

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**NOTICE OF MOTION NO. 1022 OF 2014
IN
SUIT NO. 573 OF 2014**

The Breach Candy Swimming Bath Trust & Ors. ...Plaintiffs / Applicants
vs.
Dipesh Mehta & Ors.Defendants

Mr. Shiraz Rustomjee, Senior Advocate with M/s. Archit Jayakar, Hussain Bengali, Devashish Jagirdar i/b. Jayakar & Partners for Plaintiffs.
Mr. J.P. Cama, Senior Advocate i/b. Mr. Prashant Kulkarni for Defendant No.1.
Mr. Rumi Mirza i/b. Mr. Prashant Kulkarni for Defendant No.2.
Mr. Zal Adhyarujina i/b. Mr. Prashant Kulkarni for Defendant No.3.
Mr. A.Y. Sakhare, Senior Advocate i/b. Mr. Prashant Kulkarni for Defendant No.4.
Mr. Atul Chitale, Senior Advocate i/b. Mr. Prashant Kulkarni for Defendant No.5.

CORAM : S.C. GUPTE, J.

RESERVED ON : 16 JULY 2015
PRONOUNCED ON : 29 OCTOBER 2015

JUDGMENT :

Plaintiff Nos.2 to 5 claim to be trustees of Plaintiff No.1 trust and seek injunctive reliefs in the suit against the Defendants, who are claimed to be trespassers, usurpers and intermeddlers in the property of the trust and the Plaintiffs' right to manage the same. The Plaintiffs also seek recovery of monies defalcated by the Defendants. The Notice of Motion seeks various temporary injunctions against the Defendants restraining them from holding themselves out as managing committee of the trust and preventing and/or obstructing the Plaintiffs from carrying on their duties as members of the managing committee of the trust, etc.

2. Plaintiff No.1 is a public charitable trust known as “Breach Candy Swimming Bath Trust”. The trust runs a swimming pool and club for its members. The constitution of the Plaintiff trust, established in 1876 as a trust exclusively for

European inhabitants of Bombay, underwent a change after the Independence of the Country, with the ordinary membership of the trust being opened to Indian Nationals. The trust has a peculiar administrative structure, under which it is managed by 'trustees', who are appointed to its managing committee from out of what are known as 'trust members'. These trust members can only consist of European inhabitants of Bombay. This constitution was duly approved by the City Civil Court at Bombay by a decree passed on 15 March 1967 in a suit filed under Section 50 of the Bombay Public Trusts Act, 1955. The trust was being managed under this constitution at least till 2010.

3. The Plaintiffs' case may be briefly stated thus: Sometime after 2010 and 2011, Defendant Nos.1 and 3, respectively, began claiming to be on the managing committee. In 2015, several illegal alterations and constructions were being carried out in the trust premises. Upon enquiries, Plaintiff Nos.2 to 5 discovered illegalities in the appointment of Defendant Nos.1 and 3, who were ineligible to be made trust members, in the first place, and could not have been appointed to the Managing Committee. Thereafter, by their notice dated 11 June 2013, Plaintiff Nos.2 to 5 along with 54 other trust members requisitioned an extraordinary general meeting ('EGM') of trust members. On the Defendants' refusal to hold such meeting, the EGM was duly convened and held by the requisitionists on 21 October 2013, after following the procedure prescribed therefor in the constitution of the trust. At this EGM, by a unanimous resolution, Defendants were removed from the managing committee, after expressing no confidence in them and Plaintiff Nos.2 to 5 were appointed on the managing committee. Other resolutions were also passed at this EGM suspending *inter alia* the memberships of the Defendants as ordinary members of the trust. On 17 January 2014, a change report was duly filed by Plaintiff Nos.2 to 5 with the Office of the Charity Commissioner to report the changes in the management. It is the Plaintiffs' case that the Defendants, despite these changes, are preventing Plaintiff Nos.2 to 5 by use of force and intimidation from carrying out functions as the managing committee of the trust. The Plaintiffs, therefore, approach this Court for vindication of their common law/civil rights.

4. The Defendants raise an objection to the jurisdiction of this Court *inter alia* on account of the provisions of the Bombay Public Trusts Act, 1950 and particularly, the bar of jurisdiction of civil courts contained therein. At the hearing of the ad-interim application in this Notice of Motion, learned Counsel for the parties agreed to have the preliminary issue of jurisdiction decided at the outset before the hearing of the Notice of Motion. A learned Single Judge of this Court thereupon heard the preliminary issue, which was really a matter of law, and held the suit to be maintainable. The learned Judge, however, held that the progress of the suit would be dependent upon and guided by the Charity Commissioner's conclusive findings concerning the changes effected in the management of the trust. (The relevant changes were effected in the EGM of 21 October 2013.) The learned Judge held that the reliefs prayed for by the Plaintiffs could only be granted after the decision of the Charity Commissioner. The learned Single Judge, *Inter alia*, observed as follows:

“After such a decision is reached by the Charity Commissioner, the various prohibitory and mandatory interim reliefs sought by the Plaintiffs may be granted in the Suit”.

5. Both sides carried the order of the learned Single Judge in appeal. Both appeals were admitted. Subsequently, by its order dated 27 August 2014, the Appeal Court disposed of the appeals by the following order:

“1. These are the cross appeals. The appellants are aggrieved by certain observations made by the learned single Judge disposing of the respondents' application under section 9-A of the C.P.C. The learned Judge observed that the applications filed by the appellants can be heard only after the decision of the Charity Commissioner on the change reports filed by the appellants under section 22 of the Bombay Public Trusts Act.

2. The appellants' notice of motion for interim reliefs is pending before the learned single Judge. It is bound to be heard. It is always open to the appellants to contend in the notice of motion that the application is maintainable. Likewise, it is open to the respondents to contend, *inter-alia*, that in view of the judgment impugned in these appeals, the notice of motion is not maintainable. Needless to add that the parties are at liberty thereafter to challenge the order if they so desire.”

6. The observations of the learned Single Judge concerning the interim reliefs and the order of the Appeal Court, quoted above, give rise to the first controversy in this Notice of Motion. Both parties perceive the orders and their effect differently. The Defendants claim that the matter of maintainability of the interim application is concluded by the order of the learned Single Judge and till the Charity Commissioner's conclusive decision on the Change Report is not rendered, the interim application cannot be heard. On the other hand, the Plaintiffs claim that the Appeal Court has kept that issue open. It is submitted that the Appeal Court has, in terms, said that it was "*open to the appellants (i.e. the Plaintiffs) to contend in the notice of motion that the application is maintainable*", though it has likewise kept it open for the respondents (i.e. the Defendants) to contend that the motion is not maintainable. In other words, it is a level filed for both the parties to contend that the interim application pending the decision of the Charity Commissioner is or is not maintainable.

7. Both sides made extensive submissions on this aspect and I propose to decide this controversy first, since without such decision, I can hardly embark upon an inquiry into the merits of the interim application. Ordinarily, there would have been no difficulty in deciding this question. The order of the learned Single Judge, on the construction canvassed by the Defendants, effectively meant that the motion cannot be heard till the Charity Commissioner finally decides the Change Report. After all, the learned Single Judge, in terms, said that interim reliefs can be granted only after such decision. The Appeal Court, on the other hand, observed that the motion was bound to be heard and kept the issue, namely, whether or not interim reliefs can be granted, open. In that case, the matter was clearly at large and could not be said to be concluded by the learned Single Judge's order. The difficulty, however, arises because, whilst keeping the issue open, the Appeal Court has kept it open even to the Defendants to contend that, in view of the impugned order, the motion is not maintainable. The Defendants submit that effectively what this means is that the motion may be taken up for hearing and either be dismissed in view of the order of the learned Single Judge or should be kept pending in view of that order. In

other words, the only limited purpose of the Appeal Court sending back the motion for hearing was, according to the Defendants, to enable the judge hearing the motion to decide whether to straightaway dismiss the motion on the ground of lack of maintainability, since the order of the learned Single Judge was binding and could not be gone behind, or to postpone the hearing till the Charity Commissioner decides the matter. I am afraid that would be too narrow and simplistic view to take. It would be meaningless to take such a view. The order of the learned Single Judge on Section 9A practically takes a position, in the words of the Appeal Court itself, that "*the application filed by the Appellants (i.e. the Plaintiffs) can be heard only after the decision of the Charity Commissioner on the Change Reports filed by the appellants under Section 22 of the Bombay Public Trust Act*". The very fact that the Appeal Court disagreed with it by saying that the interim application, "**is bound be heard**" must mean that the matter is at large and to be argued before the judge hearing the motion. The question, whether or not the interim reliefs can be granted having regard to the interplay of the provisions of the Bombay Public Trust Act, providing for exclusive jurisdiction of the authorities under that Act, and the provisions of the Code of Civil Procedure governing grant of temporary reliefs in a suit, is of course open. It may even be open to refer to the judgment of the learned Single Judge on Section 9A for deciding this question. But it can never be said that the observations of the learned Single Judge that interim reliefs can only be granted after the decision of the Charity Commissioner, come in the way of granting of such reliefs. Otherwise, the hearing before the Motion Court serves no purpose. The purpose suggested by the Defendants, namely, to only decide whether to simply reject the motion because the issue is concluded by the order of the learned Single Judge on Section 9A without considering anything else or keep hearing in abeyance, is devoid of any content. It would make a mockery of the hearing before me. A better view to take is that what the Appeal Court means by the order that "*it is open to the respondents to contend, inter alia, that in view of the judgment impugned in these appeals, the notice of motion is not maintainable*", is that the judgment of the learned Single Judge can be referred to and cited before the Court hearing the motion and can even be relied upon, but the observation made in it that interim reliefs can only be granted after the decision of the Charity

Commissioner is not binding on the Court hearing the motion. I decide accordingly.

