

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO.236 OF 2014**

1. Adi Burjor Banaji
2. Jamshed Dady Banaji
3. Burjor Edulji Banaji

the present Trustees of the
Banaji Limji Agiary Trust,
having their office at Banaji
Mansion, 17, Banaji Street,
Fort, Mumbai 400 001.

...Plaintiffs

Versus

Bakhtawar Maneksha Jijina, of
Mumbai Indian inhabitant, residing at
3rd Floor, Banaji Mansion, 17, Banaji
Street, Fort, Mumbai 400 001.

...Defendant

AND

IN THE BOMBAY CITY CIVIL COURT AT BOMBAY

S. C. SUIT NO. 2546 OF 2014

Bakhtawar Maneksha Jijina

...Plaintiff

Versus

Burjor Rustomji Banaji & Ors.

...Defendants

Mr. Karl F. Tamboly, along with Mr. J. N. Mistry, Ms. Vijaya Bhat and Ms. Avan Ardeshir, instructed by M/s. Mulla & Mulla & Craigie Blunt & Caroe for the Plaintiffs in Suit No. 236 of 2014 and for the Defendants in S. C. Suit No. 2546 of 2014

Ms. Sapna Khobragade with Ms. Gayatri Nayak, Mr. Raj Gupta i/by Mr. Rajesh Khobragade for the Defendant in Suit No. 236 of 2014, and for the Plaintiff in S. C. Suit No. 2546 of 2014

CORAM: S.J. KATHAWALLA, J.

RESERVED ON : 15th MARCH, 2022
PRONOUNCED ON : 22nd MARCH, 2022

JUDGMENT :

1. The present Judgment shall dispose of Suit No. 236 of 2014 filed before this Court (‘*the High Court Suit*’), as well as S.C. Suit No.2546 of 2011 which was originally filed before the Bombay City Civil Court at Bombay (‘*the City Civil Court Suit*’). The Plaintiffs in the High Court Suit had filed Notice of Motion No. 428 of 2014 seeking interim reliefs during the pendency of the High Court Suit. During the hearing of that Notice of Motion, both sides had consented to both the High Court Suit and the City Civil Court Suit being tried and heard together. Accordingly, by my order dated 15th April 2014 passed in Notice of Motion No. 428 of 2014 in the High Court Suit, the Office of this Court was directed to call for the record and proceedings in the City Civil Court Suit to this Court. Pursuant thereto, the record and proceedings in the City Civil Court Suit was transferred to this Court, and both Suits

have thereafter been tried and heard together.

2. The Plaintiffs in the High Court Suit are the Trustees of the Banaji Limji Agiary Trust (*'the Trust'*), which is a public charitable trust registered under the provisions of the Maharashtra Public Trusts Act, 1950. The Defendant in the High Court Suit is Ms. Bakhtawar Maneksha Jijina. Ms. Jijina is the Plaintiff in the City Civil Court Suit. Plaintiff Nos. 1 and 2 in the High Court Suit have been arrayed as Defendant Nos. 1A and 2A in the City Civil Court Suit. For the sake of convenience, the parties shall hereinafter be referred to as they have been arrayed in the High Court Suit, i.e. the Trustees of the Trust shall be referred to as the Plaintiffs, and Ms. Bakhtawar Maneksha Jijina shall be referred to as the Defendant, irrespective of whether they are being referred to in the context of the High Court Suit or the City Civil Court Suit.

3. The case of the Plaintiffs in the High Court Suit is briefly set out as follows :

3.1 The Plaintiffs are the present Trustees of the Banaji Limji Agiary Trust (*'the Trust'*). The Trust is a public charitable trust registered under registration no. C-418/B with the office of the Charity Commissioner, under the provisions of the Maharashtra Public Trusts Act, 1950.

3.2 In the year 1709, the Banaji family of Mumbai established a Parsi Fire Temple called the Banaji Limji Agiary (*'the Agiary'*) at Banaji Street, Fort, Mumbai

400 001. A chawl was built adjacent to the Agiary.

3.3 In the year 1843, the Agiary and chawl were found to be in a dilapidated condition and were pulled down and restored by members of the Banaji Family. A sum of Rs.23,000/- was raised by the members of the Banaji Family for restoration and endowment of the Agiary. After the work of restoration of the Agiary was completed, a sum of Rs.11,034/- remained out of the aforesaid funds raised for restoration of the Agiary. The members of the Banaji Family decided to form a trust and to place the immovable properties and funds in its care.

3.4 On 13th February 1855, a meeting was convened amongst the members of the Banaji Family and the following persons were appointed as Trustees in respect of the movable and immovable properties and the funds, viz., Dadabhoy Rustomjee Banaji, Sorabjee Pestonjee Banaji, Limji Maneckjee Banajee, Dhunjibhoy Framjee and Hormusji Ruttonjee Banaji. Thereafter these persons took charge of the Agiary, chawl and surplus monies mentioned above. Dhunjibhoy Framjee resigned as a Trustee in the year 1864. Hormusji Ruttonjee Banaji died on 26th December 1865. Pestonjee Burjorjee Davur and Nanabhoy Dhunjeebhoy Banajee were appointed as Trustees in their place and stead respectively.

3.5 By a Consent Decree dated 18th January 1877 passed by the Bombay High Court in Suit No. 525 of 1876, the Trustees were to meet within three months and execute a Trust Deed by which the Agiary and other immovable and movable

properties could be formally transferred to the Trust. In pursuance of the same, a Trust Deed dated 9th June 1879 establishing the Trust was executed by and between Sorabjee Pestonjee Banaji, Limji Maneckjee Banajee, Pestonjee Burjorjee Davur, Nanabhoy Dhunjeebhoy Banajee and Furdonjee Merwanjee Banajee (*'the Trust Deed'*). The Trust Deed was registered with the Sub Registrar of Assurances at Bombay on 9th June 1879 under Registration No.228-A at pages 62 to 71, Volume 46 of Book No.1. The land admeasuring 796 square yards and forming part of what is now Cadastral Survey No. 449 of Fort Division with the buildings of the Banaji Limji Agiary being the same land and building and the outhouses situated in Nanabhoy Lane in Fort were vested in the Trust as per the Trust Deed.

3.6 By a registered Indenture of Conveyance dated 13th July 1905, the Trust acquired the land admeasuring 112 sq.yards equivalent to 93.65 sq. meters together with the building standing thereon adjoining the Agiary. This land forms part of what is now Cadastral Survey No. 449 of Fort Division.

3.7 By a registered Indenture dated 29th November 1916, the Trust acquired the property being land admeasuring 32 sq. yards, now forming part of Cadastral Survey No. 450 situated at 14, Banaji Street, Fort, Mumbai, Ward 'A. and the premises standing thereon.

3.8 By a registered Indenture of Conveyance dated 2nd December 1926, the Trust acquired land admeasuring 65 square yards in Fort, Bombay now bearing

Cadastral Survey No. 403, with a dwelling house standing thereon.

3.9 By three registered Indentures of Conveyance dated 15th April 1885, 30th April 1885 and 16th January 1886, the Trust acquired portions of land, forming part of land now bearing Cadastral Survey No. 405 situated at 17, Banaji Street, Fort, Mumbai, Ward 'A'. Out of these lands, land admeasuring 74.58 square yards was conveyed by the Trust to the Municipal Corporation for the City of Bombay under a registered Indenture of Conveyance dated 7th December 1887.

3.10 The Trust is the owner of the aforesaid properties situated at CS Nos. 449, 450, 403 and 405. The same have been more particularly described in the Schedule contained in Exhibit A to the Plaint ('*the Suit Properties* ').

3.11 Over the years various Trustees of the Trust have retired or died, and new Trustees have been appointed to replace them from time to time. Various Deeds of Appointment of new Trustees have been registered with the office of the Sub Registrar of Assurances, thereby vesting the Suit Properties in the continuing Trustees and new Trustees.

3.12 The Trust has been paying the property and municipal taxes in respect of the Suit Properties.

3.13 One Banoo Nariman Shroff was the occupant of premises situated on the 2nd floor of Banaji Mansion. She passed away on 4th September 1998. The Defendant filed Testamentary Petition No. 950 of 1998 before this Court for probate of the last

Will and Testament dated 1st December 1983 of Banoo Nariman Shroff. Probate was granted by this Court in favour of the Defendant on 16th March 1999.

3.14 It has recently come to the knowledge of the Plaintiffs that the Defendant made another application dated 22nd December 2011 to the Prothonotary and Senior Master of this Court for amendment of the Schedule of Assets in the Probate granted to the Defendant in respect of the Will of Banoo Nariman Shroff. The Defendant claimed that in the schedule of assets annexed to Testamentary Petition No. 950 of 1998, certain assets of Banoo Nariman Shroff came to be omitted due to oversight. The schedule of amended assets annexed to the amendment application sought to introduce the Suit Properties belonging to the Trust. The amendment as sought by the Defendant was allowed as the same was uncontested, and the schedule of assets annexed to the Probate granted by this Court in respect of the Will of Banoo Nariman Shroff was amended on 28th August 2012 to include *inter alia* the Suit Properties.

3.15 The Defendant has trespassed into Banoo Nariman Shroff's premises on the 2nd floor of Banaji Mansion, and is claiming possessory and other rights therein on the strength of Banoo Nariman Shroff's will. The Trust filed Suit No. 7732 of 1988 before the Bombay City Civil Court for removal of the Defendant from the premises on the 2nd floor of Banaji Mansion. By a judgment dated 18th September, 2012, the Bombay City Civil Court dismissed S.C. Suit No.7732 of 1988. The Trust has

preferred First Appeal No.10 of 2013 before this Court.

3.16 The Defendant filed the City Civil Court Suit claiming ownership to the Suit Properties on 20th August 2011 as a counterblast to the trespass action initiated against her by the Trust in respect of the premises situated on the 2nd floor of Banaji Mansion.

3.17 The Defendant's husband was serving as a salaried priest in the Agiary which is owned by the Trust and was a tenant in respect of premises on the 3rd floor of Banaji Mansion standing on C. S. No. 405 of Fort Division owned by the Trust. The Defendant's husband was paying rent to the Trust in respect of his tenanted premises on the 3rd floor of Banaji Mansion. The Defendant's husband passed away on 29th June 2012. The Defendant continued to pay rent in respect of these 3rd floor premises in Banaji Mansion up to November 2011, i.e. well after filing the City Civil Court Suit on 20th August 2011.

3.18 However, the Defendant has been holding herself out to be the owner of the Suit Properties. She claims title to the same through Banoo Nariman Shroff. The Plaintiffs have also come to know that the Defendant has been attempting to get many of the Suit Properties transferred in her name in the revenue records on the strength of the aforesaid Probate of the will of Banoo Nariman Shroff granted to her by this Court, and the amended schedule of assets therein.

3.19 The Plaintiffs have prayed for the following reliefs :

“(a) that it be declared that the Plaintiffs, as Trustees of the Banaji Limji Agiary Trust are the owners of and are entitled to the properties described in the Schedule annexed as Exhibit “A” hereto;

(b) that it be declared that the deceased Banoo Nariman Shroff, never had any right, title or interest in any of the immovable properties described in the schedule annexed as Exhibit A hereto;

(c) that it be declared that the Defendant has no right, title or interest in any of the immovable properties described in the schedule annexed as Exhibit A hereto;

(d) that this Hon’ble Court be pleased to grant a permanent order and injunction :

(i) Restraining the Defendant by herself or by her servants and agents by permanent order and injunction of this Hon’ble Court from in any manner entering upon the properties described in Exhibit “A” hereto or any part thereof or from in any manner interfering with or disturbing the Plaintiffs’ possession of the properties described in Exhibit “A” hereto or any part hereof;

(ii) Restraining the Defendant by herself or by her servants and agents from in any manner dealing with, disposing off, transferring, alienating, encumbering, or creating any third party right in respect of the properties more particularly described in Exhibit “A” hereto or any part thereof;

(iii) Restraining the Defendant from holding herself out as the owner of or has having any right title or interest of any nature whatsoever in any of the immovable properties described in Exhibit “A” hereto or any part thereof;

(e) that this Hon’ble Court be pleased to direct the Defendant to faithfully disclose on oath before this Hon’ble Court, any and all attempts made by her to deal with any of the immovable properties mentioned in the schedule annexed and Exhibit A hereto;

(f) that pending hearing and final disposal of the suit –

(i) the Defendant by herself or by her servants and agents be restrained by temporary order and injunction of this Hon'ble Court from in any manner entering upon the properties described in Exhibit "A" hereto or any part thereof or from in any manner interfering with or disturbing the Plaintiffs' possession of the properties described in Exhibit "A" hereto or any part hereof.

(ii) the Defendant by herself or by her servants and agents be restrained from in any manner dealing with, disposing off, transferring, alienating, encumbering, or creating any third party right in respect of the properties more particularly described in Exhibit "A" hereto or any part thereof;

(iii) the Defendant be restrained from holding herself out as the owner or as having any right or title or interest of any nature whatsoever in, any of the immovable properties described in Exhibit "A" hereto or any part thereof;

(g) that pending the hearing and final disposal of this Suit this Hon'ble Court be pleased to direct the Defendant to faithfully disclose on oath before this Hon'ble Court, any and all attempts made by her to deal with, in any man manner whatsoever, any of the immovable properties mentioned in the schedule annexed and Exhibit A hereto.

(h) for ad interim reliefs in terms of prayer clauses (f) and (g) above;

(i) That the Defendant be ordered and decreed to pay to the Plaintiffs costs of this Suit.

