarged the scope of liberty granted by the Apex Court in challenging the agreements. That apart, the Charity Commissioner cannot decide validity or otherwise of these agreements.

42. As noted earlier, the Association is registered under the

Societies Registration Act, 1860. Sections 5 lays down that the property, movable and immovable, belonging to a society registered under that Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society by their proper title. As noted earlier, the land and tenements do not belong to the Association. In other words, this is not the immovable property belonging to the Association.

43. Section 16 defines the governing body to whom by the rules and regulations of the society, the management of its affairs is entrusted. In view thereof, even accepting the submission of Mr. Tulzapurkar that the immovable property belongs to the Association, the Executive Committee is vested with the powers to take decisions regarding the management of the property of the Association. In view thereof, Executive Committee was authorized to pass Resolutions dated 14.9.2004, 20.10.2005, 7.11.2005, 30.6.2008 and also was authorised to appoint respondent no.5-Developer and enter into agreements with respondent no.5 as also Jt. Venture Agreement with respondent no.5 and MHADA. Questions no.2 and 3 are answered accordingly.

Re: Questions no.4 and 5:

44. As noted earlier, the Executive Committee passed

resolutions on 14.9.2004, 20.10.2005, 7.11.2005 and 30.6.2008. the Executive Committee also appointed respondent no.5 -Developer and entered into Agreements with respondent no.5 as also Joint Venture Agreement dated 2.9.2009 with respondent no.5 and MHADA. Mr. Tulzapurkar submitted that consent of 70% members of the Association is required. The said consent has to be informed consent. The members of the Association and in particular Vibhag–I were not appraised about redevelopment scheme as also selection of respondent no.5-Developer. It is material to note that the proposed redevelopment is undertaken under D.C.R. No.33 (5) and (7). On 6.12.2008, the said D.C.R. was amended. The amended D.C.R. requires consent of 70% of the members. In view thereof, at the relevant time when the resolutions were passed and respondent no.5 was appointed as a Developer, requirement of obtaining consent of 70 % of the members was not necessary. Even otherwise, as observed earlier, the redevelopment proposal originated in the year 2001. Circular was issued in 29.11.2001 discussing pros and cons of the redevelopment. That apart, it has come on record that the consent of 75% tenants was verified on 4.6.2009. Questions no.4 and 5 are answered accordingly.

45. It is also material to note that presently the members of the Association are in possession of tenements admeasuring 500 sq.ft. on tenancy basis constructed in the year 1947. As against

this, the members will be getting a new flat admeasuring 1230 sq.ft on ownership basis. That apart, MHADA will be getting four lakhs sq.ft built up area free of costs which would otherwise be available for allotment in accordance with government policy and for rehabilitation of Project Affected Persons. Mr. Seervai submitted that respondent no.5-Developer has obtained intimation of disapproval from Municipal Corporation of Greater Mumbai on 21.9.2011. Having regard to cumulative effect of the aforesaid discussion, even otherwise, this is not a fit case for invocation of powers under Articles 226 and 227 of the Constitution of India at a belated stage. The Petition suffers from gross delay and laches at this stage.

46. Mr. Tulzapurkar submitted that while granting liberty, the Apex Court directed Charity Commissioner to decide applications uninfluenced by reasons recorded by the High Court for dismissing the writ petitions and review petitions. In the same order, the Apex Court observed that the reasons assigned by the High Court for declining relief to the petitioners are legally correct and the impugned orders do not suffer from any patent legal infirmity warranting interference under Article 136 of the Constitution. While dismissing the writ petitions, in paragraph 17 the Division Bench of this court observed that the petitioners did not move any competent court of law even for 44 weeks for getting the resolution dated 14.9.2004 set aside, though they

were given four weeks time by order of Division Bench dated 29.9.2009. In paragraph 18, this Court considered Sections 5 and 16 of the Societies Registration Act, 1860. In paragraph 19, this Court prima facie recorded a finding that the Executive Committee is vested with power to take decision regarding management of the properties of the society. In paragraph 21, this Court observed that on 6.12.2008 D.C.R No.33(5), (7) was amended and the amended D.C.R. requires consent of 70% members. Otherwise also, consent of 75% tenants was verified on 4.6.2009. In paragraph 22, it was noted that 9 out of 357 tenants have instituted writ petitions under Article 226. This Court also declined to entertain contentions based upon genuineness of the consent. In paragraph 23, this Court issued direction to the effect that MHADA will ensure the salient features of the project highlighted in paragraph 9 of the order.

47. While dismissing the Review Petitions on 25.2.2013, the Division Bench of this Court dealt with D.C.R. 33 (5) and (7) and verification of consent of 75% tenants on 4.6.2009. This Court also noted that each of 357 members presently having premises admeasuring 500 sq.ft on tenancy basis constructed in the year 1947 is going to get new flat admeasuring 1230 sq.ft on ownership basis. In paragraph 19, the Court dealt with resolution dated 14.9.2004. It was observed that the tenor of the resolution is very clear that respondent no.4-Association was ready to give

up its claim that members of respondent no.4 should get not only constructed property but also ownership rights over the land. It was only upon giving up such a stand that the respondent no.4-Association was allowed by MHADA to enter into the development agreement with MAHDA and Developer. Respondent no.4-Association decided to award development rights to respondent no.5-developer which could not have been done without accepting the stand of the State Government and MHADA that no ownership rights over land will be given to tenants which stand respondent no.4 had earlier challenged in Writ Petition No.3550 of 1991.

48. Mr. Seervai submitted that this petition is instituted under Articles 226 and 227 of the Constitution of India. He submitted that in view of the decision of the Apex Court in the cases of Estralla Rubber (supra), Ouseph Mathal (supra), Sameer Suresh Gupta (supra) and Radheshyam (supra), the order of Charity Commissioner, being order of the Court, is not amenable to writ jurisdiction under Article 226 of the Constitution of India. While exercising powers under Article 227 of the Constitution of India, the High Court does not issue writ of certiorari but exercises power of superintendence.

49. Mr. Tulzapurkar submitted that this Court can mould the relief claimed by the petitioners. I find substance in the submissions of Mr.Seervai that the order of the Charity

Commissioner, being order of the Court, is not amenable to writ jurisdiction under Article 226 of the Constitution of India and this Court exercises powers of superintendence over subordinate courts under Article 227. This Court does not issue writ of mandamus to subordinate courts.

50. In the light of the aforesaid discussion, it cannot be said that the impugned order suffers from any error apparent on the face of record or that the impugned order is perverse being based upon no material or is contrary to material on record. The reliance placed by Mr. Tulzapurkar on the decisions referred in paragraphs 13 and 14, does not advance the case of the petitioners. No case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

51. In view of dismissal of the Petition, Civil Application No. 779 of 2015 for Intervention does not survive and the same is dismissed.

(R.G.Ketkar, J.)