8. Let me now consider, if the law as it stands, even in the light of the judgment of the learned Single Judge under Section 9A, read in the context suggested by me, bars any interim relief being granted to the Plaintiffs, till the Charity Commissioner decides the Change Report. This Change Report is filed in connection with the change in management, on the basis of which the interim relief is claimed. The argument of the Defendants is that under the provisions of the Bombay Public Trusts Act, the authorities under that Act are vested with exclusive jurisdiction to decide whether or not any particular change in management of the trust has occurred. Both the factum and the legality of that change are in within this exclusive jurisdiction. The learned Single Judge in her order under Section 9A also holds so. The question, however, is whether interim reliefs, therefore, in a matter like this ought not to be granted till the change is conclusively accepted by the Charity Commissioner.

9. At the outset, I must make it clear that I am bound by the observations of the learned Single Judge that the hearing of the suit cannot be proceeded with till the Charity Commissioner conclusively rules on the change. That is an intrinsic part of the order of the learned Single Judge upholding the jurisdiction of this Court to try the suit. There is jurisdiction to try the suit, says the learned Single Judge, but the trial can proceed only after the decision on the Change Report.

10. The question is, what happens to an interlocutory application in a suit when the trial of the suit cannot for any reason proceed. To decide this, one has to delve into the question of what is meant by interim relief in the first place and what is the basis of the Court's jurisdiction to grant it pending the trial of the suit. In the very least, consideration of interim relief itself must not be part of the trial. For if it were so, obviously it cannot be taken up, since the trial itself cannot be taken up. An interim injunction is essentially a temporary injunction operating till the suit is tried and disposed of or until further orders of the Court. Such

injunction is in the nature of a preventive relief granted to a litigant *quia timet*, that is, because he fears a possible future injury. Passing of an interim order in favour of a plaintiff is only for the limited purpose of securing the interest of the plaintiff pending the trial. Its purpose is essentially to see that a certain status quo is perpetuated till the trial concludes and rights of the parties are finally determined. It ensures that a plaintiff, who has a good chance of succeeding in the trial, is not deprived of the fruits of his success by the defendant irretrievably altering or otherwise affecting the subject matter of the suit or otherwise prejudicing the plaintiff to his disadvantage. The Supreme Court in **Gujarat Bottling Co. Ltd. Vs. Coca Cola Company**¹ held as follows:

“ The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.”

Apart from preservation of status quo or mitigation of the risk of injustice pending trial, there is another principle for granting interim relief. Where a perpetual injunction is sued for and the plaintiff applies for a temporary injunction in its terms, the Court should grant such injunction if the effect of not granting such injunction will be to deprive the plaintiff forever of the rights claimed by him in the suit or render the relief infructuous. The Code of Civil Procedure grants such powers to the Court under Order 39 Rules 1 and 2. Apart from these express powers, Courts have inherent powers under Section 151 of the Code to issue an injunction even if the case does not fall under Rule 1 or 2 of Order 39. The Supreme Court, in **Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal**², clearly laid down this principle in the following words:

“There is difference of opinion between the High Courts on this

¹ (1995) 5 SCC 545

² AIR 1962 SC 527

point. One view is that a Court cannot issue an order of temporary injunction if the circumstances do not fall within the provisions of Order XXXIX of the Code: *Varadacharlu v. Narsimha Charlu*, AIR 1926 Mad 258; *Govindarajulu v. Imperial Bank of India*, AIR 1932 Mad 180, *Karuppayya v. Ponnuswami*, AIR 1933 Mad 500 (2); *Murugesu Mudali v. Angamuthu Mudali*, AIR 1938 Mad 190 and *Subramanian v. Seetarama*, AIR 1949 Mad 104. The other view is that a Court can issue an interim injunction under circumstances which are not covered by Order XXXIX of the Code, if the Court is of opinion that the interests of justice require the issue of such interim injunction: *Dhaneshwar Nath v. Ghanshyam Dhar*, AIR 1940 ALL 185; *Firm Bichchha Ram Baburam v. Firm Baldeo Sahai Surajmal*, AIR 1940 All 241; *Bhagat Singh v. Jagbir Sawhney*, AIR 1941 Cal 670 and *Chinese Tannery Owners' Association v. Makhan Lal*, AIR 1952 Cal 560. We are of opinion that the latter view is correct and that the Courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order XXXIX, C.P.C.”

11. Thus, the jurisdiction of a Civil Court being plenary in nature, if it is seized of a suit, provisions of Order 39 Rules 1 and 2 and Section 151 are clearly attracted and whether or not the Court is in a position to conduct the trial, it can always grant interim relief by exercising these powers. On this principle, even where the trial of a suit is stayed under Section 10 of the Code of Civil Procedure, the Courts exercise these powers and grant interim relief. Our Court recognized this in the case of **Senaji Kapurchand vs. Pannaji Devichand**³, holding as follows:

“ The first point taken was that as an order has been made under Section 10 of the Civil Procedure Code staying the suit owing to the pendency of another suit between the same parties in the Court at Bellary, therefore no interlocutory order could be made in this suit. But under Section 10 it is provided that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties That does not prevent the Court from making interlocutory orders, such as orders for a Receiver, or an injunction, or, as in this case, an order for attachment before judgment.”

The Allahabad High Court in the case of **Rameshwar vs. Vth**

3 AIR 1922 Bom.276

Addl.Dist.Judge, Basti⁴ held as follows :

“ There are various kinds of interlocutory matters such as application for injunction, appointment of receiver, attachment before judgment, maintenance pendente lite in matrimonial proceeding, substitution of parties, addition of parties and so on and so forth which are all interlocutory matters without affecting the decision on merits of the suit or proceeding. Whether such interlocutory matters would have any impact or affect on the decision of the merit of the suit or proceeding is a question which is dependent on the facts and circumstances of the each case depending on the nature of the proceedings and the substance of the controversy between the parties, the issues involved and the relief sought. If the decision on such interlocutory matter does not affect in any way the decision on the merit, in that event, the stay of further proceeding granted by the superior Court would not prevent the Court to decide such interlocutory matters.”

Even pending an appeal to Privy Council, or Supreme Court, courts have passed interim orders or preserved status quo. (see the cases of **Nand Kishore Sing vs. Ram Golam Sahu⁵**, **Sailendra Nath Das vs. Saroj Kumar Das⁶**, **Jewan Ram Gangaram & Co. vs. Commissioners for Port of Calcutta⁷** and **Ramendra Narayan Roy vs. Smt.Bibhibati Devi⁸**.)

On the same principle, in a trade mark infringement case, pending consideration of a rectification application by IPAB, though the trial remains stayed, the law empowers the court to grant interim relief.

12. Thus, the jurisdiction to grant interim relief is based on the court's duty to do justice pending trial and has nothing to do with the trial as such. It is neither a step in the trial nor a part of it. Even if the court is not in a position to undertake a trial till some formalities are complied with or by reason of a stay of further proceedings in the trial, the Court is free to grant appropriate interim relief. Even if we proceed, in the present case, on the basis that the progress of the suit would depend upon and be guided by the Charity Commissioner's conclusive

4 **AIR 1999 ALLAHABAD 1**

5 **(1912) 40 Calcutta 955**

6 **(1934) 38 CWN 795 = AIR 1934 Cal.823**

7 **AIR 1939 Calcutta 308**

8 **AIR (29) 1942 Calcutta 488**

order on the Change Report, that does not prevent the Court from passing interim orders. Passing of such orders does not mean the court has taken any particular view with regard to the merits of the trial.

13. Let us now consider, if, as suggested by learned Counsel for the Defendants, any provisions of the Bombay Public Trusts Act, 1950 ("Trusts Act") restrict the powers of this Court to grant interim relief prayed for by the Plaintiffs. Various contentions are urged in this behalf. It is submitted that the provisions of the Trusts Act are a complete code; they provide for powers of the Charity Commissioner to even pass interim orders; there cannot be two parallel proceedings before two separate authorities or forii.