(j) For such further and other reliefs as this Hon'ble Court deems fit in the facts and circumstances of the present case to grant."

4. The Defendant filed the City Civil Court Suit on 20th August 2011 against the Trustees of the Trust in which she has contended as follows :

4.1 The Defendant has stated in the City Civil Court Suit that she caused a search to be taken in the office of the Collector at Bombay on 14th June 2011. The

search revealed that the Collector of Bombay has issued property cards in respect of the Suit Properties. The property card does not reveal that the Trust is the owner of the Suit Properties and that she is in fact the owner. She further stated that the property cards in respect of the Suit Properties reflect the name of one Sorabji Nanabhoy Banaji as the owner of the Suit Properties. Even the municipal records reflect the name of Sorabji Nanabhoy Banaji as the owner of the Suit Properties.

4.2 The Suit Properties have never been conveyed by Sorabji Nanabhoy Banaji or his successors in title to the Trust. The estate of Sorabji Nanabhoy Banaji vested in his son Nanabhoy Sorabji Banaji. Upon Nanabhoy Sorabji Banaji's death, his estate vested in his sister Banoo Nariman Shroff. Since the Defendant is the beneficiary to the estate of Banoo Nariman Shroff, she is the owner of all of the Suit Properties which according to her belonged to Sorabji Nanabhoy Banaji.

4.3 The Trust is not entitled to the Suit Properties. At the time of registration of the Trust, the documents on the basis of which the properties were transferred to the Trust have not been set out. There is no formal transfer of the Suit Properties to the Trust. Without first obtaining conveyance of the properties in question, the Trust cannot claim to be entitled to the same in deeds of appointment of new Trustees.

4.4 The Suit Properties have devolved upon the Defendant from Sorabji Nanbhoy Banaji, and the Defendant has disputed that the Trust is entitled to the same.

Accordingly, the Defendant has prayed for the following reliefs in the City Civil Court

Suit :

“(a) That this Hon’ble Court be pleased to restrain the Defendants, their agents, servants and / or person/s claiming by under or through them by an order of permanent injunction restraining the Defendants from in any manner inducting any third party and / or dealing with disposing off or parting with possession of the any gala/ shop/ office/ residential premises as also creating any tenancy or transferring tenancy or inducting third party in any capacity whatsoever or altering terms and conditions of evicting tenant in suit premises *viz* -

	a) Building No.	Cadastral Survey No.	Structure size	Description
01	13	400	G+1	G= Occupied
				1= Occupied
02	14	450	G+4	G= Occupied
				1= Occupied
				2= Occupied
				3=vacant
				4=vacant
03	15	405	Ground	Godown
04	16	450	G+4	G= Occupied
				1= Occupied
				2= Occupied
				3=vacant
				4=vacant
05	17	400	G+3	G= Occupied
				1= Occupied
				2= Occupied
				3=Occupied by Plaintiff
06	18	450	Ground	G Occupied
07	21	405	G+1	G= Occupied
				1= Occupied

b) that this Hon'ble Court may be pleased to restrain the Defendants, their Agents, servants, employees and / or person/s claiming by under or through them by an order of injunction of this Hon'ble Court from in any manner inducting any third party and / or dealing with or parting with possession of the suit premises as mentioned in prayer clause (a) herein above.

5. The Defendant has filed her Written Statement to the High Court Suit on 27th June 2014, in which she has contended as follows :

5.1 The Trust Deed dated 9th June 1879 is only a Deed Poll. It is only in the nature of a declaration of trust and does not amount to conveyance of the Banaji Limji Agiary. The Banaji Limji Agiary was never conveyed by the members of the Banaji Family to the Trust and the same continues to belong to the members of the Banaji Family.

5.2 The Trust Deed dated 9th June 1879 does not create a Trust nor does it amount to a Deed of Trust.

5.3 The Trustees of the Trust are only managers, and not owners, of the Suit Properties.

5.4 The property cards in respect of the Suit properties describe the Trust as the party in beneficial ownership thereof, but the same are merely revenue documents and cannot be stated to create title.

5.5 The Plaintiffs have not established that the Trust is the owner of the Suit properties.

5.6 The High Court Suit has been filed as a counter blast to the City Civil Court Suit filed by the Defendant.

5.7 Only the members of the Banaji Family are entitled to be Trustees of the Trust. The Plaintiffs have not shown their lineage to the Banaji Family and are not entitled to be Trustees of the Trust.

5.8 The suit properties belonged to Sorabji Nanabhoy Banaji. Sorabji Nanabhoy Banaji by his Will dated 19th October 1936 left his entire estate to his son Nanabhoy Sorabji Banaji. Nanabhoy Sorabji Banaji by his Will dated 27th September 1983 left his entire estate to his sister Banoo Nariman Shroff. Nanabhoy Sorabji Banaji predeceased Banoo Nariman Shroff and therefore his entire estate vested in Banoo Nariman Shroff. Banoo Nariman Shroff by her Will dated 1st December 1983 left her entire estate to the Defendant. After the death of Banoo Nariman Shroff, the Defendant has obtained Probate in respect of the Will of Banoo Nariman Shroff from this Court. The Suit properties are included in the amended schedule of assets. The Defendant has inherited all the suit properties from Banoo Nariman Shroff and the inclusion of the same in the Schedule of Assets annexed to the Probate confer title in respect of the Suit properties in her favour.

6. The Plaintiffs have filed their Written Statement dated 25th September 2013 to the City Civil Court Suit, in which they have contended as follows :

6.1 The Plaintiffs have set out how they claim to be the owners of the Suit Properties. Since these contentions have already been set out above while setting out the Plaintiffs contentions in the High Court Suit, they are not being repeated here.

6.2 The will of Banoo Nariman Shroff does not reflect the Suit Properties. The amendment to the Schedule to the Probate of her will is bogus and fraudulent and false to the knowledge of the Defendant. The Defendant has only amended the Schedule to perpetuate her false claim on the Suit Properties belonging to the Trust.

6.3 The name of Sorabjee Nanabhoy Banaji appears on the property cards of the Suit Properties in his capacity as a Trustee of the Trust.

7. On 8th July 2014, Issues were framed in the High Court Suit and the City Civil Court Suit, which are set out as follows :

Issues in Suit No.236 of 2014 (the High Court Suit):

1. Whether the Plaintiffs prove that they, as Trustees of Banaji Limji Agiary Trust, are the owners of, and are well and sufficiently entitled, to the immovable properties which are the subject matter of these Suits?
2. Whether the Plaintiffs prove that Banaji Limji Agiary Trust is in possession of the properties which are the subject matter of these Suits?
3. Whether the Plaintiffs prove that the Defendant is attempting to interfere with or disturb their possession in respect of the properties which are the subject matter of these Suits?
4. Whether the Defendant proves that the executants of the Deed of Poll dated 9th June 1876 were not Trustees but mere managers?
5. What order?

Issues in transferred Bombay City Civil Court Suit No.2546 of 2011 (the City Civil Court Suit):

6. Whether the Plaintiff proves that as the proving sole executor of, and the universal legatee under the last Will and Testament of late Banoo Nariman Shroff, the Plaintiff is entitled to claim interest in respect of the properties which are the subject matters of these Suits?
7. Whether the Plaintiff proves that she is entitled to restrain the Defendants from dealing with or disposing of or creating third party rights in, or parting with possession of any of properties which are the subject matter of these Suits?
8. To what reliefs, Plaintiff is entitled?
9. What order?

8. On 1st February 2016, the following additional issue was framed :

(i) Whether the Defendant proves that the Suit as filed, is not maintainable for the reasons set out by the Defendant in her Written Statement?

9. The Plaintiffs examined Plaintiff No.1 (PW-1) who filed an Affidavit in lieu of examination in chief dated 4th September 2014. He tendered documents on behalf of the Plaintiffs which have been taken on record and marked as Exhibits P1 to P80 under an order dated 5th September 2014 of this Court. He was cross examined in Court on 13th February 2015. Two further documents which were produced by the office of the Sub Registrar of Assurances, were tendered by the Plaintiffs and the same were taken on record and marked as Exhibits P81 and P82 under an order dated 14th October 2015 of this Court. Thereafter the Plaintiffs closed their evidence.

10. The Defendant examined herself by filing an Affidavit in lieu of examination in chief dated 30th March 2015. The Defendant also tendered documents which were taken on record and marked as Exhibits D-1 to D-9 under an order dated 31st July 2015 of this Court. The Defendant was cross examined on 31st July 2015 in Court. Thereafter she closed her evidence.

11. Thereafter the final hearing in the Suit initially commenced.

12. During the midst of the final hearing, the Plaintiffs took out Notice of Motion No. 1950 of 2015 seeking to reopen their evidence and to lead additional evidence of PW-1 and of one Shri Adi Mehta in view of events which had transpired after they had closed their evidence. By an order dated 1st February 2016, Notice of Motion No. 1950 of 2015 was allowed, and the Plaintiffs were permitted to lead additional evidence through Plaintiff No.1 and Shri Adi Mehta (PW-2).

13. The Plaintiffs thereafter filed an additional Affidavit in lieu of examination in Chief dated 4th February 2016 of Plaintiff No. 1 (PW-1) and an Affidavit in lieu of examination in chief of Shri Adi Mehta (PW-2) dated 4th February 2016. By an order dated 4th July 2016, four further documents of the Plaintiffs were taken on record and marked as Exhibits P83 to P86. PW-2 was cross examined on 4th July 2016 in Court. PW-1 was further cross examined on 4th and 5th July 2016 in Court.

14. Thereafter the Plaintiffs once again closed their evidence. The Defendant did not make any application seeking to lead any further evidence following the further evidence led by the Plaintiffs.

15. The following is a list of documents, along with their Exhibit numbers, which have been tendered by the Plaintiffs in these Suits :

DOCUMENT	Page Nos. in Plaintiff's compilation of documents	Exhibit No.
Certified Copies of Property Cards in respect of properties bearing C.S.No. 403, C.S.No.405, C.S.No.400 and C.S.No.401 more particularly described in the Schedule annexed as Exhibit "A" to the plaint.	1 – 6	P1 (colly)
Certified Copies of Property Cards in respect of properties bearing C.S.No. 449 and C.S.No. 450 more particularly described in the Schedule annexed as Exhibit "A" to the plaint.	7 – 8	P-87
Certified Copy of the Change Report dated 31 st March 1980 filed in the office of the Charity Commissioner regarding the appointment of Plaintiff No. 1 as Trustee.	9 –10	P-2
Certified Copy of the Change Report dated 19 th May 2005 alongwith annexures filed in the office of the Charity Commissioner regarding the appointment of Plaintiff No. 2 and 3 as Trustees.	11-19	P-3
Original Resolution dated 18 th August 2014 confirming the appointment of Mr.Burjor Edulji Banaji as a Trustee.	20	P-50
Certified Copy of Schedule 1 maintained by the office of the Charity Commissioner.	21 – 24	P-4

Certified Copy of the Trust Deed dated 9 th June 1879 alongwith a typed copy thereof.	25 – 34 35 – 47	P-5 & P5-1
Certified copy of the Indenture of Conveyance dated 13 th July 1905 made between Maneckji Hormusji Kanga as the Vendor and Furdoonjee Merwanjee Banajee and others, the Trustees of the Trust as the Purchasers.	48 – 55	P-6
Certified copy of Indenture of Conveyance dated 29 th November 1916 made between Bai Hirabai and Dorabji Cowasji Dawar, Cooverjee Nanabhoy Banaji, Sorabjee Nanabhoy Banajee, Nowrojee Jehangerjee Framjee and Framjee Dadabhoy Banajee, the then Trustees of the Trust.	56 – 65	P-7
Certified copy of Indemnity Bond dated 29 th November 1916 executed by Bai Hirabai.	66 – 69	P-8
Certified copy of Indenture of Conveyance dated 2 nd December 1926 made between Cassum Motee and Dorabji Cowasji Dawar, Sorabjee Nanabhoy Banajee, Framjee Dadabhoy Banajee, Hormusjee Nanabhoy Banaji and Kaikhushroo Pestonjee Davar, the then Trustees of the Trust.	70 – 79	P-9
Certified copy of Indenture of Conveyance dated 15 th April 1885 made between Dorabjee Nasserwanji Masani and Limji Maneckjee Banaji, Nanabhoy Dhunjibhoy Banajee and Furdoonjee Merwanjee Banaji, the then Trustees of the Trust.	80 – 83	P-10
Certified copy of Indenture of Conveyance dated 30 th April 1885 made between Dorabjee Nasserwanji Masani and Limji Maneckjee Banaji, Nanabhoy Dhunjibhoy Banajee and Furdoonjee Merwanjee Banaji, the then Trustees of the Trust.	84 – 89	P-11
Certified copy of Indenture of Conveyance dated 7 th December 1887 made between the then Trustees of the Banajee Limjee Agiary conveyed 74.58 sq.yds. out of the lands now comprised in C.S. No.405 to the Municipal Corporation for the City of Bombay.	90 – 95	P-12