14. The Trusts Act is enacted to regulate and make better provision for the administration of public religious and charitable trusts in the State. The Act defines a "trustee" (S.2(18)) as a person in whom either alone or in association with other persons, the trust property is vested, but it does not provide how such trustee is appointed or the property of the trust comes to vest in the trustee so defined. One has to look for that purpose into the instrument of the trust or its scheme of management (including its constitution). The Trusts Act requires a compulsory registration of all public trusts with the Public Trusts Registration office which is under a deputy or assistant charity commissioner appointed by the State Government. The Trust Act *inter alia* requires maintenance of a register of trusts and casts a duty on trustees of a public trust to apply for registration of the public trust (S.18). On receipt of an application and after an inquiry in the prescribed manner (S.19), the Deputy or Assistant Charity Commissioner records his findings as to the matters provided for in Section 19 (S.20) and then makes entries in the Register, which entries are, subject to the provisions of the Trusts Act and subject to changes to be recorded thereunder, treated as final and conclusive (S.21). Names of trustees are part of these entries. Whenever any change occurs in any of the entires, such change is required to be reported by the trustees to the Deputy or Assistant Charity Commissioner, whereupon an inquiry is made by the latter into such change and upon satisfaction that the change has so occurred, a finding is recorded and the concerned entry or entries

is or are amended or deleted accordingly (S.22). If at any time after such entries are made, if it appears to the Deputy or Assistant Charity Commissioner that any change has remained to be inquired into, he has the power to make a further inquiry (S.22A). An appeal from any decision of the Deputy or Assistant Charity Commissioner lies before the Charity Commissioner (S.70). The Charity Commissioner also has revisional powers (S.70A). The entries made in the register, subject to appeal or revision under Sections 70 and 70A, are final and conclusive (S.22). Save as expressly provided in the Trusts Act, no Civil Court has jurisdiction to decide or deal with any question, which is by or under that Act to be decided or dealt with by any authority under that Act, or in respect of which the decision or order of such authority has been made final and conclusive (S.80). These provisions do not envisage any power in the charity authorities to pass any interim order either pending an inquiry into particulars prescribed under Section 19 for making any initial entry under Section 20 or pending an inquiry into any change under Section 22 or further inquiry under Section 22A. It may, however, be possible to say that the general power of the Charity Commissioner to issue directions for administration of any trust under Section 41A could be invoked in an appropriate case. This is broadly the scheme of the Trusts Act, so far as we are concerned in this Motion.

15. These provisions do show that an entry in a register of trusts about appointment of a trustee and its amendment by the charity authorities are final and conclusive and no suit lies to cause such entry or amendment to be made or deleted or altered. The Plaintiffs, in the present case, do not sue for causing any such entry to be made, deleted or altered, but for preventing the Defendants, who they claim to have no authority to do so, from interfering with their rights to administer and manage the trust. These are civil or common laws rights which every trustee has and if someone unauthorisedly interferes, or threatens to interfere, with these rights, a suit would obviously lie before a civil court. None of the provisions of the Trusts Act prevents any such suit being filed or any interim relief being granted in such suit. The charity authorities are not empowered to decide or deal with any such question, namely, whether anyone can or cannot interfere with the trustees' right to administer or manage the trust and its property;

neither is any decision of the charity authorities in this behalf made final or conclusive by any provision of the Trusts Act. There is, therefore, no bar under Section 80 of the Trusts Act into a civil Court going into such question.

16. The charity authorities have no authority or power to pass any interim order pending an inquiry into any entry or any change in it except perhaps, as I have noted above, under the general powers to issue directions for administration of a public trust under Section 41A. These general powers are independent of the powers under Sections 19, 20, 22 and 22A of the Trusts Act. It cannot, therefore, be said that because an inquiry under Section 22 is pending before the charity authorities, this Court cannot grant any interim relief, since the charity authorities themselves have powers to grant interim reliefs in such inquiry. There is no question of prosecuting two parallel proceedings on the same subject matter before two different authorities or forii.

17. One more argument of the Defendants may be appropriately dealt with in this context. The Defendants submit that this Court is asked to grant interim relief on the footing that the EGM of the Trust Members has effected a change in the management; but such change, even assuming that it is made, cannot take effect till the particular entry reflecting such change is made in the register under Section 22. The submission is devoid of any substance. As I have noted above, the Trusts Act does not make any provision as how a person is appointed as a trustee or how the property of a public trust vests in a person defined as a trustee under that Act. For the factum and validity of an appointment we have to look to the instrument of trust or its scheme of management or constitution. The appointment or removal of a trustee is made under those provisions. Because such appointment or removal is to be entered in a register of trusts and such entry is preceded by an inquiry under the Trusts Act, it cannot be suggested that the change has not in fact or in law occurred till the inquiry is held and entry made. The charity authorities merely inquire into and render a finding about a change, which has in fact and law already occurred. Even if the charity authorities eventually hold that the change did not actually occur, what it means is that the change had never occurred. A change is, thus, inquired into and found by

the charity authorities and not that the change comes about or takes effect because the authorities find it. Our Court in the case of **Chembur Trombay Education Society vs. D.K. Marathe**⁹ went into this question. As in our case, so in that case, the argument was that the particular amendment in the constitution, on the basis of which elections were held, was not accepted by the charity authorities and till such time as they did not accept it, the elections could not have been held under the amended constitution. Our Court negated the contention. The Court relied on the decision of the Supreme Court in **Managing Committee, Khalsa Middle School vs. Smt. Mohinder Kaur**¹⁰ on similar corresponding provisions under the Societies Registration Act, 1860. This is what our Court in **Chembur Trombay Education Society** held :

“ The Apex Court was called upon to examine similar provisions of the Societies Registration Act, 1860. The scheme of section 12-A of that Act is more or less same as section 22 of the Bombay Public Trusts Act. The Apex Court compared the said provision with the provisions of sections 18 and 19 of the Companies Act which mandate that the alteration or amendment to the Memorandum of Association of the Company takes effect from the date of its registration only. In that context the Apex Court in para 11 of the said judgment has observed that in absence of any requirement in the Act that the alteration in the Rules and Regulations must be registered with the Registrar, it cannot be held that registration of the amendment is a condition precedent for such an alteration to come into effect. A priori, any amendment or change brought about in accordance with law would come into effect from the date of resolution of the Society to bring about such a change. This proposition is fortified from the plain language of section 22 of the Bombay Public Trusts Act. The said section requires that where any change occurs in any of the entries recorded in the register kept under section 17, the trustee shall, within 90 days from the date of the occurrence of such change, report such change to the Deputy or Assistant Charity Commissioner, as the case may be. The dictionary meaning of expression "occur" as observed in the Black's Law Dictionary is:

"To happen; to meet one's eyes; to be found or met with; to present itself; to appear; hence, to befall in due course; to take place; to arise."

⁹ 2002(3) Bom.C.R. 161

¹⁰ 1993 Supp (4) SCC 26

Giving the natural meaning to this word in section 22 of the Act, coupled with the principle enunciated by the Apex Court that when the Act does not require that registration of any change is a condition precedent to come into effect, I have no hesitation in taking the view that the amendment to the constitution as well as subsequent elections of the President and members of the Governing Council, therefore, came into effect from the date of the respective resolutions of the general body. The enquiry postulated under section 22 is only to ascertain the factum as to whether the change has occurred or not. In the event, the competent authority is satisfied that the change has not occurred in accordance with law, only then that change will have to be undone and status quo ante will have to be restored. A fortiori, resolution of the general body of the Society is sufficient to ignite the change of amendment in the constitution as well as of electing new general body for administering the affairs of the Society. The fact that the change report is pending consideration before the Charity Commissioner, would be of no avail. Understood thus, as a necessary corollary, it will have to be held that the respondent-Shri Marathe ceased to be the President of the Society from the date when the General Body elected another President in its meeting dated June 18, 1995. If this be the position, the respondent-Shri Marathe will have no right whatsoever to continue in the post of president and, there would be no question of granting any mandatory relief at this stage.”

This view of the learned Single Judge was affirmed by a Division Bench of our Court in **Ganesh Mahadeorao Thawre vs. Central Hindu Military Education Society**¹¹, observing as follows :

“10. We find that any of the provisions contained in Bombay Public Trusts Act or the Rules thereunder do not mandate that amendment to the bye-laws or the Rules of constitution of society passed by the society or trust shall not operate unless and until said amendment gets approval of Charity Commissioner / Assistant Charity Commissioner etc.

We therefore, see no reason to take a different view than one taken by the learned Single Judge who has drawn these conclusion on the basis of discussion in the judgment in (Managing Committee, Khalsa Middle School Vs. Mohinder Kaur). Reported at 1993 DGLS 589 : 1993 Supp (4) S.C.C. 26.”

¹¹ 2007(5) Bom.C.R. 680

These decisions clearly apply to the facts of our case. The Defendants' submission that the change in the management cannot take effect till it is entered in the register, accordingly, has no substance.

18. That brings us to the question 'whether the interim relief prayed for by the Plaintiffs here ought to be granted.' The principles on which such relief is granted are far too established to admit of any debate. Whether the plaintiff has a *prima facie* case, whether not granting such relief would cause irretrievable injustice to the plaintiff and where does the balance of convenience lie. Let us examine the facts in the present case to test whether the Plaintiffs' case merits any interim relief on these principles.

19. It is not in dispute that the Plaintiffs and 54 others, who requisitioned and eventually held the EGM, are trust members. They did convene and hold the EGM and pass the resolutions removing the Defendants as members of the Managing Committee and appointing Plaintiff Nos.2 to 5 as the new members. The only question debated before me was, whether they had the power to do so as 'trust members'. It is important to note the various relevant provisions of the constitution of the trust in this behalf. (I must at the outset make it clear that the arguments on the relevant constitutional provisions in this case were advanced on the basis of a particular constitution, which was admittedly the applicable constitution, till an altogether different constitution surfaced during the pendency of this suit. I have discussed this issue later in this order, though in a different light. As both the parties have requested me to do, the powers of the respective parties to effect the concerned changes have been tested with reference to the original constitution on which alone the parties have pleaded and argued their respective cases.)

20. The relevant provisions of the constitution of the trust are quoted below :

2. Unless the context otherwise requires, the following words, wherever used herein, shall, for the purposes thereof, be deemed to have the following meanings, namely :--

(2) 'Member' shall mean a person who is a beneficiary of the Trust under the Principal Indenture, or, alternatively, a person other than a beneficiary, who, in either case, shall have been admitted by the Committee to enjoy the benefits under the trust, as hereinafter provided : Provided Always that nothing anywhere herein contained in these Articles shall be deemed to constitute a Club under the Trust ;

(c) 'Trust Member' shall mean a person duly admitted as such by the Committee in terms of Article 4 hereof ;

(d) 'Ordinary Member' shall mean a person duly admitted as such by the committee in terms of Article 6 hereof ;

(8) 'Committee' shall mean a meeting of the Ordinary Trustees duly called and constituted or the Ordinary Trustees assembled at a meeting, as the case may be ;

(9) 'Members of the committee' shall mean the Ordinary Trustees for the time being or the Ordinary Trustees assembled at a meeting of the committee, as the case may be ;

(11) 'Extraordinary General Meeting' shall mean a General Meeting of the Trust Members duly called and constituted in terms of Article 32 hereof and any adjournment or postponement thereof, as the case may be ;

4. Any European inhabitant of Bombay shall, on payment of the requisite Entrance Fee and Annual Subscription, if any, prescribed by the Committee, be eligible for admission by the Committee as a Trust Member.

6. Any other inhabitant of Bombay shall, unless any addition to the overall membership at any time of the Trust would, in the opinion of the Committee, whose opinion in that behalf shall be final and binding, interfere with the amenities and comforts of existing members, be eligible, on payment of the requisite Entrance Fee and Annual Subscription, if any, prescribed by the Committee, for admission by the Committee as an Ordinary Member of the Trust at the sole discretion of the Committee, subject always, however, to such maximum number of such Members as the Committee may from time to time decide.

14. (a) A *Trust Member* shall, on payment of all such daily admission or other charges, if any, as may from time to time be prescribed by the Committee, have the right to the full and unrestricted use of the Trust premises and shall, as and so long as he shall duly observe the Constitution and Bye-Laws of the Trust and shall conduct himself in a proper and fitting manner at all times and shall continue to pay the requisite Annual Subscription as herein provided, he re-admitted as a Trust Member from year to year by the Committee as long as he shall remain an inhabitant of Bombay : Provided always that a Trust Member shall have the right to introduce into the Trust premises nor more than two guests on any one day, but on not more than two occasions in any one month : Provided Further that, in respect of any guest to introduced by a Trust Member hereunder, such Trust Member shall be required to pay on behalf of such guests introduced by him, all such daily admission or other charges, if any, as may from

time to time be prescribed by Committee in that behalf.

(b) A Foreign, Ordinary or Visiting Member shall, on payment of all such daily admission or other charges, if any, as may from time to time be prescribed by the Committee, have the right to the full and unrestricted use of the Trust premises in the same manner and to the same extent in all respects and subject to the same conditions as a Trust Member, save and except that he shall not be entitled to attend or vote at any Annual or Extra-ordinary General Meeting of the Trust nor to serve on the Committee or any sub-committee nor shall he be entitled to introduce guests into the Trust premises.

(c) An Honorary or Honorary Life Member shall have the right to the full and unrestricted use of the Trust premises in the same manner and to the same extent in all respects and subject to the same conditions as a Trust Member, save and except that he shall not be entitled to attend or vote at any Annual or Extraordinary General Meeting of the Trust nor shall he be eligible for appointment as a Trustee nor to serve on the Committee or any sub-Committee nor shall he be entitled to introduce guests into the Trust premises : Provided Always that an Honorary or Honorary Life Member shall not be required to pay any Entrance Fee, Annual Subscription or any other daily admission or other charges whatsoever in respect of his admission to, or use of, the Trust premises.

(d) Any person admitted by the Committee to any class of membership of the Trust, other than Honorary Life or Visiting Membership, shall retain such membership from the conclusion of one financial year of the Trust or from date of his admission, whichever is the later, until the conclusion of the financial year then current at which time his membership shall determine : Provided Always that any person to whom this sub-Article refers may apply for re-admission to membership for the following year at any time prior to the end of each year but not later than such date in each such year as may from time to time be prescribed by the Committee in that behalf and his re-admission shall be considered and dealt with by the Committee in the same manner as on his first application.

17. The funds, securities, and other moveable property of the Trust shall be vested in not less than three nor more than ten Trust Members as Trustees (herein referred to as "the Ordinary Trustees") appointed in the manner hereinafter provided.

18. Anyone having the right hereunder to appoint a Trustee in terms of these Articles shall also have the right, at any and all times, to remove such Trustee and to appoint any other person, who, in the case of an individual, shall be Trust Member, in his place or to appoint any person as aforesaid to fill any vacancy in that office, whether caused by death, resignation or otherwise.

19. (a) The management of the Trust shall be vested in a committee of the Ordinary Trustees who shall have the right from time to time to elect from among their number an Ordinary Trustee to act as Chairman of the Committee and, in the absence of the Chairman or, if he is unable or unwilling to act, the Committee shall elect another from among their number to act as Chairman, but for that meeting only.

(b) The Chairman of the Committee referred to in sub-Article (a) hereof shall hold office from the conclusion of the meeting of

the Committee at which he is elected as such until the conclusion of the first meeting of the Committee following upon the Annual General Meeting of the trust next following, but shall be eligible for re-election.

20. (a) The following persons shall be the first Ordinary Trustees of the Trust:

- | | |
|----------------------------|----------------------------|
| (i) C.H. Campbell, Esq., | (vi) A.G.Reynolds, Esq., |
| (ii) W. Holderegger, Esq., | (vii) S.R.Stevenson, Esq., |
| (iii) F.C. Johnston, Esq., | (viii) E.L. Summer, Esq., |
| (iv) N.G. Mcneill, Esq., | (ix) E.H.Toovey, Esq., |
| (v) F.J. Rauwenhoff, Esq., | (x) D. Wilson, Esq., |

(b) In the event at any time of there being no Ordinary Trustees, whether by reason of death, resignation or otherwise, or in the event of the Ordinary Trustees at any time being unable or unwilling to act, the Trust Members in General Meeting shall have the right to appoint such of their number, within the limits prescribed in Article 17 hereof, to act as the Ordinary Trustees of the Trust.

21. The Ordinary Trustees shall, at any and all times and from time to time, have the right to add to their number, within the limits prescribed in Article 17 thereof, and shall also have the right to co-opt, but as advisers only, to the Committee any person or persons whatsoever as they may, in their sole discretion, think fit : Provided Always that any person above referred to so co-opted to the Committee hereunder shall act in an advisory capacity only and shall not have any right to attend or vote at Meetings of the Committee or any sub-Committee.

32. The Chairman or the Committee may, whenever he or they may think fit, and the Committee shall, on the requisition of not less than fifty Trust Members, proceed forthwith to convene an Extraordinary General Meeting of the Trust Members, and in the case of such requisition, the following provisions shall have effect :-

(i) the requisition shall state the object of the meeting and shall be signed by the requisitionists and deposited at the offices of the Trust and may consist of several documents in like form, each signed by one or more requisitionists ;

(ii) if the Committee shall not proceed to convene a meeting to be held within twenty-one days from the date of the deposit of a requisition referred to in sub-Article (i) of this Article, the requisition, or a majority of them, may themselves convene the meetings, but any meeting so convened shall be held within not more than three months from the date of deposit of the requisition aforesaid ;

(iii) any meeting convened hereunder by the requisitionists shall be convened as nearly as possible in the same manner as that in which meetings are required to be convened by the Chairman or the Committee.