Certified copy of Registered Deed of Appointment of Trustees dated 16 th June 1905.	96 – 103	P-13
Certified copy of Registered Deed of Appointment of Trustees dated 9 th October 1916.	104 – 116	P-14
Certified copy of Registered Deed of Appointment of Trustees dated 18 th August 1924.	117 – 128	P-15
Certified copy of Registered Deed of Appointment of Trustees dated 22 nd July 1939.	129 – 142	P-16
Certified copy of Registered Deed of Appointment of Trustees dated 29 th June 1942.	143 – 157	P-17
Certified copy of Registered Deed of Appointment of Trustees dated 9 th July 1951.	158 – 176	P-18
Certified copy of Registered Deed of Appointment of Trustees dated 23 rd June 1976.	177 – 188	P-19
Copy of Registered Deed of Appointment of Trustees dated 30 th October 1972 obtained from the office of the Charity Commissioner.	189 – 200	P-20
Original Registered Deed of Appointment of Trustees dated 8 th June 2004.	201 – 222	P-21
Certified Copy of Schedule A issued by the office of the Charity Commissioner under the Parsi Public Trust Registration Act, 1936.	223 – 224	P-22
Original counter foil of the rent receipt for the period June – July 2011 issued to Maneck Jijina the late husband of the Defendant in respect of premises on the 3 rd floor of House No.17	225 – 226	P-23
Original counter foil of the rent receipt for the period August – September 2011 issued to Maneck Jijina the late husband of the Defendant in respect of premises on the 3 rd floor of House No.17	227 – 228	P-24
Original counter foil of the rent receipt for the period	229 – 230	P-25

October – November 2011 issued to Maneck Jijina the late husband of the Defendant in respect of premises on the 3 rd floor of House No.17		
Original Receipt No. 2872496 dated 31 st December 2013 in the amount of Rs. 18,966/- for payment of property tax in respect of building No.13 standing on property bearing C.S.No.403;	231 – 232	P-26
Original Receipt No. 5523807 dated 20 th June 2012 in the amount of Rs.4,855/- for payment of property tax in respect of building No.17 standing on property bearing C.S.No.405;	233 – 234	P-27
Original Receipt No. 2872291 dated 31 st December 2013 in the amount of Rs. 4,920/- for payment of property tax in respect of the Agiary premises standing on property bearing C.S.No.449;	235 – 236	P-28
Original Receipt No. 5523804 dated 20 th June 2012 in the amount of Rs. 1,959/- for payment of property tax in respect of building No.16 standing on property bearing C.S.No.449;	237 – 238	P-29
Original Receipt No. 2872290 dated 31 st December 2013 in the amount of Rs. 3,476/- for payment of property tax in respect of building No.14 standing on property bearing C.S.No.450;	239 – 240	P-30
Original Receipt No. 2872693 dated 31 st December 2013 in the amount of Rs. 1,904/- for payment of repair cess	241	P-31
Original Receipt No. 287270 dated 31 st December 2013 in the amount of Rs. 884/- for payment of repair cess	242	P-32
Original Receipt No. 287270 dated 31 st December 2013 in the amount of Rs. 198/- for payment of repair cess	243	P-33
Original Receipt dated 2 nd January 2013 issued by National Insurance Company Ltd. to Trust of Banaji Limji Agiary Trust for a sum of Rs.4,200/- for the year 2012;	244 – 245	P-34
Original Receipt dated 9 th January 2012 issued by	246 – 247	P-35

National Insurance Company Ltd. to Trust of Banaji Limji Agiary Trust for a sum of Rs.4,123/- for the year 2011;		
Original Receipt dated 20 th January 2011 issued by National Insurance Company Ltd. to Trust of Banaji Limji Agiary Trust for a sum of Rs.4,123/- for the year 2010;	248 – 249	P-36
Original Receipt dated 31 st December 2009 issued by National Insurance Company Ltd. to Trust of Banaji Limji Agiary Trust for a sum of Rs.3,943/- for the year 2009;	250 -251	P-37
Original Tax Invoice No. 118 dated 11 th September 2012 issued by Venus Fire Services to Banaji Limji Agiary for a sum of Rs.4050/-;	252	P-38
Original Tax Invoice No. 8858 dated 20 th October 2011 issued by Venus Fire Services to Banaji Limji Agiary for a sum of Rs.1400/-;	253	P-39
Original Tax Invoice No. 8651 dated 12 th August 2011 issued by Venus Fire Services to Banaji Limji Agiary for a sum of Rs.2200/-;	254	P-40
Original Tax Invoice No. 8592 dated 29 th October 2010 issued by Venus Fire Services to Banaji Limji Agiary for a sum of Rs.1100/-;	255	P-41
Original Tax Invoice No. 8529 dated 13 th August 2010 issued by Venus Fire Services to Banaji Limji Agiary for a sum of Rs.7000/-;	256	P-42
Original Receipt No.160 dated 15 th October 2010 issued by Burjor Framji & Co. to Banaji Limji Agiary for a sum of Rs.14,937/-	257	P-43
Original Receipt dated 1 st July 2009 issued by Meta Roof Engg. Co. to M/s. Banaji Limji Agiary for a sum of Rs.1,47,680/-	258	P-44

Original Receipt No. 695 dated 2 nd June 2009 issued by Dinshaw Electric Works to Banaji Limji Agiary Trust for the sum of Rs.50,000/-.	259	P-45
Original Receipt No. 696 dated 2 nd June 2009 issued by Dinshaw Electric Works to Banaji Limji Agiary Trust for the sum of Rs.25,000/-	260	P-46
Original Tax Invoice No. R-006 dated 18 th April 2009 issued by AMG INC to M/s. Banaji Limji Agiary for a sum of Rs.45,041-;	261	P-47
Original Cash Memo No. 17554 dated 16 th March 2009 issued by Glitteria The Light Gallery to Banaji Limji Agiary Trust for a sum of Rs. 4,680/-;	262	P-48
Original Tax Invoice No. 5516 dated 21 st January 2009 issued by Sorabji & Co. to M/s. Banaji Limji Agiary for a sum of Rs.1,330/-;	263	P-49
Original Cash Voucher dated 22 nd July 2014 issued by Banaji Limji Agiary to Homiyar Sherdiwala for a sum of Rs.8,000/- being his salary for the month of July 2014;	264	P-51
Original Cash Voucher dated 22 nd June 2014 issued by Banaji Limji Agiary to Homiyar Sherdiwala for a sum of Rs.8,000/- being his salary for the month of June 2014;	265	P-52
Original Cash Voucher dated 27 th May 2014 issued by Banaji Limji Agiary to Homiyar Sherdiwala for a sum of Rs.8,000/- being his salary for the month of May 2014;	266	P-53
Original Cash Voucher dated 23 rd April 2014 issued by Banaji Limji Agiary to Homiyar Sherdiwala for a sum of Rs.8,000/- being his salary for the month of April 2014;	267	P-54
Original Cash Voucher dated 28 th March 2014 issued by Banaji Limji Agiary to Homiyar Sherdiwala for a sum of Rs.8,000/- being his salary for the month of March 2014;	268	P-55
Original Cash Voucher dated 24 th February 2014 issued by Banaji Limji Agiary to Homiyar Sherdiwala for a sum of Rs.8,000/- being his salary for the month	269	P-56

of February 2014;		
Original Cash Voucher dated 25 th January 2014 issued by Banaji Limji Agiary to Homiyar Sherdiwala for a sum of Rs.8,000/- being his salary for the month of January 2014;	270	P-57
Original Cash Voucher dated 26 th December 2014 (sic 2013) issued by Banaji Limji Agiary to Homiyar Sherdiwala for a sum of Rs.8,000/- being his salary for the month of December 2013;	271	P-58
Original Cash Voucher dated 26 nd November 2014 (sic 2013) issued by Banaji Limji Agiary to Homiyar Sherdiwala for a sum of Rs.8,000/- being his salary for the month of November 2013;	272	P-59
Original Cash Voucher dated 14 th October 2014 (sic 2013) issued by Banaji Limji Agiary to Homiyar Sherdiwala for a sum of Rs.8,000/- being his salary for the month of October 2013;	273	P-60
Original Cash Voucher dated 26 th July 2014 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of July 2014;	274	P-61
Original Cash Voucher dated 25 th June 2014 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of June 2014;	275	P-62
Original Cash Voucher for the month of March 2013 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of March 2013;	276	P-63
Original Cash Voucher for the month of February 2013 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of February 2013;	277	P-64
Original Cash Voucher for the month of January 2013 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of January 2013;	278	P-65
Original Cash Voucher for the month of December	279	P-66

2012 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of December 2012;		
Original Cash Voucher for the month of November 2012 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of November 2012;	280	P-67
Original Cash Voucher for the month of October 2012 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of October 2012;	281	P-68
Original Cash Voucher for the month of September 2012 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of September 2012;	282	P-69
Original Cash Voucher for the month of August 2012 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of December 2012;	283	P-70
Original Cash Voucher for the month of July 2012 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of July 2012;	284	P-71
Original Cash Voucher for the month of June 2012 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of June 2012;	285	P-72
Original Cash Voucher for the month of May 2012 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of May 2012;	286	P-73
Original Cash Voucher for the month of April 2012 issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of April 2012;	287	P-74
Original Cash Voucher for the month of March 2012	288	P-75

issued by Banaji Limji Agiary to Mr. Cyrus Tangri for a sum of Rs 5000/- in respect of cleaning charges of the Agiary for the month of March 2012;		
Original Cash Voucher for the month of July 2010 issued by Banaji Limji Agiary to Mr. Eric Guzder for a sum of Rs 4500/- in respect of cleaning charges of the Agiary for the month of July 2010;	289	P-76
Original Cash Voucher for the month of March 2010 issued by Banaji Limji Agiary to Mr. Eric Guzder for a sum of Rs 4500/- in respect of cleaning charges of the Agiary for the month of March 2010;	290	P-77
Original Cash Voucher for the month of January 2010 issued by Banaji Limji Agiary to Mr. Eric Guzder for a sum of Rs 4500/- in respect of cleaning charges of the Agiary for the month of January 2010;	291	P-78
Original Cash Voucher for the month of December 2009 of issued by Banaji Limji Agiary to Mr. Eric Guzder for a sum of Rs 4500/- in respect of cleaning charges of the Agiary for the month of December 2009;	292	P-79
Original Cash Voucher for the month of November 2009 of issued by Banaji Limji Agiary to Mr. Eric Guzder for a sum of Rs 4500/- in respect of cleaning charges of the Agiary for the month of November 2009;	293	P-80
Certified copy of Indenture of Conveyance dated 16 th January 1886 made between Mancherji Framjee Cama and Limji Maneckjee Banaji, Nanabhoy Dhunjibhoy Banajee, Furdoonjee Merwanjee Banaji, Sorabjee Jehangirjee Banaji and Darabji Cavasji Davur, the then Trustees of the Trust.	294 – 298	P-81
Certified copy of Index I bearing Reference No. YPP-S 1206-3000-12-57-ALC 2	299 – 300	P-82
Original letter dated 31 st July 2015	301	P-83
Office copy of letter dated 28 th October 2015 bearing the original acknowledgment of the Defendants' representative and Mr. Adi Mehta.	302 – 309	P-84
Xerox copy of cheque number 080285 dated 8 th	310	P-85

December 2015 drawn in the name of Banaji Limji Agiary Trust for the amount of Rs.50,000/-.		
Xerox copy of cheque number 080284 dated 1 st January 2016 drawn in the name of Banaji Limji Agiary for the amount of Rs.50,000/-.	311	P-86

16. The following is a list of documents, along with their Exhibit numbers, which have been tendered by the Defendant in these Suits :

DOCUMENT	Page Nos. of Defendants compilation of documents	Exhibit No.
Original Probate dated 16-3-1999 granted by the Bombay High Court of the last Will and Testament of Banoo Nariman Shroff.	1-38	D-1
Notarized Xerox copy of the Last Will & Testament dated 19-10-1936 of late Sohrabji Nanabhoy Banaji.	39-43	D-2
Xerox copy Last Will & Testament dated 27-09-1983 of Nanabhoy Sohrabji Banaji.	44-46	D-3
Original Copy of the rent receipt issued in the name of Nanabhoy Sohrabji Banaji.	47-54	D-4
Certified copy of the Property card which reflects the name of late Sohrabji Nanabhoy Banaji.	55-61	D-5
Copy of Form 18 showing that the Trust was created by a Deed of Declaration on 9-08-1979	62-67	D-6
A copy of various bills reflecting the name of Sohrabji Nanabhoy Banaji.	68-71	D-7
Copy of the application dated 27-12-2012.	72-81	D-8
Original endorsement copy of Letter written to the Collectors office for transfer of the name.	82-83	D-9

17. I have heard Mr. Tamboly, learned Counsel on behalf of the Plaintiffs,

and Ms. Khobragade on behalf of the Defendant. The evidence and contentions of both sides are dealt with, Issue – wise, as follows.

18. **Issue No. 1**

Whether the Plaintiffs prove that they, as Trustees of Banaji Limji Agiary Trust, are the owners of, and are well and sufficiently entitled, to the immovable properties which are the subject matter of these Suits?

Issue No. 6 (City Civil Court Suit)

Whether the Plaintiff proves that as the proving sole executor of, and the universal legatee under the last Will and Testament of late Banoo Nariman Shroff, the Plaintiff is entitled to claim interest in respect of the properties which are the subject matters of these Suits?

18.1 The central issue in both these Suits is the title to the Suit Properties. According to the Plaintiffs, the title to the Suit Properties vests in the Trust and its Trustees, whereas according to the Defendant, the title thereto vests in her. I have already set out the rival pleadings in this regard above. The evidence led and arguments made by both sides in respect of the issue of title, are set out as follows.