33. Fourteen days' notice of every Annual General Meeting and twenty one days' notice of every Extraordinary General Meeting specifying the place, date and time of meeting, and in the case of any special business to be transacted thereat, the general nature of such business shall be given to the Trust Members by a notice published in newspaper in the English language circulating in Bombay : Provided

that in the case of an Extraordinary General Meeting at which no business is to be transacted requiring the passing of a Special Resolution, less than twenty-one days' notice may be given if the Chairman or the Committee decide that the nature of the business to be transacted thereat is of sufficient urgency to require the giving of such shorter notice."

21. Evidently, the constitution envisages two different types of members (that is, apart from other types, which we are not concerned here with), namely, (a) 'Trust Member', who is duly admitted as such by the Committee in terms of Article 4 and (b) 'Ordinary Member', duly admitted as such in terms of Article 6. Article 4 makes it clear that only a European inhabitant of Bombay (as the city of Mumbai was known then) is eligible to be a Trust Member. Under Article 6, any other inhabitant of Bombay is eligible to be an ordinary member. Under Article 17, the funds, securities and other movable property of the trust vest in not less than three and not more than ten Trust Members as Trustees (referred to as "Ordinary Trustees") who are appointed in the manner provided in the constitution. The management of the Trust vests in a Committee of Ordinary Trustees under Article 19. One inescapable conclusion which flows from a collective reading of these provisions is that unless you are a European inhabitant of Bombay admitted as a trust member you cannot be an Ordinary Trustee or in the management of the Trust. That is beyond a pale of doubt. Let us now see how such Ordinary Trustees are appointed or removed. In the first place, ten persons are named, under Article 20(a), as the first Ordinary Trustees of the Trust. Ordinary Trustees other than these ten named individuals can be appointed in two ways : one, by the Ordinary Trustees adding to their number under Article 21 and two, the Trust Members appointing such of their number to act as Ordinary Trustees of the Trust under Article 20(b). Article 18 provides that anyone having the right under the constitution to appoint an Ordinary Trustee shall have the right, at any and all times, to remove such trustee and to appoint any other person, who shall be a Trust Member, in his place. These three Articles, namely, Articles 18, 20 and 21, need a closer look, since the whole controversy in the present suit practically hinges upon their meaning and content.

22. Right to appoint an Ordinary Trustee is without doubt conferred only

on two categories of persons : one, the Ordinary Trustees themselves under Article 21 and two, the Trust Members in General Meeting under Article 20(b). About the power of the Ordinary Trustees, there is absolutely no doubt. Article 21 clearly provides for it, when it says that the “*Ordinary Trustees shall, at any and all times and from time to time, have the right to add to their number, within the limits prescribed in Article 17 thereof.*” Article 17, as we have noted, requires the number to be “*not less than three and not more than ten*”. Subject to this limit, the Ordinary Trustees for the time being can always appoint other Ordinary Trustees. The contest is on the right of the Trust Members to appoint Ordinary Trustees in a General Meeting. The Defendants submit that the Trust Members can appoint Ordinary Trustees only if there are no Ordinary Trustees at all or if Ordinary Trustees are unable or unwilling to act. The Plaintiffs, on the other hand, contend that “no Ordinary Trustees” must mean no Ordinary Trustees fulfilling the minimum number of Article 17. Article 17 talks of the funds, securities, and other movable property vesting in “*not less than three or more than ten Trust Members as Trustees*”. It is these Trustees which are referred to as “*the Ordinary Trustees*”. It is reasonable to construe, therefore, the provision of Article 20(b) concerning “*there being no Ordinary Trustees*” as implying “**no Ordinary Trustees within the limits of Article 17**”, meaning thereby “**no Ordinary Trustees of a number not less than three**”. If the number of Ordinary Trustees falls below three, the Trust Members ought to be able to appoint one or more of such trustees in their General Meeting so as to meet the requirement of the minimum number according to Article 17. This, however, appears to be debatable, though the Plaintiffs' view commends itself as a better view. But what is indefensible is how a situation of there being “*no Ordinary Trustees*” can actually come about (even in the sense of there being no Ordinary Trustee at all). It can come about by reason of “*death, resignation or otherwise*”. “**Removal**” of an Ordinary Trustee must come within these reasons, through the residuary entry of “*otherwise*”. Read *ejusdem generis*, the reasons must include “**removal**”. (We will come to the removal provision separately, but for the purposes of this discussion, it is sufficient to note that the constitution specifically provides for ‘*removal*’ of Ordinary Trustees.) Thus, if by reason of removal, there are no Ordinary Trustees, even if we go by the Defendants' sense of the term, namely,

no Ordinary Trustees at all, the Trust Members will have the right to appoint Ordinary Trustees.

23. We now come to the removal provisions of Article 18. Anyone having the right to appoint a Trustee in terms of the Articles also has the right, “**at any and all times**”, to remove such Trustee and to appoint any person (being a Trust Member) in his place or to appoint any person as aforesaid to fill in any vacancy in that office, whether caused by death, resignation or otherwise. This provision completely puts paid to the Defendants' plea that the Trust Members have no power to appoint an Ordinary Trustee except when there is no Ordinary Trustee at all. Trust Members obviously have the power to appoint a Trustee under the Articles, in which case they clearly have a power to remove an Ordinary Trustee and then to appoint another in his place. Besides, Article 18 does not simply stop at appointment of a Trustee in place of the Trustee removed, but permits appointment of “*any person as aforesaid to fill any vacancy in that office, whether caused by death, resignation or otherwise*”. That means power to appoint does not merely imply power to remove and appoint in his place, but generally to appoint to fill any vacancy in that office, whether caused by death, resignation or otherwise. This power is common to the Ordinary Trustees themselves and the Trust Members in General Meeting. Article 18 in fact generally enables the appointing authorities to fill any vacancy caused by death, resignation or otherwise. Thus, in addition to Articles 20 and 21, it has an important bearing on the question as to who and when can fill in any vacancy in the office of the Ordinary Trustee.

24. Learned Counsel for the Defendants submits that the Trust Members' power to appoint is not a general power, but is subject to the condition of Article 20(b). I am afraid, I am unable to accept this submission, but even if I do, there is no reason why this power, even if it be conditional, should not be seen as the power to appoint within the meaning of Article 18. The constitution of the Trust does provide for restrictions on the power to appoint Ordinary Trustee, whoever exercises the power. Even the Ordinary Trustees themselves can appoint only subject to a restriction, namely, to stay within the limits prescribed in

Article 17. That does not detract from them being persons having the right to appoint within the meaning of Article 18. Likewise, even if we assume that the power to appoint an Ordinary Trustee reserved for the Trust Members is to be exercised under some restrictions placed by the Articles, it is nonetheless a power to appoint within the meaning of Article 18. Once they have this power to appoint, it is needless to reiterate again, they have the power to remove an Ordinary Trustee and appoint someone in his place and also to fill in any vacancy in that office, whether caused by death, resignation or otherwise.

25. Not less than fifty Trust Members had, without doubt, requisitioned an EGM of Trust Members for removal of the Defendants as Ordinary Trustees and appointment of Plaintiff Nos.2 to 5 in their place. The Chairman or the Committee was bound to convene the EGM under Article 32. The Committee admittedly did not proceed to convene any EGM within twenty-one days from the date of the deposit of the requisition. The requisitionists or a majority of them could, in that case, themselves convene the EGM. The requisitionists did actually convene such EGM and did duly pass therein the resolutions referred to above. None of this admits of any debate.

26. In short, the Trust Members (i.e. Plaintiff Nos.2 to 5 and 54 others) did have the power to remove the Defendants as Ordinary Trustees and appoint Plaintiff Nos.2 to 5 in their place in a General Meeting; they did lawfully convene a General Meeting and did so remove and appoint. The Defendants have, in that case, no right to prevent the Plaintiffs from managing the Trust and its affairs. The Defendants cannot usurp the management or hold out as Ordinary Trustees (who alone are members of the Managing Committee of the Trust). The Plaintiffs have an overwhelming *prima facie* case of being entitled to the reliefs claimed in the suit. The first principle of eligibility to claim interim relief is, thus, fully satisfied.

27. Before we take up the other aspects, namely, irretrievable prejudice and balance of convenience, a few legal submissions of the Defendants, which bear on the relief, need to be dealt with. Learned Counsel for the Defendants made the following submissions in addition to their submissions on the

constitutional provisions, which have been dealt with above, in support of their case that interim relief should not be granted to the Plaintiffs :

(a) A suit for injunction simplicitor such as the present, unaccompanied by a prayer for declaration, cannot lie; and

(b) Plaintiff Nos.2 to 5, not being in possession of the trust property, ought to have claimed the relief of possession and without such relief being claimed and considered, no interim relief in the form claimed by the Plaintiffs could be granted.

28. The arguments of the Defendants that a suit simplicitor for injunction without a prayer for declaration or possession does not lie, is based on an analysis of the relevant provisions of the Specific Relief Act and particularly the judgment of the Supreme court in the case of **Anathula Sudhakar vs. P. Buchi Reddy**¹². Section 36 of the Specific Relief Act provides that preventive relief is granted at the discretion of the court by injunction, temporary or perpetual. As provided by Section 37 of that Act, whereas temporary injunctions are granted under, and regulated by, the Code of Civil Procedure, a perpetual injunction can only be granted by a decree made at the hearing and upon merits of the suit. By such perpetual injunction, the defendant is perpetually enjoined from assertion of a right, or from commission of an act, which would be contrary to the plaintiff's rights. Section 38 provides for the circumstances in which a perpetual injunction may be granted. In the first place, a perpetual injunction may be granted to prevent the breach of an obligation, which exists in favour of the plaintiff. Secondly, a perpetual injunction may be granted to prevent an invasion or threat to invasion of the plaintiff's right to, or enjoyment of, property, in certain cases. These cases are – (a) where the defendant is trustee of that property for the plaintiff, (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion, (c) where the invasion is such that compensation in money would not afford adequate relief and (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings. This completes the survey of the Specific Relief Act insofar as it relates to perpetual

¹² (2008) 4 SCC 594

injunction. This law, does not, in terms, require any declaration for claiming perpetual injunction. The case of **Anathula Sudhakar** considered an altogether different question, namely, where it is actually necessary to file a suit for declaration and possession and where injunction is a mere consequential relief, whether a mere suit for permanent injunction unaccompanied by prayers for declaration and possession would lie. The Supreme Court considered four cases : (A) where a plaintiff is in lawful possession of a property and such possession is interfered with or threatened by the defendant, (B) where the title of the plaintiff is not disputed, but he is not in possession, (C) where the plaintiff is in possession, but his title is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant; and (D) where the plaintiff is neither in possession nor having a title without cloud. The Court held that whereas in case A, a simplicitor injunction suit would lie, in cases B, C and D it would not. In case B, the plaintiff will have to seek a relief of possession, whereas in case C, the plaintiff will have to pray for a declaration of his title and then a consequential relief of injunction and whereas, in case D, he will have to sue for declaration, possession and title. What is to be noted is that, in the first place, the whole discussion of the Supreme Court refers to suits for possession – where the plaintiff either claims possession of property or defends his possession of it. In such a suit, if the plaintiff has both title and possession, he may simply sue for injunction; if he has title but not possession, his real remedy lies in suing for possession and only consequentially for injunction and not in merely asking for an injunction; and if there is a cloud on his title, in the sense of there being some apparent defect in his title to the property or when some *prima facie* right of a third party over it is made out or shown, the remedy lies in seeking a declaration and a consequential relief of injunction. There may even be a case where both want of possession and a clear title may be apparent, in which case all three reliefs, namely, declaration, possession and injunction, would have to be prayed for. These four cases are by no means exhaustive of cases of perpetual injunction. There are myriad of cases, where we may not be really concerned with title or possession directly, but where the defendant invades or threatens to invade a right claimed by the plaintiff. These cases countenance a suit for perpetual injunction simplicitor. A plaintiff may

complain of a breach of an obligation existing in his favour or breach of his right to do something, which amounts to a civil wrong or tort and claim an injunction to prevent such breach. Our case really lies amongst these other cases. The Plaintiffs here claim to be ordinary trustees who form the committee of management of the Trust; their right to administer and manage the Trust is a civil right; and if such right is invaded or breached, they have a cause of action to sue for a perpetual injunction. They need not sue either for a declaration, since there is no cloud on their right in the sense in which the Supreme Court has understood it in **Anathula Sudhakar**, or for possession, since we are really concerned with their right to administer and manage the Trust. The possession of the trust property as such trustees or members of the managing committee is merely incidental to this right. The objection of the Defendants on the ground of maintainability of a simplicitor injunction suit is, thus, rejected.

29. Another important facet of the controversy, which bears not only on the *prima facie* case, but also on irretrievable prejudice and balance of convenience, is the status of the Defendants *vis-a-vis* the trust and their eligibility, in the first place, to be on the Managing Committee, which caused the Trust Members to convene the EGM and remove them. We will briefly examine the case of each of the Defendants in this light.

Defendant No.1 :

30. As the record of the case, relied on mostly by the Defendants themselves, indicates, there are a number of versions on record about how Defendant No.1 came to be appointed on the Managing Committee, whereas it is doubtful if he ever was duly admitted even to the ordinary membership of the Trust. (He is obviously not a Trust Member and admittedly not even eligible to be one.) There is no record, contemporaneous or otherwise, in support of his ordinary membership of the Trust except a certain 'Season Ticket Register' where he is shown as having membership no.O-077. There is nothing to show that Defendant No.1 was at any time admitted to the ordinary membership of the Trust by the Committee in terms of Article 6. There is nothing to show payment of the requisite

entrance fee by him. There is no balloting committee minute or other document showing his admission. No receipts of annual subscription and no reference in the membership register are placed on record either. It is claimed by the Defendants that Defendant No.1 has been an ordinary member of the Trust since 1986, but that no record could be produced to show that. They say, none of the application forms for memberships granted prior to the year 2002 has been preserved, and no records of the trust in support of his membership could be produced. This is strange to say the least. It is hard to believe that there are no records whatsoever maintained by the Trust in respect of its membership. Anyway, the Defendants, who have been in the management of the Trust so far, cannot produce any evidence to show the membership of Defendant No.1. All that they can show is that since about 2004, the name of Defendant No.1 features in minutes of Annual General Meetings of the Trust. But then, it is an admitted position that Defendant No.1 was a legal advisor of the Trust. There is nothing in these minutes to show that he participated in these meetings in his capacity as an ordinary member of the Trust. On the other hand, we have at least two affidavits on record, one by Adrian Groom, who was the Hon.Treasurer of the Trust from 2001-2003, who has affirmed that as per his knowledge, Defendant No.1 was never a member of the Trust, and the other, by Ann Means, who was the Hon.Secretary of the Trust from 2003-2009, confirming that during her tenure, Defendant No.1 was only a legal advisor of the Trust and not even its ordinary member. As for the alleged membership of Defendant No.1 of the Managing Committee, there are at least the following six different versions of how he became such member.

(i) Minutes of meeting of the AGM of 12 January 2006 mention that he was appointed in the AGM of 12 December 2005;

(ii) Letter of Defendant No.2 dated 17 November 2006 addressed to Deputy Charity Commissioner claims that Defendant No.1 was appointed to the Managing Committee in the AGM of 14 December 2004 (though there is no resolution to that effect reflected in the minutes of that AGM);

(iii) Change Report No.451 of 2007 filed by Defendant No.1 himself claims that he was an 'Advisor' before 10 November 2006, and became a 'Trustee' on 10 November 2006;

(iv) Affidavit of Defendant No.1 of 9 May 2009 filed in the Charity Commissioner's office claims his appointment on the Managing Committee on 18 January 2007 (though there is no resolution passed in the Committee meeting of 18 January 2007 to so appoint him);

(v) Newsletter of 20 October 2012 sent to members, states that Defendant No.1 was appointed to the Managing Committee in a process which started in 2002 and culminated in 2007 with the help of then trustees Adrian Groom and Arte Weijburg (though both Adrian Groom and Arte Weijburg have in separate affidavits denied his membership);

(vi) Separate statements of Defendant Nos.2 and 4 to the Gamdevi Police Station, mention that Defendant No.1 was co-opted on the Managing Committee on 16 November 2006.

31. What is important to note is that though there are at least six potential dates purporting to be the dates of his appointment, there is not a single minute of meeting brought on record to show that by some process, whether by appointment or co-option, on any of these dates Defendant No.1 was in fact admitted to the Managing Committee. The net result is that Defendant No.1 is not even eligible to be a Trust Member in the first place; he could never have been appointed on the Managing Committee as such; there is no document placed on record actually appointing him on the Committee; and as for evidence showing his appointment, the material is clearly contradictory and unreliable. There is no reliable evidence of even his ordinary membership of the Trust. On the other hand, the erstwhile committee members, with whose help Defendant No.1 himself claims to have come on the Managing Committee, deny his membership not only of the Committee but even his ordinary membership of the Trust. (Though the trusteeship of Defendant No.1 is accepted by the Deputy Charity Commissioner

in a Change Report order, a revision from that order is pending before the Charity Commissioner, with the result that the matter has not attained any finality from the point of view of the Trusts Act either.)

Defendant No.2 :

32. Neither Trust Membership nor Committee Membership of Defendant No.2 (till his removal from the Committee in the EGM of 21 October 2013) is disputed by the Plaintiffs.