18.2 I am first setting out the evidence and arguments advanced by and on behalf of the Plaintiffs.

18.3 The Plaintiffs have examined Plaintiff No. 1, Shri Adi Burjor Banaji (PW-1). In his first Affidavit in lieu of examination in chief dated 4th September 2014, PW-1

has stated that he is a Trustee of the Trust. He has stated that the Plaintiffs are the owners of the Suit Properties which have been described in the Schedule annexed as Exhibit A to the Plaint. He has stated that these properties are shown in the schedule 1 register maintained by the office of the Charity Commissioner as belonging to the Trust. He has set out the facts pertaining to the establishment of the Banaji Limjee Agiary Trust in the year 1709 and the facts which have been set out in the recitals contained in the Trust Deed with respect to the establishment of the Trust, the Consent Decree dated 18th January 1877 passed by the Bombay High Court in Suit No.525 of 1876 and the execution of the Declaration of Trust Deed dated 9th June 1879. He has thereafter adverted to and tendered the various Indentures of Conveyance dated 13th July 1905, 29th November 1916, 2nd December 1926, 15th April 1885, 30th April, 1885, 16th January 1886, 7th December 1887 registered with the office of the Sub Registrar of Assurance, conveying the title in respect of the various Suit Properties in favour of the Trustees of the Trust. He has adverted to and tendered the various Deeds of Appointments of Trustees relied upon by the Plaintiffs as set out above and has stated that these are all registered with the Sub Registrar of Assurances. He has stated that the Trust was initially registered under the Parsi Public Trust Registration Act, 1936 (Exhibit P-22) and that it has thereafter been registered under the provisions of the Maharashtra Public Trust Act, 1950. He has tendered the Municipal receipts issued for payment of Municipal Taxes. He has tendered the

invoices and receipts in respect of expenses incurred by the Trust over the years in maintaining the Suit Properties. He has tendered vouchers showing payments made by the Trust to various persons / employees in the course of managing the day to day activities in respect of the Suit Properties.

18.4 PW-1 was cross examined on 13th February 2015. In the course of his cross examination he has stated that the Trust has all the necessary documents including a conveyance and Deeds of Appointment of Trustees. He has stated that he has read the Trust Deed. He has stated that any member of the Banaji family can be a Trustee. He has stated that the family tree of the Banaji family is displayed in the Agiary itself in a frame mounted on a wall in the Agiary. He has stated that he became a trustee of the Trust on 3rd November 1987 and that his father was appointed as a Trustee in 1952. He has stated that there are no documents showing him to be a member or descendant of the Banaji family, but his father was the senior most trustee having served the Trust for 50 years. He has stated that the Agiary was founded by Banaji Limji in 1709 and that there is no separate Deed of settlement by Banaji Limji himself. He has denied the allegation that the suit properties never vested with the Trust. He has further denied that the Trust was only the caretaker of the Agiary or that it had no ownership right in respect of the other properties. He denied that the Plaintiffs do not have any document prior to the year 2000 to show that the Trust was managing the suit properties as the owner thereof. He denied that the property cards

and MCGM assessment register records still stand in the name of S. N. Banaji.

18.5 PW-1 filed a further Affidavit dated 4th February 2016 in lieu of examination in chief in which he stated that after the evidence in this suit was initially led and closed by both sides, the Defendant along with Shri Adi Mehta (PW-2) addressed a letter dated 31st July 2015 to the Trustees of the Trust as landlords of Banajee Mansion Building (Exhibit P-83), pointing out the need for urgent repairs in a portion of that building which had sunk in. He stated that he replied by his letter dated 28th October 2015 (Exhibit P-84) with respect to the repairs which were required to be carried out. He stated that thereafter, the Defendant as her contribution towards the repairs of Banajee Mansion issued two cheques bearing Nos.080284 and 080285 in favour of the Trust for sums of Rs.50,000/- each . He tendered copies of these cheques (Exhibits P-86 and P-85). He further stated that the repairs were in fact carried out to Banajee Mansion.

18.6 PW-1 was cross examined on 5th July 2016 in respect of the additional evidence led by him. Whilst questions were put to him by the learned Advocate for the Defendant in respect of his appointment as a Trustee of the Trust, his knowledge qua the handling of affairs of the Agiary and resolutions passed relating to the institution of the Suit, no questions were asked or suggestions were put to him regarding the contents of this Affidavit dated 4th February 2016.

18.7 The Plaintiffs examined Shri Adi Noshir Mehta (PW-2) who filed his

Affidavit in Lieu of Examination-in-Chief dated 4th February 2016. He stated that in the last week of July 2015, a portion of the flooring of the 3rd floor of Banajee Mansion caved in causing damage to the premises where he is a Licensee. This area was directly below the washing area of the room occupied by the Defendant on the 3rd floor of Banajee Mansion. He stated that the Defendant, her daughter Jeroo Colah, his son Noshir Mehta and he had an informal meeting to decide how to deal with the situation and they together decided to approach the Trustees of the Trust being the landlords of the building to carry out the necessary repairs. He stated that he thereupon had the letter dated 31st July 2015 typed in his office and he signed the same. He stated that he personally spoke to the Defendant on the telephone and informed her that he had prepared the letter as decided, read out and explained the letter to her and told her that he was sending it to her for her signature. He stated that thereafter his peon took the letter to the Defendant for her signature and after sometime brought it back to his office with the Defendant's signature affixed thereon. He stated that the Defendant was at all times a willing party to the decision to request the landlords of Banajee Mansion to carry out the repairs and was clearly aware of and understood the contents of the letter which she signed. He stated that he has seen paragraph 7 of the Affidavit dated 4th December 2015 of the Defendant in reply to Notice of Motion 1950 of 2015 (which was taken out by the Plaintiffs for leading additional evidence) in which the Defendant has taken a stand that PW-2 acted in collusion with the Trustees and

deliberately took her signature on the aforesaid letter and that she was unaware of its contents. He stated that this stand of the Defendant is false and incorrect. He stated that he met the Defendant in the month of December and reminded her to make payment of her share towards the repairs to be carried out in Banajee Mansion. He stated that at no point of time did the Defendant ever accuse him of taking advantage of her or forcing her to sign the letter dated 31st July 2015 or any other letter.

18.8 PW-2 was cross-examined on 4th July 2016. He stated that he is a tenant occupying a room on the south side of the first floor of Banaji Mansion, since 1982. He stated that there is no room number. He stated that there were no minutes recorded of the meeting held amongst the Defendant, himself and their children. He stated that it was an informal meeting and therefore the question of documenting the same in the form of minutes did not arise. He stated that there are three to four tenants residing in Banajee Mansion and that they were not part of this meeting since the portion of the building which had caved in affected only the Defendant and him. Therefore, the question of having a meeting with all the tenants or occupants did not arise. He further stated that he was not aware of any repairs being carried out by MHADA, and that he was only aware of a complaint made to the landlord. He stated that since he is a tenant for several years, he knows Plaintiff No. 1 well enough. He stated that he has vague knowledge about the dispute between the Defendant and the Trust but not in much detail. In response to a case put to him on behalf of the Defendant that the premises in

Banajee Mansion are reserved only for priests of the Agiary or their legal heirs, he stated that he has no knowledge of any such reservation and that he is residing in the said building for the last several years though he is not a priest. He further stated that there are others also residing in the said building though they are not priests. He stated that he is not aware that the Defendant is not acquainted with the English language. With respect to the contents of the letter dated 31st July 2015, he stated that he talked to the Defendant and since he converses with the Defendant in Gujarati, he explained the contents of the same to her in Gujarati. He stated that in fact they had decided together that such a letter would be written to the landlord. When a case was put to him that he had not explained the contents of the letter in Gujarati language either word to word or line by line to the Defendant, he stated that he explained to her in Gujarati that what they had discussed was put by him in the letter, i.e. to request the landlord to repair the washing room i.e. mori which had caved in. He stated that as far as he knew, only he and the Defendant had contributed to the repairs and that he is not aware about the others. He denied that he came before the Court only to help / support the Trustees.

18.9 In respect of the above Issues qua the title to the Suit Properties, Mr. Tamboly on behalf of the Plaintiffs submitted as follows :

(a) In so far as the Suit Property forming part of CS No. 449 is concerned, Mr. Tamboly contended that :

(i) The Trust is the owner of the land bearing City Survey No.449 situated at Banaji Street, Fort, Mumbai 400 001 alongwith the Banaji Limji Agiary and outhouses situated thereon. The description of this immovable property has been set out in detail in at page 31 of the Complaint.

(ii) The Agiary was established in the year 1709. The Agiary was restored in 1843 and it was then decided by the members of the Banaji family to form a Trust and to vest the immovable property in such trust. The first Trustees were appointed at a meeting amongst the members of the Banaji family on 13th February 1855. Thereafter, by a Consent Decree dated 18th January 1877 passed by this Court in Suit No.525 of 1876, the then Trustees were directed to execute a Trust Deed within three months. The Trust Deed dated 9th June 1879 (Exhibit P-5) was executed and duly registered with the Sub-Registrar of Assurances by the then Trustees. The Trust Deed/Declaration of Trust mentions that Banaji Limji Agiary as well as the land underneath which is now numbered as City Survey No.449 was held in trust for all members of the Zoroastrian community professing the Zoroastrian faith.

(iii) Mr. Tamboly laid emphasis on the contents of the Trust Deed to contend that the immovable property of the Agiary and the land standing thereunder were vested unto the Trust by the members of the Banaji Family.

(iv) He next relied upon the registered Deed of Conveyance dated 13th July 1905 (Exhibit P-6). According to the Plaintiffs, by this conveyance Manekji

Hormasji Kanga conveyed the land adjoining the Banaji Limji Agiary to Ferdunjee Banaji, Sorabjee Banaji, Dorabjee Davar, Cooverji Banaji and Sorabjee Banaji, the then Trustees of the Trust.

(v) He contended that the aforesaid registered deed of conveyance clearly demonstrates that the immovable property mentioned therein has been conveyed to the Trust.

(vi) Mr. Tamboly contended that the aforesaid two properties now form part of Cadastral Survey No. 449. The property card in respect of C.S. No.449 (Exhibit P-87) reflects that this property stands in the names of the Trustees of the Trust as the beneficial owners thereof.

(vii) He further contended that over the years there have been various Deeds of Appointment of the Trustees of the Trust. All of these have been registered with the Sub Registrar of Assurances. These Deeds of Appointment are dated 16th June 1905 (Exhibit P-13), 9th October 1916 (Exhibit P-14), 18th August 1924 (Exhibit P-15), 22nd July 1939 (Exhibit P-16), 29th June 1942 (Exhibit P-17), 9th July 1951 (Exhibit P-18), 30th October 1972 (Exhibit P-20), 23rd June 1976 (Exhibit P-19) and 8th June 2004 (Exhibit P-21). The aforesaid Suit Properties forming part of C.S. No. 449 are reflected as the property of the Trust in each of these registered Deeds of Appointment, and the same have vested in each new incoming Trustee by virtue of the respective registered deeds of appointment of trustees.

(viii) Mr. Tamboly next contended that the Trust has been registered under the provisions of the Maharashtra Public Trust Act, 1950 as the Banaji Limji Fire Temple. The property at C.S. No.449 is reflected in the Schedule 1 register of trusts (Exhibit P-4) maintained by the office of the Charity Commissioner under the provisions of sections 18 to 21 of the Maharashtra Public Trusts Act, 1950.

(ix) Mr. Tamboly relied upon two judgments viz. **Shrinivasdas Bavri v/s Meherbai & Ors.**¹ and **Shamsudin Tajbhai v/s Dahyabhai Maganlal**² to contend that the recitals contained in old deeds are binding on the parties thereto and to persons claiming under them. Relying upon the same, he contended that the recitals in the Trust Deed which is a registered document must be accepted, especially in view of the fact that the Defendant has not produced any evidence to show to the contrary.

(b) In so far as the Suit Property forming part of CS No. 450 is concerned, Mr. Tamboly contended as follows :

(i) The property situated at City Survey No.450 has been described more particularly at page 32 of the Plaint.

(ii) The property card in respect of this property (Exhibit P-87) shows that the same stands in the names of the Trustees of the Trust.

(iii) By and under a registered Deed of Conveyance dated 29th November 1916 (Exhibit P-7), one Bai Hirabai conveyed the property now standing on

1 AIR 1916 PC 5

2 1923 BLR 105

C.S. No.450 to Cooverji Banaji, Dorabjee Davar, Sorabjee Banaji, Navroji Framjee and Framjee Banaji as Trustees of the Trust.

(iv) Mr. Tamboly contended that this immovable property at C.S. No.450 is reflected in the Deeds of Appointment of Trustees of the Trust dated 18th August 1924 (Exhibit P-15), 22nd July 1939 (Exhibit P-16), 29th June 1942 (Exhibit P-17), 9th July 1951 (Exhibit P-18), 30th October 1972 (Exhibit P-20), 23rd June 1976 (Exhibit P-19) and 8th June 2004 (Exhibit P-21) as being owned by the Trust.

(v) He contended that the property at C.S. No.450 has also been described as the property belonging to the Trust in Schedule 1 register maintained by the office of the Charity Commissioner (Exhibit P-4).

(vi) He contended on this basis that it is thus established that the property at C.S. No.450 has been conveyed to the Trustees of the Trust in the year 1916 and that the Plaintiffs are today the owners thereof.

(c) In so far as the Suit Property forming part of CS No. 403 is concerned, the Mr. Tamboly contended as follows :

(i) The property at C.S. No.403 has been more particularly described at page 33 of the Plaint. The property card (Exhibit P-1) shows that this property stands in the names of the Trustees of the Trust.

(ii) By and under a registered Deed of Conveyance dated 2nd December 1926, one Cassum Motee and other conveyed the property at C.S. No.403

to the then Trustees of the Trust (Exhibit P-9).

(iii) Mr. Tamboly contended that the property at C.S. No.403 is reflected in the Deeds of Appointment of Trustees of the Trust dated 22nd July 1939 (Exhibit P-16), 29th June 1942 (Exhibit P-17), 9th July 1951 (Exhibit P-18), 30th October 1972 (Exhibit P-20), 23rd June 1976 (Exhibit P-19) and 8th June 2004 (Exhibit P-21) as being owned by the Trust.

(iv) He contended that the property at C.S. No.403 has also been described as the property of the Trust in the Schedule 1 register maintained by the office of the Charity Commissioner (Exhibit P-4).

(v) Based on the above, Mr. Tamboly contended that the property at C.S. No.403 has been conveyed to the Trustees of the Trust in the year 1926 and that the Plaintiffs are today the owners thereof as Trustees of the Trust.

(d) In so far as the Suit Property forming part of CS No. 405 is concerned, Mr. Tamboly contended as follows :

(i) This property has been more particularly described at page 33 of the Plaint. The property card for C.S. No.405 (Exhibit P-1) shows that the Trustees of the Trust as the owners of that property.

(ii) The property at C.S. No.405 is reflected in the Deeds of Appointment of Trustees of the Trust dated 18th August 1924 (Exhibit P-15), 22nd July 1939 (Exhibit P-16), 29th June 1942 (Exhibit P-17), 9th July 1951 (Exhibit P-18), 30th

October 1972 (Exhibit P-20), 23rd June 1976 (Exhibit P-19) and 8th June 2004 (Exhibit P-21) as being owned by the Trust.

(iii) By and under a registered Deed of Conveyance dated 30th April 1885 (Exhibit P-11) Dorabjee Masani, Avabai Masani, Edulji Masani, Cawasji Masani and Nasserwanji Masani conveyed a portion of what is now C.S. No.405 to the then Trustees of the Trust.

(iv) Mr. Tamboly contended that by and under a registered Deed of Conveyance dated 15th April 1885 (Exhibit P-10) one Dorabjee Masani conveyed another portion of what is now C.S. No.405 to the then Trustees of the Trust.

(v) Mr. Tamboly contended that by and under a registered Deed of Conveyance dated 16th January 1886 (Exhibit P-81) a further portion of what is now C.S. No.405 was conveyed to the then Trustees of the Trust by Mancherji Cama.

(vi) He contended that the total area of land purchased by the then Trustees through the aforementioned three Deeds of Conveyance dated 15th April 1885, 30th April 1885 and 16th January 1886 was 194 sq.yards. By and under a registered Deed of Conveyance dated 7th December 1887, a portion of land admeasuring 74.58 sq.yards was sold to the Municipal Corporation for the City of Bombay, out of the total area of 194 sq. yards. The remaining land admeasuring 119.42 sq. yards still belongs to the Trustees of the Trust. The property now numbered as C.S. No.405 has been described as being owned by the Trust in all the Deeds of Appointment registered with

the Sub Registrar of Assurances. This property has also been shown to be the property of the Trust in the Schedule 1 register of the Trust maintained by the office of the Charity Commissioner (Exhibit P-4).

(vii) Based on the above, Mr. Tamboly contended that the Trust is the owner of the property at C.S. No.405.

(e) Mr. Tamboly relied upon sections 18 to 21 of the Maharashtra Public Trust Act, 1950, to contend that when applying for registration of a Trust, the immovable properties of the Trust must be disclosed in the prescribed format and the Deputy or Assistant Charity Commissioner is required to make an inquiry as to whether the property described is the property of the Trust and must record his findings thereon. Necessary entries in that regard are required to be made in the Public Trust Register. In the present case the public trust has been registered and its registration Schedule 1 has been opened under the aforesaid Maharashtra Public Trust Act, 1950. The suit properties have been mentioned therein as the properties of the Trust. He therefore contended that this further establishes that the title of the Suit Properties vests solely in the Trust.

(f) Mr. Tamboly next contended that the Trust has been maintaining the Suit Properties and paying municipal taxes and repair cess in respect thereof as has been evidenced by the receipts in respect of the same (Exhibits P 26 to P 33). Similarly, payment vouchers to the staff of the Agiary and its outhouses are evidence

of expenses incurred by the Trust in maintaining the properties (Exhibits P 51 to P 90).

(g) Mr. Tamboly referred to the oral evidence led by PW-1, which has been set out above. He contended that PW1 was not cross examined at all on his testimony and documents tendered, as evidence of the Trust's ownership of the Suit Properties. According to him, the Defendant did not cross examine PW-1 on the contents of the Declaration of Trust, the various registered Deeds of Conveyances, the various registered Deeds of Appointment of Trustees reflecting the names of the Trustees as the owners of the Suit Properties, the Property Cards showing the names of the Trustees of the Trust as the beneficial owners of the Suit Properties. PW-1 was not cross examined on his case that the municipal taxes are paid by the Trust and the receipts are issued in the name of the Trust, or in respect of his testimony of payment of salaries to the staff of the Trust for maintaining the Suit Properties. Mr. Tamboly thus contended that the testimony of PW-1, and the documents tendered by him in evidence on the core issue of title to the Suit Properties has gone uncontroverted and unchallenged in cross examination.

(h) Mr. Tamboly next relied upon the evidence led by PW-1 and PW-2 with respect to the events which transpired after the final hearing of the Suits first commenced, and more particularly on Exhibits P-83 to P-86. Relying upon the same, Mr. Tamboly contended that even during the pendency of this Suit, the Defendant by

her conduct has accepted the Plaintiffs to be the owners of Banaji Mansion by calling them the landlords thereof, though it is her express case that she is the owner of the Suit Properties which include Banaji Mansion. Moreover, the Defendant has not further examined herself to rebut what has been stated by PW-1 and PW-2 in this regard.

(i) Based on the aforesaid evidence and submissions, Mr. Tamboly submitted that Issue No. 1 be answered in favour of the Trust and its Trustees.

19. I shall now set out the oral evidence and arguments advanced by and on behalf of the Defendant.

19.1 The Defendant has examined herself by filing her Affidavit in lieu of examination in chief dated 30th March, 2015. In her Affidavit she has stated that Banoo Nariman Shroff executed a Will in her favour and that she had applied for and obtained Probate dated 16th March 1999 in respect of the last Will and Testament of Banoo Nariman Shroff. She tendered the Probate granted by this Court (Exhibit D-1). She stated that in the year 2011 she made a search in the office of the Collector of Bombay and found that the Collector of Bombay has issued property card in respect of the property which do not show the Plaintiffs as the owners thereof. She stated that she is challenging the very title of the Trust as owner of the suit property. She stated that she is occupying one room on the 2nd Floor of the building Banaji Mansion being

the Executrix and universal legatee under the will of Banoo Nariman Shroff. She stated that the said room was the subject matter of Suit No. 7732 of 1988 filed by the Trust before the Bombay City Civil Court for a declaration that she is a rank trespasser in respect thereof. She stated that the Suit came to be dismissed as the Trust had failed to prove its title. She stated that prepositor of original Banaji was Sorabji Nanabhoy Banaji. She stated that Sorabji Nanabhoy Banaji died on 12th September 1949 leaving behind his two children Nanabhoy Sorabji Banaji and Banoo Nariman Shroff. She tendered the Will of Sorabji Nanabhoy Banaji (Exhibit D-2). She stated that there is no reference to the said property in the Will but his name appears in the property card in respect of the said property. She stated that Nanabhoy Sorabji Banaji during his life time was the Managing Trustee and was occupying a room in Banaji Mansion. She stated that Nanabhoy Sorabji Banaji died on 27th October 1983 leaving behind his Will dated 27th September 1983. A copy of the Will has been tendered by her (Exhibit D-3). She stated that even in the Will of Nanabhoy Sorabji Banaji no reference is made to the said property but reference is made that Nanabhoy Sorabji Banaji used to pay rent to the Trust. She stated that Nanabhoy Sorabji Banaji bequeathed his estate to his sister Banoo Nariman Shroff who died at Mumbai on 4th September 1988 leaving behind her last Will and Testament and that the probate in respect thereof obtained by the Defendant has not yet been challenged by anyone. She stated that rent receipts were issued to Banoo Nariman Shroff by the Trust and in the name of Nanabhoy Sorabji

Banaji and were tendered by her (Exhibit D-4). She stated that the Will of Banoo Nariman Shroff does not state that the Trust is the owner of the suit properties. She stated that as Banoo Nariman Shroff's successor, after her death, the Defendant used to pay rent to the Trust but the Trust refused to accept rent and instead filed a trespass suit against her in the Bombay City Civil Court. She stated that none of the members of the Banaji family ever conveyed by a Deed of Conveyance the suit properties to the Trust. She stated that her search in the office of the Collector of Bombay reveals that the property card stands in the name of Nanabhoy Sorabji Banaji. She stated that though the Trust has sought to rely upon the Deeds of appointment of new trustees to prove title, they have not pointed out that the Trust itself was the transferee of the suit properties from the original owners/members of the Banaji family. She stated that she has obtained a copy of form No.18 filed by the Trust with the Charity Commissioner, Maharashtra State, and she has tendered the same (Exhibit D-6). She stated that the trustees of the Trust are claiming ownership of the Suit Properties without obtaining conveyances in respect thereof. According to her the documents relied upon by the Trust do not confer title upon the Trust or its Trustees. According to her the Trust could claim to be owner only if it were the original transferee of the suit properties. She stated that she is the ultimate beneficiary of the properties devolved upon her through Sorabji Nanabhoy Banaji, Nanabhoy Sorabji Banaji and Banoo Nariman Shroff. She states that it is for the Plaintiffs to establish their title and that the

Plaintiffs have failed to do so. She stated that though the Deed Poll (Declaration of Trust) is dated 9th June 1879 the Plaintiffs have not explained as to why it is registered only under the Maharashtra Public Trust Act 1950 and not under previous statutes such as the Religious Endowments Act, 1976 and Maharashtra Public Trust Act, 1935. This according to her, casts doubts on the registration itself. She has further stated that the Declaration of Trust sets out the mode of appointment of trustees to be followed. She further states that the lineage of the Banaji family has not been established by the Plaintiffs.

19.2 The Defendant was cross examined on 31st July 2015. She has stated that she has prepared her Affidavit in lieu of examination in chief dated 30th March 2015. She stated that she does not remember the contents of her Affidavit. When asked if she can read or write in English she answered in the negative and stated that she can only sign in English. When asked as to the basis on which the seven properties (which include the Suit Properties) were included by her in the Probate petition qua the will of deceased Banoo Nariman Shroff, she stated that she was asked to do so by her Advocate and Solicitor Mr. Bharat Merchant. She volunteered in response to this question that the seven properties are in the name of Shri S. N. Banajee. She stated that she was not in possession of the original Will of Banoo Nariman Shroff and that the notarised copy of the Will was on the basis of a photocopy. She stated that she got the same notatized but does not remember when or before whom it was notarized.

When the statement of Nanabhoy Sorabji Banaji in his Will to the effect that the landlords of the Banaji Mansion are the Trustees of the Trust, was put to her, she stated that she does not remember if anyone has explained this to her at any point of time. When she was asked if it was correct that Nanabhoy Sorabji Banaji had himself stated in his Will that the property of Banaji Mansion belongs to the Trustees of the Trust and that they are the landlords thereof, she stated that what is stated therein is incorrect. She stated that the contents of Banoo Nariman Shroff's Will were explained to her in Gujarati in the past. She stated that Banoo Nariman Shroff's statement in her own Will that the property of Banaji Mansion belongs to the Trust is incorrect. She stated that seven properties were included in the Probate Petition since certain papers were produced before the Solicitors which showed that all the properties were in the name of Sorabji Nanabhoy Banaji. Her statement in her Affidavit to the effect that she had made search in the office of the Collector was put to her and she was questioned as to what occasioned her visit to the office of the Collector on 14th June 2011 and take inspection of the Property Card in respect of the suit property. To this she answered that she had not gone to the Collector's office and in any event, did not remember that she had gone to the Collector's office and taken search of documents. The Court put a question to her that if she did not remember anything then on what basis has she made a statement in paragraph 6 of her Affidavit to that effect. To this she answered, that she had never been to the office of the

Collector of Mumbai. The papers were received from the Collector's office by her Advocate Mr. Bharat Merchant and after receipt of these documents, she realized that the properties are in the name of S.N. Banajee. Mr. Merchant advised her to pay the taxes and bring the receipts to him. She stated that she has in her possession receipts showing that she has paid taxes in respect of the seven properties but that she did not produce the same before the Court as she was not advised to do so. When the Property Card of the suit properties was put to her and she was shown that the names of Sorabjee N. Banajee and Ors. are shown to be in beneficial ownership as Trustees of the Trust, she stated that the record is incorrect and that they cannot be shown as Trustees since according to her there is no Trust. She stated that she did not remember if all of the properties were purchased by Sorabjee N. Banajee. She stated that she has not come across any such documents whereunder properties have been conveyed in favour of the Trustees of the Trust. She stated that her letter to the Collector (Exhibit D-9) was prepared by Mr. Vinod Dalal. She stated that her husband was not paying rent for occupation of the tenement on the 3rd floor of Banajee Mansion but that they were paying compensation for being used towards the upkeep of the fire at the fire temple. She stated that her husband's name was Maneksha Adarji Jijina. She confirmed that the rent receipts at Exhibits P24 and P25 issued by the Trustees of the Trust in the name of her husband were in fact so issued to her husband. She denied that the name of Sorabjee Nanabhoy Banajee appearing on the documents tendered by

her was in his capacity as a Trustee of the Trust and not in his individual capacity. She denied that she has no right, title or interest in the Suit Properties.