Defendant No.3 :

33. Defendant No.3 is neither a Trust Member (admittedly so) nor even eligible to be a one. His eligibility to be on the Managing Committee is thus ruled out. Even his ordinary membership of the Trust is in grave doubt. In a proceeding before the Charity Commissioner, Defendant No.3 has relied on a membership form (for ordinary membership). This form is alleged by the Plaintiffs to be a forged document and an FIR is lodged in that behalf before Gamdevi Police Station. There are many indications which cast a serious doubt on the authenticity of this document. This form is purportedly filled up on 13.2.2003 and yet mentions his gmail address (gmail did not exist then); his telephone number, mentioned as 66714672, was activated only in July 2003 and later de-activated in May 2010; the form is allegedly signed as main sponsor by one Ms.Claudia Dutt De Cavey (deceased), whose daughter Mrs.Ayesha Shroff has given an affidavit to Gamdevi Police Station that her mother's signature on the form was forged, and her mother and her family did not know any Lalit Agarwal (Defendant No.3); one seconder on the form is one Hilde Khatau (deceased), whose son has also made a statement before Gamdevi Police Station that his mother's signature was forged and they never knew Defendant No.3; another seconder, one Ms.Pia Doser, herself attended Gamdevi Police Station and gave a statement that the signature was not hers and she never signed the membership form of Defendant No.3; the membership form could not have a seven digit telephone number as by October 2002, MTNL had introduced eight digit numbers by adding digit "2"

before every telephone number; if one goes by the date of the form, the daughters of Defendant No.3, who also appear as applicants in the form, ought to be 8 and 5 years, respectively, on the date the form was filled in, but the photographs show much older girls; and the membership form filled up on February 2003 has been approved by Defendant No.1 in 2010. A statement made by Defendant No.4 to Gamdevi Police Station claims that in 2010, when Defendant No.3 and his wife were called for interview (before admitting them as members), since two of his proposers had already died (whose signatures are claimed to be forged, as noted above) and he did not know the third, Mrs.Pia Doser, Defendant No.2 agreed to stand as his proposer. (The minutes of that meeting are said to be unavailable.) All this raises serious suspicion over the genuineness of the form. No doubt Defendant No.3 has some explanation or the other to offer for each of these strange circumstances. He explains how in 2003 a waiter by the name of Peter, working at the bar of the club ran by the Trust, procured signatures of the abovenamed individuals and filled in their details in the form; that he was called for an interview in December 2010, at which since two of the three proposers had died and he was not in touch with the third, Defendant No.2 attended the interview and stood as a sponsor; that though he had submitted his form in 2003, later when he went to the club to inquire about the status of his application, he filled in his email id and his office number and also affixed the photographs of his daughters (then current photographs), which were not affixed earlier. All these explanations seem to be far too contrived and do not dispel the cloud of suspicion cast by all the strange circumstances noted above collectively.

Defendant Nos.4, 5 and 6 :

34. These Defendants are indisputably both ordinary members and Trust Members of the Trust. The legality of their appointments as Ordinary Trustees on the Managing committee is however under cloud. Their appointments are made by a Committee comprising of Defendant No.1 as the Chairman / Member of Managing Committee. The Change Reports in respect of these Defendants, which are opposed by the other side, are pending with the Charity authorities.

35. The net result is that out of six Defendants, who were purportedly members of the erstwhile Managing Committee and who were removed in the EGM of 21 October 2013, only Defendant No.2 appears to be duly appointed on the Committee. Defendant Nos.1 and 3 are admittedly not even Trust Members. They are clearly ineligible to hold the office of Ordinary Trustees or be on the Managing Committee. It is doubtful if they are even Ordinary Members of the Trust. Defendant Nos.4 to 6 are appointed by a Committee under the Chairmanship of Defendant No.1. In any event, in so far as their acceptance by the Charity authorities as Trustees is concerned, they are on no different footing from the Plaintiffs. All this will bear on the question of balance of convenience, which I have discussed below.

36. One last aspect, though not the least in importance, which bears very pertinently on the questions of irreparable prejudice and balance of convenience, is the altogether different constitution, which has suddenly surfaced during the pendency of these proceedings. Its provisions, as I have noted below, make a strange reading, whilst its genesis makes an even stranger reading. This so called constitution was for the first time introduced with an affidavit of Defendant No.2, filed as late as on 7 November 2014, after the parties had practically concluded filing of their pleadings in the matter.

37 This so called constitution (which we shall term as “new constitution” for convenience of reference, whilst we shall refer to the original constitution as “original constitution”) contains some startling deviations from the original constitution. In Articles 6 and 7, which, respectively provide for 'ordinary membership' and 'visiting membership' of the Trust, the reference to the Committee's power to restrict membership so as to not allow an addition to the overall membership interfere with the amenities and comforts of individual members, stands deleted. In Article 14, the restriction in the original constitution that a foreign, ordinary or visiting member shall not be entitled to attend and vote at any Annual or Extra-ordinary General Meeting of the Trust or serve on the Managing Committee, etc. stands deleted in the new constitution. In Articles

40(b) and (c) of the original constitution, in the reference to 'Trust Member', the word 'Trust' is deleted in the new constitution for the manner of proposing a resolution in a General Meeting. So also, the word 'Trust' appearing in Article 51 in the reference to the Trust Members in connection with approval of Trust Accounts is deleted in the new constitution. The resultant position is that ordinary members of the Trust appear to have been now empowered to attend and vote at the General Meetings of the Trust. A far reaching and fundamental change in the membership rights indeed!

38. This Court had, by an interim order passed earlier, called for the original record of the Bombay City Civil Court in Suit No.448 of 1967, where the constitution was approved by the Court. What that record reveals is even more startling.

39. In the first place, the original record reveals that the above mentioned changes to be found in the new constitution are made in a crude manner by simply scoring out the relevant portions in the constitution annexed to the court order dated 15 March 1967. There are no initials to be found for the scored out portions. It is obvious that the record of the case has been tampered with. The oral judgment passed by the City Civil court on the suit under Section 50 of the Trusts Act, which was for amendment of the constitution of the Trust in accordance with the draft annexed to the plaint, clearly records that the main object of the amendments proposed was to allow non-Europeans as members of the Trust and that substantially the amendments were in conformity with the original scheme, the only modification being sought was in respect of membership of non-Europeans. This makes it abundantly clear that the only amendment sanctioned by the City Civil Court by its decree of 15 March 1967 in pursuance of which the constitution, which we have termed as "original constitution" in this order has come into effect, was in respect of admission of non-Europeans as members of the Trust. The scheme of management of the Trust mainly by Trust members, who alone had the right to attend and vote at the Annual General Meeting of the Trust and to appoint Ordinary Trustees which comprise of the Managing Committee of the Trust, was clearly untouched by the

decree of the City Civil Court. This is made clear even in the history of the Trust, which is set out in the bye-laws of the Trust. The history set out in the bye-laws *inter alia* provides as follows :

“ With the advent of Indian Independence on the 15th August, 1947, the need was increasingly felt that the Baths should also be opened to inhabitants of all Communities in Bombay. These intentions were, however, overtaken to a certain extent by the pressure of social events and interim modifications were made to the terms of the original Constitution and approved by the City Civil Court at Bombay on the 28th September, 1960, whereafter local inhabitants were admitted to the use of the Trust premises as guests. Again, however, in 1964, charges of discrimination were quite unwarrantedly brought against the Trust and, in the light of this, the then Committee, under the Chairmanship of Mr.C.H. Campbell, C.B.E., decided that the time had clearly come to vindicate such charges by putting into effect immediately a complete redrafting of the Constitution. With the consent and concurrence of the Government of the State of Maharashtra, a new Constitution was drafted and approved by the General Meeting of the beneficiaries of the Trust on the 26th February 1965. A Decree of the City Civil Court at Bombay was finally obtained on the 15th March, 1967 and the present Constitution brought into effect on the 1st May, 1967, which later, while continuing to uphold and maintain the terms of the original Trust Indenture dated the 3rd February, 1876 was regard to the European inhabitants of the City, made Membership available to persons of all Communities.

This history is clearly consistent with the original constitution and is at clear odds with the new constitution. The fourth and probably the most important aspect of the matter is that all parties have acted on the original constitution from 1967 till date. Even the pleadings of the parties have proceeded clearly on the footing of the original constitution. It is only the printed copy of the original constitution, which is produced and relied upon by both sides in the present suit.