20. Ms. Khobragade made the following submissions on behalf of the Defendant in respect of the issue of title to the Suit Properties :

20.1 Ms. Khobragade contended that the Plaintiffs have not proved their title to the Suit Properties. The Defendant has contended that the Trust Deed is a mere declaration of Trust, and that the same cannot legally vest title to immovable property upon the Trust. A perusal of the Trust Deed makes it clear that this is no transfer clause or vesting clause and thus, this is not a document on the basis of which the Plaintiffs can claim that the Suit Properties vest in the Trust. She relied upon the answers given by PW-1 to questions, where PW-1 has confirmed that the Agiary was founded by Banaji Limji in the year 1709 and contended that that Banaji Limji has not founded the Trust. She contended that the Trust cannot claim to be entitled to the Agiary or the land standing underneath the same or to any other part of the property bearing C. S. No. 449.

20.2 She next contended that the Trust does not exist at all. She again relied upon the answers given by PW-1 to questions, where PW-1 has confirmed that the Agiary was founded by Banaji Limji in the year 1709 and submitted that Banaji Limji has not founded the Trust. She submitted that it is for the Plaintiffs to prove that the Trust was established or that the same was vested with immovable properties, which

according to her, the Trust has not done.

20.3 Ms. Khobragade argued that the Plaintiffs have failed to prove that the “Banaji Limji Agiary” and the “Banaji Limji Fire Temple” are one and the same, though these expressions have been used to describe the Trust in different documents.

20.4 Ms. Khobragade next contended that the Trust Deed sets out that the Trustees are to be the members of the family of Banaji Limji. That apart there is a specific mode of appointment of Trustees in the Trust Deed. The Plaintiffs have failed to prove their lineage from the Banaji family. The Plaintiffs have failed to prove that they are validly appointed Trustees of the Trust. Therefore, the Plaintiffs cannot claim ownership of the Suit Properties for and on behalf of the Trust.

20.6 Ms. Khobragade contended that since according to the Defendants there is no Trust nor have the Plaintiffs proved that they are validly appointed Trustees, there cannot be any conveyance of properties in favour of a non existent Trust. Thus, the Deeds of Conveyance in respect of the Suit Properties in favour of the Trust cannot come to the Plaintiffs rescue, as there exists no Trust to begin with.

20.7 She next contended that the deeds of appointment of Trustees cannot operate as conveyances or be considered as title documents.

20.8 Ms. Khobragade next contended that her client is the ultimate beneficiary of the Suit Properties by virtue of being the sole beneficiary under the Will of Banoo Nariman Shroff. The Suit Properties were owned by S. N. Banaji, the father

of Banoo Nariman Shroff. His name is reflected in the Property Card and Municipal records in respect of the Suit Properties. The Suit Properties have never been conveyed by Sorabji Nanabhoy Banaji or his successors in title to the Trust. The Defendant is the ultimate beneficiary of all the properties of Sorabji Nanabhoy Banaji as his estate vested in his son Nanabhoy Sorabji Banaji and subsequently Nanabhoy Sorabji Banaji's estate vested in his sister Banoo Nariman Shroff. Since the Defendant is the beneficiary to the estate of Banoo Nariman Shroff, she is the owner of all of the Suit Properties.

20.9 Ms. Khobragade on behalf of the Defendant contended that once she has obtained Probate of the will of Banoo Shroff, and once the schedule of assets thereto has been amended to include the Suit Properties, the Defendant is entitled to claim the Suit Properties as her own.

21. In rejoinder, Mr. Tamboly made the following submissions to deal with the aforesaid contentions of the learned Advocate of the Defendant :

21.1 Mr. Tamboly pointed out that there are serious contradictions between the case pleaded by the Defendant in her Written Statement, examination in chief and her cross examination. Moreover, the cross examination shows that the Defendant has come with a bogus case, and when confronted with the same, the Defendant has disowned documents which have been tendered and relied upon by she herself in this case.

21.2 In response to the Defendant's contentions that the Trust doesn't exist, Mr. Tamboly submitted that the same is wholly erroneous. Under section 18 of the Maharashtra Public Trusts Act, 1950, the Trustees of a public trust are required to make an application in the prescribed form and with the required particulars to the concerned Deputy / Assistant Charity Commissioner for registration of the public trust. Under section 19 of the Act, once such an application under section 18 has been received, the concerned Deputy / Assistant Charity Commissioner shall make an inquiry in the prescribed manner *inter alia* for determining whether the trust exists and whether such trust is a public trust. Under section 20 of the Act, upon completion of the inquiry under section 19, the Deputy / Assistant Charity Commissioner shall record his findings and the reasons therefore. Under section 21 of the Act, the Deputy / Assistant Charity Commissioner shall make entries in the public trust register maintained under section 17, as per the findings recorded under section 20. These entries are final and conclusive, subject to further change and subject to the provisions of the Act. The Banaji Limji Agiary Trust has been registered with the office of the Charity Commissioner under **PTR No.C-418(BOM)** under the provisions of sections 18 to 21 of the Maharashtra Public Trust Act, 1950. The same is evident from the certified copy of the Schedule 1 Register maintained by the office of the Charity Commissioner in respect of the Banaji Limji Agiary Trust (Exhibit P-4).

21.3 Mr. Tamboly thus submitted that the fact that the Trust exists is final

and conclusive as per the provisions of the Act, and the same cannot be disputed before this Court in these proceedings. In this regard he relied upon Section 80 of the Maharashtra Public Trusts Act, 1950 Act, which reads thus :

“80. Save as expressly provided in this Act, no Civil Court shall have jurisdiction to decide or deal with any question which is by or under this Act to be decided or dealt with by any officer or authority under this Act, in respect of which the decision or order of such officer or authority has been made final and conclusive.”

21.4 Based on this provision he argued that this Court does not have jurisdiction to determine the question of existence of the Trust which has been raised by the Defendant, as the same has already been determined by the Authorities under the aforesaid Act, and such determination is final and binding.

21.5 Mr. Tamboly next contended that the Trust is inter changeably also known as Banaji Limji Agiary and Banaji Limji Fire Temple (Agiary), and this is evident from the Change Report, which has been taken on record as Exhibit P-2 in this Suit, which shows the name of the Trust as Banaji Limji Fire Temple (Agiary), showing the same public trust registration number viz. **PTR No.C-418(BOM)**. Moreover, the Trust Deed dated 9th June 1879 (Exhibit P-5) itself sets out that the then Trustees were Trustees of Banaji Limji Agiary Trust or Banaji Limji Fire Temple. All of the Deeds of Appointment of new trustees which are at Exhibits P-13 to P-21 record the name of the Trust as Banaji Limji Agiary or Banaji Limji Fire

Temple. This conclusively establishes that the Plaintiffs are the trustees of the Trust known interchangeably as Banaji Limji Agiary or Banaji Limji Fire Temple. “Agiary” is the colloquial term for Fire Temple and both words mean one and the same thing. According to him the Defendant is making a desperate attempt to demonstrate that the Banaji Limji Agiary Trust and the Banaji Limji Fire Temple are not one and the same but Nothing could be further from the truth.

21.6 Mr. Tamboly argued that the submission that the Trust does not exist as there is no Trust Deed is factually incorrect. The Trust Deed is very much in existence and a certified copy thereof is on record as Exhibit P-5. The same clearly evidences the existence of the Trust. The Defendant’s argument that the Trust did not exist as there was no Settlor of the Trust is also factually incorrect according to him. The recitals of the Trust Deed dated 9th June 1879 (Exhibit P-5) clearly demonstrate that the members of the Banaji family were the settlors of the Trust and that the Agiary premises and certain monies were settled unto Trust for the benefit of the members of the Zoroastrian community professing the Zoroastrian faith. The Defendant has also argued that the Trust does not exist as there only exists a Deed Poll and not a Trust Deed. It is submitted by Mr. Tamboly that it is not necessary in law, for the creation of a trust to have a Trust Deed comprising of a Settlor and Trustees. A Declaration by persons holding the property in trust is sufficient and meets all the requirements of a trust set out in the Indian Trust Act 1882. The Deed of

8th June 1879, which was executed pursuant to directions passed by this Court, is also registered with the Sub Registrar of Assurances and subsequently registered with the office of the Charity Commissioner under the provisions of the Maharashtra Public Trusts Act, 1950.

21.7 Dealing with the Defendant's contentions qua the validity of the Plaintiff's appointment as Trustees of the Trust, Mr. Tamboly submitted that The Assistant/Deputy Charity Commissioner has jurisdiction to determine questions pertaining to existence and registration of the Trust under Sections 19 to 21 of the Maharashtra Public Trust Act, 1950. Under Section 22 of the Act, the power to decide change reports and to record whether or not a trustee has or has not been validly appointed also vests with the Assistant/Deputy Charity Commissioner. The relevant change reports recording the relevant registered Deeds of Appointment of Trustees and change reports recording the appointment of the Plaintiffs as Trustees of the Banaji Limji Agiary Trust are already on record at Exhibit P-2 and P-3 in this Suit. Therefore, the Defendant cannot contend that the Plaintiffs are not validly appointed Trustees according to the Plaintiffs.

21.8 Mr. Tamboly contended that under Section 80 of the Maharashtra Public Trust Act, 1950, no Civil Court has jurisdiction to decide or deal with any question which is to be decided or dealt with by the officer appointed under that Act. Therefore, once a change report pertaining to the appointment of a Trustee has been

accepted by the Assistant / Deputy Charity Commissioner, and the necessary entry to that effect has been effected in the public trust register, no Civil Court can go behind the validity of the same. Therefore, it is submitted by him that this Court cannot go behind the same nor can the Defendant agitate the validity of the same before this Court as the same is not the appropriate forum to decide such questions. In support of this submission, he relied upon a Full Bench decision of this Court in **Keki Pestonji v. Khodadad Merwan Irani**³, and upon a Division Bench judgment of this Court in the case of **Charu K. Mehta v/s Lilavati Kirtilal Mehta Medical Trust & Ors.**⁴ Relying upon these judgments, Mr. Tamboly contended that it is clear that once the concerned Deputy / Assistant Charity Commissioner renders a finding and records a change under section 22 of the Maharashtra Public Trusts Act, 1950, the same is final and conclusive, subject only to being overturned in Appeal. Therefore, the Defendant cannot call upon this Court to go behind the Change Reports accepted by the competent authorities under that Act.

21.9 Mr. Tamboly contended that the Defendant's claim to title to the properties of the Trust is unbelievable to say the least. The Defendant claims to be the sole executrix and legatee under the Will dated 1st December 1983 of one Banoo Nariman Shroff. The Defendant obtained probate of her Will on 16th March 1999 from the Bombay High Court. At the time of filing the Testamentary Petition for

3 AIR 1973 of Bombay 130

4 2012 SCC Online Bom 1679 : (2013) 1 Bom CR 23

Probate, none of the properties of the Trust were mentioned in the Schedule of properties as belonging to Banoo Shroff. However, by an application dated 22nd December 2011, almost 10 years after the death of Banoo Shroff, the Defendant applied to the Prothonotary and Senior Master of the Bombay High Court for amending the list of immoveable properties annexed to the probate of the Will of Banoo N. Shroff. This amended list of immoveable properties included the properties in question in the present Suit as well as two other erstwhile properties of the Trust which had been acquired by the BEST in 1972. On the strength of this amended probate, the Defendant applied to the Collector for transferring the properties of the Trust in her name.

21.10 Mr. Tamboly argued that the reliance of the Defendant on the municipal records and property cards to state that the Suit Properties belong to S. N. Banaji is misplaced, as that the name of S.N.Banaji appears on all official documents in his capacity as a Trustee of the Trust and not in his individual capacity.

21.11 Mr. Tamboly argued that S. N. Banaji, Nanabhoy Banaji and Banoo Nariman Shroff themselves always treated the Trust as the owners of the properties in question. For example, S. N. Banaji is a signatory to the Deed of Appointment of Trustees dated 29th June 1942 (Exhibit P 17) which shows all the properties in question as the properties belonging to the Trust.

21.12 Mr. Tamboly pointed out that Nanabhoy Banaji in his own Will has stated the Trust to be the owner and landlord of Banaji Mansion, situated on land bearing C.S. No.405. Banoo has similarly described the Trust as the owner of Banaji Mansion situated on C.S. No.405. Moreover all of these three persons have listed in their respective Wills what they believed to be their immoveable properties which they were bequeathing by way of their respective wills. Not even one of them has listed a single property belonging to the Trust as their solely owned property which they were bequeathing under their own wills.

21.13 Mr. Tamboly submitted that it is a well settled position in law that Probate of a Will does not confer title and that the Probate Court is not concerned with questions of title of any property forming part of the estate of a deceased. Thus, the Defendant cannot rely upon the probate of Banoo Shroff's will as a source of her title. The Defendant has to independently prove that Banoo Nariman Shroff as well as her predecessors in title were owners of the suit properties. The Defendant has miserably failed to do so, since Banoo Shroff, Sorabjee Banaji and Nanabhoy Banaji were never owners thereof, nor did they ever claim to be so.

21.14 Mr. Tamboly submitted that all of the above clearly goes to show that the Defendant has done nothing but attempted to take undue advantage of the appearance of the name of Sorabjee Nanabhoy Banaji in the property card and the other records, misconstrue the same to contend that these properties were his

individually owned properties and therefore by this convoluted logic have been inherited by her.

21.15 Mr. Tamboly submitted that the Defendant's conduct runs contrary to her pleaded case of title to the Suit Properties. He pointed out that the Defendant has herself accepted the Trust as the landlord of Banaji Mansion standing on C. S. No. 405 on different occasions in the following manner :

(a) The Defendant has paid rent in respect of her husband's premises situated on the 3rd floor of Banaji Mansion. The rent receipts are at Exhibits P-23 to P-25.

(b) The Defendant has also admitted that she is a tenant in her Affidavit in Reply dated 14th August 2009 filed in Suit No.7732 of 1988 in the City Civil Court at Bombay.

(c) The Defendant has after evidence in the suit had been led, addressed a letter dated 31st July 2015 to the Plaintiffs referring to them as landlords of Banaji Mansion (Exhibit P-83). Thereafter in furtherance of the directions of the Plaintiffs in their letter dated 28th October 2015 (Exhibit P-84), the Defendant has issued 2 cheques of Rs. 50,000/- (Exhibits P-85 and 86) each as her contribution to the repair work in respect of the portion of Banaji Mansion between the 2nd and 3rd floor which had collapsed.

(d) The Defendant has not led any evidence to rebut this evidence or explain her admissions and actions set out above.

25.15 Thus, according to Mr. Tamboly the Defendant's own conduct demonstrates that she has treated the Plaintiffs to be the landlords and owners of at least Banaji Mansion, which is one of the suit properties, though she contends to the contrary in these two Suits. The Defendant is by her own conduct estopped from contending that the Plaintiffs are not the owners of the suit properties.

26. I have considered the pleadings filed, evidence taken on record and arguments advanced by both sides. My findings with respect to Issue No. 1 qua the title of the Trust to the Suit Properties is as follows.

26.1 As noted above, the central issue in these Suits is the issue of title to the Suit Properties. The Plaintiffs state that the title to the same vests in the Trust, whereas the Defendant claims that the same vests in her. I shall first deal with the Plaintiffs case in this regard.

26.2 I shall begin with the first property set out in the schedule of Suit Properties annexed as Exhibit A to the Plaint in the High Court Suit i.e. the land bearing C. S. No. 449 situated at Banaji Street, Fort, Mumbai 400 001 and the Agiary and outhouses situated thereon. The Plaintiffs have tendered the Trust Deed 9th June 1879 (Exhibit P-5) executed by and between Sorabjee Pestonjee Banaji, Limji Maneckjee Banajee, Pestonjee Burjorjee Davur, Nanabhoy Dhunjeebhoy Banajee and

Furdonjee Merwanjee Banajee. The Trust Deed was registered with the Sub Registrar of Assurances at Bombay on 9th June 1879 under Registration No.228-A at pages 62 to 71, Volume 46 of Book No.1. The following recitals of the Trust Deed shed light on the establishment of the Agiary property, the transfer of the same to the Trust by the members of the Banaji family, and the facts leading up to the execution of the Trust Deed :

“We, SORABJEE PESTONJEE FRAMJEE, LIMJEE MANOCKJEE, PESTONJEE BURJORJEE DAVUR, NANABHOY DHUNJEEBHOY BANAJEE, AND FURDOONJEE MERWANJEE BANAJEE, all members of the Banajee family, and of Bombay, Parsee Inhabitants Trustees of the Banajee Limjee Agiary or Fire Temple, send greeting :

WHEREAS the Banajee Limjee Agiary or Fire Temple, situate in Nanabhoy's Lane in the Fort of Bombay, was established in or about the Christian year 1709, corresponding with the Yezdazerd year 1078, by Banajee Limjee, late of Bombay, Parsee inhabitant, and was consecrated on the Zoroastrian ninth day Adur and ninth month Adur Shenshai in the year of Yezdazerd 1078, corresponding with the Christian date 25th June 1709, and the ceremonies were performed according to the Shenshai rites, and a chawl was built by the said Banajee Limjee adjacent to the said Agiary, out of the rents and profits whereof funds were provided for the discharge of the current expenses of the said Agiary. And whereas in or about the Christian year 1843, corresponding with the Yezdazerd year 1213, the said Agiary and chawl having become dilapidated were pulled down, and in the same year the sum of Rs.23,000 was raised by subscription by the late Framjee Cawasjee, Cursetjee Cowasjee, Rustomjee Cawasjee deceased, the then senior members of the said Banajee family, and by other members of the same family as set forth in the Schedule hereunder written and marked A, and paid to the said Framjee Cowasjee for the restoration and

endowment of the said Agiary, and after rebuilding and restoring the said Agiary and defraying the expenses thereof, a balance of Rs.11,034-0-85 remained in the hands of the said Framjee Cowasjee at the date of his death on the 11th day of February 1851. AND WHEREAS after the restoration of the said Agiary the consecration thereof, and the replacement of the Sacred Fire therein, was effected in the presence of the Parsee community on the 15th day of April 1845, corresponding with the 20th day Byram of 7th month Adur of the year 1241 Yezdazerd. And whereas the said Framjee Cowasjee duly made and published his last will and testament writing dated the 5th day of July 1828, and a codicil thereto dated the 15th day of December, 1831, and thereby appointed his widow Bachoobae and his two sons Pestonjee Framjee and Nanabhoy Framjee Executrix and Executors thereof, and the said will and codicil were subsequently proved by the said Bachoobae and the said Pestonjee Framjee and Nanabhoy Franjee in the then Supreme Court of judicature at Bombay. And whereas the said Bachoobae, by a circular letter in Goojrathee dated the 23rd day of August, 1854, addressed to the surviving subscribers and to the representatives of deceased subscribers to the said Fund, suggested to them the propriety of making a Trust Deed, and nominating three or more Trustees from among them, to whom the balance in her hands of the said Fund might be paid. And Whereas it was agreed by a majority of the surviving subscribers, and the representatives of deceased subscribers to the said Fund, by memoranda on the said circular letter, that Dadabhoy Rustomjee Banajee, Sorabjee Pestonjee Framjee, Limjee Manockjee, Dhunjeebhoy Framjee, and Hormusjee Ruttonjee Banajee should be appointed Trustees. And Whereas in consequence of certain objections made by two dissentient subscribers to the appointment of the Trustees, a meeting of all the subscribers and representatives of deceased subscribers was duly convened on the 13th day of February 1855, and resulted in the confirmation of the appointment of the Trustees. And Whereas the said Dadabhoy Rustonjee Banajee, Sorabjee Pestonjee Framjee, Limjee Manockjee, Dhunjeebhoy

Framjee, and Hormusjee Ruttonjee Banajee took charge of the said Agiary and other property belonging to the Agiary, and, at the request of the said subscribers and representatives of deceased subscribers to the said Fund, further undertook to receive all further subscriptions for the benefit of the Agiary by members of the said Banajee family. And Whereas the said Hormusjee Ruttonjee Banajee took no part in the management of the Agiary. And Whereas the said balance received by the said Bachoobae as Executrix, with certain further subscriptions and accumulations of interest, after payment of charges for maintenance of the said Agiary, were from time to time invested by her in Four and Five per cent Promissory Notes of the Government of India. And Whereas on the 26th December 1859, Promissory Notes of the Government of India for Rs.13,000 (Thirteen thousand), namely, Five Promissory Notes numbered respectively 18434, 18436, 29782, 35035, and 45172, each of Rupees one thousand, bearing interest at 4 per cent per annum, one Promissory Note numbered 12259, for Rupees two thousand, bearing interest at 4 per cent per annum, and six Promissory Notes numbered respectively 8199, 9894 to 9898 each of Rupees one thousand, bearing interest at 5 per cent. Per annum, and a sum of Rs.15.2.42, being the balance in the hands of the executors of the late Framjee Cowasjee of the Trust Fund, were respectively duly transferred and paid to the said Dadabhoy Rustomjee, Sorabjee Pestonjee Framjee, Limjee Manockjee, and Dhunjeebhoy Framjee and Trustees. And Whereas the said Dhunjeebhoy Framjee resigned his trusteeship in the year 1864, and the said Hormusjee Ruttonjee Banajee died on the 26th day of December, 1865. And Whereas owing to disputes between the said Dadabhoy Rustomjee and his Co-Trustees the said Sorabjee Pestonjee Framjee and Limjee Manockjee, the said Sorabjee Pestonjee Framjee and Limjee Manockjee found it necessary to submit such differences to the members of the Banajee family, and a meeting of such members was duly convened and held on the 10th day of February, 1876, whereat Messrs. Pestonjee Burjorjee Davur and Nanabhoy Dhunjeebhoy Banajee were appointed

Trustees in the places of the said Dhunjeebhoy Framjee and Hormusjee Ruttonjee Banajee respectively, and it was also resolved that the said Sorabjee Pestonjee Framjee and Limjee Manockjee should, conjointly with the said Pestonjee Burjorjee Davur and Nanabhoy Dhunjeebhoy Banajee, endeavour to bring about an amicable understanding with the said Dadabhoy Rustomjee. And Whereas endeavours were made to bring about an amicable settlement with the Said Dadabhoy Rustomjee, but without result, and at another meeting of the members of the Banajee family held on the 11th June 1876, it was, among other matters, resolved that legal steps should be taken to have the said Dadabhoy Rustomjee removed from his trusteeship. And Whereas suit No.525 of 1876 was accordingly filed in the High Court of Bombay by the said Sorabjee Pestonjee FRamjee, Limjee Manockjee, Pestonjee Burjorjee Davur, and Nanabhoy Dhunjeebhoy Banajee against the said Dadabhoy Rustomjee, praying that he might be removed from acting as a Trustee of the said Agiary, and restrained from interfering further in the management thereof, that another person might be appointed by the majority of the members of the Banajee family present at a meeting to be convened under the orders of the Court to be a Trustee in the said defendant's place and stead, and for the purposes aforesaid all proper or necessary accounts, directions, or enquiries might be taken, given, or made, and by a consent decree in the said suit dated the 18th day of January 1877, it was ordered that the parties to the suit should meet within three months from the date thereof in the Banajee Limjee Agiary, or at such other place as the majority of the Trustees should fix, on such occasions as should be arranged, and transact and complete within that time the following business: namely, First, all account books and papers relating to the said Fire Temple should be produced for their examination and settlement, and all Funds belonging to the Trust should forthwith be transferred to the names of all the Trustees. Second, a Trust Deed of the said Fire Temple should be prepared and executed, and if any difference of opinion should arise with regard to the Trust Deed, or the terms thereof,

the decision of the majority of the Trustees should be conclusive and binding. Third, a set of rules should be framed for the proper management of the Fire Temple, the same to be signed and confirmed by a resolution at a meeting of the Trustees to be convened for the purpose, such rules to be subsequently observed by all the Trustees, and that in case a difference of opinion should arise in framing any particular rule or rules, the same should be referred to two arbitrators, one to be chosen by each of the parties, the Plaintiffs and defendants to the suit, with power to those Arbitrators to select their own umpire in writing before entering upon the arbitration, and that their or his decision on the subject should be binding on all the parties. And Whereas the said Dadabhoy Rustomjee Banajee neglected and refused to carry out the said decree although repeatedly called upon by his Co-Trustees so to do, and on the 13th day of August 1877 resigned his trusteeship. And Whereas at a meeting of the members of the Banajee family, duly convened and held at the Cowasjee Byramjee Atush Byram on the 9th September, 1877, the said Furdoonjee Merwanjee Banajee was duly appointed a Trustee in the place of the said Dadabhoy Rustomjee Banajee. And Whereas all funds belonging to the Trust have been transferred to the names of the present Trustees as directed by the said decree, and are correctly set forth in the schedule marked B hereunder written.

Now, know ye, and these presents witness, that in pursuance of the directions contained in the said decree, it is hereby declared and agreed that we, the said Sorabjee Pestonjee Framjee, Limjee Manockjee, Pestonjee Burjorjee Davur, Nanabhoy Dhunjeebhoy Banajee, and Furdoonjee Merwanjee Banajee, and the survivors and survivor of us, and the executors and administrators of such survivor; will at all times hereafter stand seized, possessed of, or interested in the said Agiary and hereditaments described in the Schedule marked C hereunder written, and will stand possessed and interested in the Securities and monies described in the schedule marked B hereunder written, and other the