40. The manner in which the new constitution has surfaced is even more strange and leaves little to the imagination. The Defendants appear to have applied under the Right to Information Act, 2005 for copies of relevant documents and at that time were handed over a copy of the decree and order dated 15 March 1967 passed by the City Civil Court in Suit No.448 of 1967 along with a copy of Exhibit-A, being amended / modified constitution of the Trust. This judgment and modified constitution was recorded as per an entry in Schedule-I in

the trust register. This entry is apparently made by a mutation made by a senior clerk working at the office of Charity Commissioner together with signatures of Superintendent and Deputy Charity Commissioner. This entry is said to be made on a miscellaneous application filed on 19 September 2014 being Miscellaneous Application No.DYCC/637/2014. It is revealed by the record that this miscellaneous application appears to have been made unilaterally by officers in the office of Charity Commissioner. The signatories to this application include two persons, who are also signatories to the entry and endorsement made in the register. Apparently, these two officers posed a query in the miscellaneous application and answered their own query vide the concerned entry and endorsement. There is no order revealed on the record as order passed on the miscellaneous application. In fact, the purported miscellaneous application appears to be merely a letter addressed by these officers. The letter records that despite search in the office of the Charity Commissioner, the constitution of the Trust could not be found and hence, upon a verbal direction of the Charity Commissioner, it was felt necessary to call for the same from the City Civil Court. Accordingly, a question is posed as to whether a decree passed in Suit No.448 of 1967 together with the constitution approved by the court should be taken on record. No notice of this application was given to any of the parties, that is to say, neither the Plaintiffs, who are trustees of the Trust, nor the Defendants, who claim to be the trustees. Clearly, an attempt is made to alter the record of the Trust surreptitiously and a dubious and illegal document appears to have been brought on record of the Charity Commissioner. This indicates a serious lapse not only on the part of the concerned officers of the Charity Commissioner, but something more sinister appears to be behind this whole exercise. The fact that the so called new constitution has come to light at a critical juncture when the present matter is hotly contested before this Court, the manner in which this so called constitution came to light, the manner in which the original record of the City Civil Court appears to have been tampered with together with several internal contradictions in the tampered document, clearly suggest that this is a handiwork of persons who are interested in asserting the rights of ordinary members of the Trust to attend and vote at the general meetings of the Trust and appoint ordinary trustees to form the Managing Committee of the Trust. It is equally apparent that

it is only the Defendants, who are interested in establishing this.

41. From the foregoing discussion, at least this much is *prima facie* clear. It is only the Defendants, who stand to gain by projecting the new constitution as the correct constitution of the Trust. At any rate, the new constitution, the genesis of which is mired in queer circumstances, has come about, as noted above, during the period during which the Defendants were admittedly managing the affairs of the Trust. Though it is not possible to come to any definite conclusion at this interlocutory stage about the culpability of any particular person or group in this grave act of tampering with not just the record of the Trust, but with the record of the Court and the order passed by it, there is certainly an eminently triable case in this behalf against the Defendants. The Plaintiffs may of course have to take steps such as amendment of the plaint for the purpose. But that is for the trial stage. For the purposes, however, of this interlocutory application, a concrete possibility of such a case is itself an important circumstance which must go into the consideration of the application. As held by the Supreme Court in the case of **Gaiv Dinshaw Irani vs. Tehmtan Irani**¹³, the Court can, and in many cases must, take cognisance of subsequent developments during the pendency of the suit whilst moulding the relief. And if even there were such a case, this would be it.

43. In sum, the emerging position is this : Till 21 October 2013, the Trust was being managed by a Managing Committee, the appointment of which *prima facie* appears to be illegal. Two of the six members of the Committee, one of whom was instrumental in appointing at least three others out of four, are not even Trust Members and are clearly ineligible to be appointed on the Committee. After noticing these illegalities, fifty-eight persons, all of whom are Trust Members in whom alone the ultimate authority to guide administration and management of the Trust vests, duly convened an EGM of the Trust, voted out the Defendants and appointed the Plaintiffs on the Managing Committee as Ordinary Trustees. The removal of the Defendants and appointment of the Plaintiffs are *prima facie* clearly valid and legal. There is no legal impediment in the Plaintiffs assuming the

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charge of the Managing Committee. The Defendants have no right *prima facie* to obstruct the management of the Trust by the Plaintiffs. There is more than an arguable case, that the affairs of the Trust are not safe in the hands of the Defendants, considering, *inter alia*, the manipulation of records and documents during their tenure, as noted above, and the avowed absence of the Trust record reflecting even a vital aspect such as membership of the Trust.

44. We may now, in the light of the foregoing discussion, consider the questions of irreparable prejudice and balance of convenience. The question of prejudice is not very difficult. It is quite clear that by its very nature, the prejudice suffered by the Plaintiffs if the Defendants are permitted to prevent or obstruct the Plaintiffs' management of the Trust, cannot in any proper sense be repaired or remedied. What really falls for consideration is the balancing of the respective prejudices suffered by the Plaintiffs and the Defendants by grant or refusal of interim relief. The interim relief sought is for a temporary injunction restraining the Defendants from obstructing the Plaintiffs in their management of the affairs of the Trust as the Managing Committee of the Trust duly appointed in the EGM, and from holding out as members of the Managing Committee of the Trust after being removed as such members in the EGM. If this relief is not granted, the Plaintiffs are irreparably prejudiced; on the other hand, if such relief is granted, the Defendants, who claim that their removal from the Managing Committee was null and void and they continue to be on the Managing Committee despite such removal, are prejudiced, and if they are right, irreparably so. What tilts the balance in favour of the Plaintiffs, however, are two very pertinent aspects. The Defendants' appointment, in the first place, is *prima facie* fraught with illegalities, which are patent on record. Defendant Nos.1 and 3, not even being eligible to be appointed on the Managing Committee (and there is no plausible contrary argument) and Defendant No.1, lacking thus in eligibility, being instrumental in appointment of Defendant Nos.4 to 6, the appointment of the Defendants is *ex facie* bad in its inception. If that be the case, their continuation in office is not in the interest of the Trust. After all, this Court, amongst its many functions, acts as the protector of charities. A Committee, the legitimacy of which is in grave doubt, cannot be allowed to perpetuate itself in the Management of the Trust after it is

duly removed by the persons in whom the ultimate authority to guide the destiny of the Trust rests. Apart from bearing on the balance of convenience as between the two parties before the Court, it would bear on the severe prejudice that may be caused to the Trust as a result of refusal to order interim relief. Secondly, as I have considered in detail above, manipulation of records as well as absence of vital records of the Trust ought to put this Court on guard. *Prima facie* it is clear to me that the affairs of the Trust are not safe in the hands of the Defendants. The Trust is likely to suffer a far too serious prejudice than any of the parties before this Court, if the injunction prayed for is not granted. Even otherwise, considering the fact that the Plaintiffs have made out an overwhelming *prima facie* case, even if the prejudice to be suffered by the Defendants by grant of interim relief be equal in measure to the one suffered by the Plaintiffs by the refusal to grant such relief, I should hold rather in favour of the Plaintiffs than the Defendants, particularly having regard to the peculiar facts of the case.

45. In the premises, the following order is passed :

- (i) The Notice of Motion is made absolute in terms of prayer clauses (a), (b) and (c);
- (ii) The Defendants are directed to co-operate with the Plaintiffs to enable the Plaintiffs to take a complete charge and control of the office of the Managing Committee, including the premises of the office and all cupboards, computers, registers, data, books of accounts, lists, forms, contracts, documents of the trust, etc.,
- (iii) Costs of the Notice of Motion shall form part of the costs of the suit and shall be taxed accordingly.

46. Learned Counsel for the Defendants seeks stay of this order. I am not inclined to consider any stay of the order, which has the result of allowing Defendant Nos.1 and 3 in the management of the trust in any way. Learned

Counsel for the Defendants submits that in that case, at least Defendant Nos.2, 4 and 5 along with Mr.Sandeep Mehta, who has been appointed as a member of the Managing Committee in the interregnum, should be allowed to operate as the Managing Committee for a limited period and that he would accept this as a condition of the stay order. I am inclined to consider stay of this order for a limited period on this footing. However, in the facts and circumstances, which I have discussed in this order, I can only permit such stay even for a limited period subject to conditions. Hence, the operative part of this order is stayed for a limited period of six weeks from today, subject to the following conditions :

- (i) Defendant Nos.1 and 3 shall not be allowed to participate in any of the meetings of the Managing Committee or hold themselves out as members of the Managing Committee;
- (ii) Defendant Nos.2, 4, 5 and Mr.Sandeep Mehta shall merely look after the day to day management of the trust and its premises and shall not take any policy decision or admit any new members, ordinary or trust members. They shall not admit any new member on the Managing Committee. They shall give full, free and complete access to the records of the Trust including all cupboards, computers, registers, data, books of accounts, lists, forms, contracts, documents of the trust to Plaintiff Nos.2 to 5 for the purposes of inspection.
- (iii) Defendant Nos.2, 4, 5 and Mr.Sandeep Mehta shall not initiate any disciplinary action against Plaintiff Nos.2 to 5;
- (iv) It is made clear that no record of the trust shall be removed from the office of the trust;

(v) Defendant Nos.2,4,5 and Sandeep Mehta shall conduct the day to day management of the trust as provided in this order in accordance with the constitution referred to in this order as the original constitution which is annexed as Exh "A" to the Petition.

(vi) Liberty to the parties to apply in case of any difficulty;

47. After I dictated this order, learned Counsel for the Plaintiffs mentioned the matter and submitted that according to the Plaintiffs' information, records of the trust were being removed from the trust office after this Court pronounced its order in open Court in the morning session. In view of this complaint, the Prothonotary & Senior Master of this Court is directed to forthwith designate a staff member as Court Commissioner for inspecting the record of the trust. The Court Commissioner shall assess the record of the Trust, look into the aspect of removal of files and make a report to this Court within one week from today.

(S.C. Gupte, J.)