Trust monies and Securities for the time being respectively upon the Trust, and to and for the ends, intents and purposes, and subject to the powers, provisos and declarations hereinafter respectively declared and contained concerning the same, that is to say, In Trust to permit all members of the Zoroastrian community professing the Zoroastrian faith to use the said Agiary subject to the rules aforesaid, and In Trust to retain the said Securities in their present investment, or to sell the same or any part thereof, and invest the proceeds thereof and any monies for the time being in our hands in Securities of the Government of India, or in shares of the Bank of Bombay, Bengal or Madras, with power to vary such Securities, and to pay or apply the interest and income of such Securities, or so much thereon as may in our judgment and discretion appear necessary, in performance annually on the anniversary of the death of the said Banajee Limjee of the usual anniversary ceremony at a cost not exceeding Rs.15 per annum, and in maintaining and repairing the said Agiary and any other buildings belonging to the Trust, and in maintaining the establishment necessary for the said Agiary, and in the celebration of the religious, charitable and other like services and ceremonies from time to time to be performed in the said Agiary, or in anywise connected therewith, with power, in the event of any accident by fire or otherwise happening to the said agiary or any other buildings belonging to the Trust, to apply so much of the principal funds as may be necessary in rebuilding and restoring such Agiary and buildings. And it is hereby further declared, that it shall be lawful for the Trustees or Trustee for the time being, if unanimously of opinion that it will be expedient so to do, to apply the whole or any part of the Trust Funds in the purchase of hereditaments of the nature of freehold and in the erection or alteration of buildings thereon, with power to insure such buildings against fire, and it is hereby further declared, that the Trustees or Trustee for the time being shall have power to appoint such person or persons as they or he shall think fit to act as the Agent of the Trustees or Trustee in receiving and applying the interest, rents and annual income of

the Trust Property at such reasonable remuneration as they or he may think proper, without being answerable for any loss occasioned by the neglect or default of any such person or persons. And it is further declared, that an account of the Trust property and of the receipts and expenditure in respect thereof, and the disposition thereof, shall be made out every year; and shall be open to inspection by all subscribing members of the said Banajee family and further; that an account shall be kept with one of the local Banks in the names of the Trustees or Trustee for the time being, and that upon the receipt of any further subscriptions to the Trust Funds, the same shall be paid to such accounts with such Bank, and that whenever the same shall amount to the sum of Rupees five Hundred or upwards, after payment of all expenses and charges, the amount thereof shall be invested in the names or name of the Trustees or Trustee for the time being in such of the before mentioned investments as the Trustees or Trustee for the time being shall think fit. And further, that the receipt in writing of the Trustees or Trustee for the time being of these Presents for any monies, rents or securities paid or transferred to them or him in pursuance of these Presents, or the Trust thereof, shall effectually discharge the person or persons paying or transferring the same therefrom, and from being concerned to see to the application thereof. And it is hereby further declared, that if we, or any of us, or other the Trustees or Trustee for the time being, shall leave Bombay for a longer period than twelve months, or shall die or desire to be discharged from, or refuse or become incapable to act, then and so often the surviving or continuing Trustees or Trustee (ad for this purpose every retiring or refusing Trustee shall, if willing to act in the execution of this power, be considered a continuing Trustee), or in the event of there being no Trustee, the executors or administrators of the last surviving Trustee shall immediately, by deed or writing under their or his hands and seals, or hand an seal attested by one or more witnesses, appoint a new Trustee or new Trustees to be selected from the members of the Banajee family in the stead of the Trustee or Trustees so leaving Bombay, dying or desiring to be

discharged, or refusing or becoming incapable to act, and upon every such appointment the said Agiary and other Trust premises shall be so conveyed and transferred that the same may become vested in the new Trustee or Trustees jointly with the surviving or continuing Trustees or Trustee, or solely as the case may require, and every such new Trustee shall (as well before as after the Trust Property shall have become so vested) have the same powers, authorities and discretions as if he had been originally appointed a Trustee, and it is hereby declared, that the Trustees or Trustee for the time being shall be respectively chargeable only with such monies or Securities for money as they respectively shall actually receive notwithstanding his joining in any receipt for the sake of conformity, and shall not be answerable for each other, nor for any banker, broker or other person in whose hands any of the Trust monies or Securities shall be placed, nor for the insufficiency or deficiency of any Shares or Securities, nor otherwise for involuntary losses, and that the Trustees for the time being may respectively reimburse themselves out of the Trust premises all expenses incurred in or about the execution of the aforeTrusts and powers. And it is hereby lastly provided, that in the event of any Trustee publicly abjuring the Zoroastrian religion, or embracing any other religion, he shall thereupon be disqualified from acting, and shall cease to act, as a Trustee, and shall forthwith join in conveying and transferring all the Trust property, so that the same may become vested in a new Trustee or Trustees jointly with the surviving or continuing Trustees or Trustee, or solely as the case may require.”

[Emphasis supplied]

26.3 The aforesaid contents of the Trust Deed make it abundantly clear that the Agiary was established by Banaji Limji, and was subsequently vested unto the Trust to be used by the members of the Zoroastrian community professing the Zoroastrian religion. The Trust Deed is a registered document.

26.4 The next document pertaining to C. S. No. 449 is a registered deed of conveyance dated 13th July 1905 executed by Manekji Hormasji Kanga in favour of Ferdunjee Banaji, Sorabjee Banaji, Dorabjee Davar, Cooverji Banaji and Sorabjee Banaji, the then Trustees of the Trust, the relevant portions of which are as follows :

“This Indenture made the thirteenth day of July one thousand nine hundred and five Between Maneckjee Hormasji Kanga of Bombay Parsee Inhabitant (hereinafter called the Vendor) of the one part and Inrdoorjee Inerwanjee Bamanjee Sorabjee Jehangirjee Banajee, Dorabjee Cawasjee Dawer Cooverjee Nanabhoy Banajee & Sorabjee Nanabhoy Banajee. The Trustees of the Banajee Limjee Fire Temple also of the same place Parsi Inhabitants (hereinafter called the Trustees which term shall include every succeeding trustee & trustees of the said Fire Temple) of the other part Whereas the said Vendor being said & possessed of or otherwise well & sufficiently entitled to the hereditaments & premises including the well hereinafter described hath agreed to sell the same to the Trustees at or for the price or sum of Rupees One Thousand Nine Hundred & Forty Two only law this Indenture witnesseth that in pursuance of the aforesaid agreement & in consideration of the sum of Rupees one thousand nine hundred & forty two only to the said Vendor paid by the Trustees at or immediately before the execution of these presents (the payment & receipt of which said sum of Rupees one thousand nine hundred and forty two he the said Vendor doth hereby admit and acknowledge and of from the same & every part thereof doth acquit release & discharge the Trustees for ever by these presents) He the said Vendor doth hereby grant & convey unto the Trustees. All that price or parcel of land containing by admeasurement one hundred & twelve square yards or thereabouts & registered by the collector of Land Revenue under Old No.8485 new no.4924 old survey no.415 & new survey no.9377 together with the

messuage tenement or building & the well standing thereon assessed by the municipality of Bombay under ward A no. 1487 street no.5,6,7, all which premises are situate at and on the south side of Cawasjee Patel cross Lane at Bombay with Registration sub-district of Bombay and are bounded on the east by the property of Seerinbai Maneckjee Patel daughter of Maneckjee Heerjeebhoy Patel on or towards the west by the Banajee Fire Temple on or towards the north by the property of Bhowsar Naran Daya and on or towards the south partly by the property of Sorabjee Cawasji Pathan and Furdoonjee Shapurjee Masani and partly by the property of the said Vendor & were formerly & are now in the occupation of the tenants of the said Vendor & are delineated on the place hereunto annexed & thereon surrounded with a red color boundary line. Together with all & singular the out houses buildings courts compounds ways paths passages sewers drains wells waters watercourses lights privileges easements advantages & appurtenances whatsoever to the said hereditaments & premises belonging or in anywise appertaining or with the same now or hereafter held occupied or enjoyed or reputed to below or be appurtenant thereto And all the deeds writings & evidences relating to or in anywise concerning the title to the said hereditaments & premises in the possession or power of the said Vendor or which he can without suit procure And all the estate right title & interest whatsoever both at law & in equity of him the said Vendor in to or out of the said message land hereditaments and premises and every part thereof I have and to hold all and singular the said message old no. 8485 new no.4924 old survey no.415 & new survey no.9377 together with the measurage tenement or building & the well standing thereon assessed by the Municipality of Bombay under ward A no.1487 street no.5,6,7, all which premises are situate at and on the south side of Cawasjee Patel Cross Lane at Bombay in the Registration Sub-district of Bombay and are bounded on the East by the property of Seerinbai Maneckjee Patel daughter of Maneckjee Heerjeebhoy Patel on or towards the west by the

Banajee Fire Temple on or towards the North by the property of Bhowsar Naran Daya and on or towards the South partly by the property of Sorabjee Cawasjee Pathan and Furdoonjee Shapurjee Masani and partly by the property of the said Vendor & were formerly & are now in the occupation of the tenants of the said Vendor & are delineated on the place hereunto annexed & thereon surrounded with a red color bound any line. Together with all & singular the outhouses buildings courts compounds ways paths passages sewers drains wells waters watercourses lights privileges easements advantages & appurtenances whatsoever to the said hereditaments & premises belonging or in anywise appertaining or with the same now or hereafter held occupied or enjoyed or reputed to below or be appurtenant thereto”

26.5 The aforesaid instrument is a registered deed of conveyance in favour of the then Trustees of the Trust.

26.6 The Plaintiffs have tendered the Property Card in respect of the Suit Property situated at C. S. No. 449. The same shows that the property stands in the name of the Trustees of the Trust.

26.7 The Plaintiffs have produced registered deeds of appointment of new trustees of the Trust dated 16th June 1905 (Exhibit P-13), 9th October 1916 (Exhibit P-14), 18th August 1924 (Exhibit P-15), 22nd July 1939 (Exhibit P-16), 29th June 1942 (Exhibit P-17), 9th July 1951 (Exhibit P-18), 30th October 1972 (Exhibit P-20), 23rd June 1976 (Exhibit P-19) and 8th June 2004 (Exhibit P-21). These registered instruments which have been executed by the then Trustees of the Trust mention the creation of

the Trust and the vesting of the Agiary in the Trustees. The schedules of the same describes the Agiary and the property at C. S. No. 449 as belonging to the Trust.

26.8 The Trust has been registered under the provisions of the Maharashtra Public Trust Act, 1950 as the Banaji Limji Fire Temple under registration number PTR No.C-418(BOM). The Plaintiffs have tendered the Schedule 1 register of trusts (Exhibit P-4) maintained by the office of the Charity Commissioner under the provisions of sections 18 to 21 of the Maharashtra Public Trusts Act, 1950, which reflects the property at C.S. No. 449 as the property of the Trust.

26.9 The Privy Council in the case of **Shrinivasdas Bavri v/s Meherbai & Ors.** (*supra*) relied upon by Mr. Tamboly, has held as follows :

“Although, however, recitals in a Deed are only evidence as against the parties to the Deed or those who claim through or under them, **it has long been the custom of Conveyances, at any rate in this country, to provide in contract of sale and purchase that recitals in Deeds of a certain shall be sufficient to satisfy a Purchaser of the truth of the fact recited.** The existence of such a custom is material whenever a Purchaser is bound to accept a marketable title, for the insertion of a usual condition in a contract of resale could not be depreciatory. In this country the usual condition (now recognized by statute) is confined to Deeds dated not less than twenty years before the contract and there is no evidence of any custom among Bombay Conveyances relating to more recent Deeds. In their Lordships opinion, a condition making the recitals in the release of 1902 evidence of the fact recited would have been depreciatory, especially having regard to the fact that the Vendors cannot produce one of the title deeds deposited for the purpose of the equitable charge or the equitable charge itself.”

[Emphasis supplied].

26.10 In the case of **Shamsudin Tajbhai v/s Dahyabhai Maganlal** (*supra*) it was held as follows :

“There is a conveyancing practice in Bombay that, in the absence of anything to the contrary in the agreement for sale, (a) in investing a title, recitals in deeds of over twenty years old should be accepted in the absence of anything throwing suspicion on their character, and (b) the costs of obtaining certified copies of the orders and decrees mentioned in a document of title should be borne by the purchaser.

Nos. 1 to 5 relate to recitals in the Conveyance of 1863 (Exhibit L). That was a document about forty seven years old and the recitals contained therein should have been accepted, in the absence of anything throwing suspicion on their character. Mr.Rustamji, Plaintiffs Solicitor has given uncontradicted evidence of the practice of Bombay solicitors to accept recitals in Deeds of over twenty years old, in the same way as is done in England under the Vendor and Purchaser Act, 1874, (Williams, Vol.I, p. 186) [Emphasis supplied].

26.11 The aforesaid two judgments are authorities for the proposition that in the absence of anything to the contrary, the recitals in deeds of some age, must be accepted. The Trust Deed is dated 9th June 1879 and is a registered document. There is no evidence whatsoever placed on record by the Defendant to cause any doubts or suspicion qua its recitals and contents. In the absence of the same, and considering the vintage of the document and the fact that it is a registered instrument, I have no hesitation in accepting the contents thereof to be true and correct. Once that be the case, the contents of the Trust Deed pertaining to the establishment of the Agiary in

the year 1709, the facts leading up to the creation of the Trust, and the vesting of the Agiary in the Trust for the benefit and use of members of the Zoroastrian community stands established. That apart, the Agiary and its outhouses forming part of the property now renumbered as C. S. No. 449 have been contemporaneously shown to be the property of the Trust in each of the registered deeds of appointment of Trustees of the Trust. The Property Card in respect of C.S. No. 449 stands in the name of the Trustees of the Trust.

26.12 Apart from the above, the Plaintiffs have tendered property tax Original Receipt No. 5523807 dated 20th June 2012 in the amount of Rs.4,855/- for payment of property tax in respect of building No.17 standing on property bearing C.S.No.405 (Exhibit P-27), Original Receipt No. 2872291 dated 31st December 2013 in the amount of Rs. 4,920/- for payment of property tax in respect of the Agiary premises standing on property bearing C.S.No.449 (Exhibit P-28) and Original Receipt No. 5523804 dated 20th June 2012 in the amount of Rs. 1,959/- for payment of property tax in respect of building No.16 standing on property bearing C.S.No.449 (Exhibit P-29). PW-1 has referred to these documents in paragraphs 11c, d and e of his Affidavit in lieu of examination in chief dated 4th September 2014. He has not been cross examined on this aspect at all. The Defendant has not produced any documents to show that she is paying the property tax. In answer to question nos. 16 and 17 of her cross examination, the Defendant stated that she has receipts to show that she has paid

taxes in respect of the Suit Properties but that she has not produced the same as she was not advised to do so. The stand taken by her is not a credible one. Considering the nature of the issue at hand viz title to the suit properties, payment of property tax would be an extremely relevant factor. The Trust has produced evidence to show that it has been paying the same. The Defendant has not. Therefore by the Defendant not producing the same, the only inference which can be drawn is that the Defendant has not paid any such municipal taxes in respect of any of the Suit Properties and she does not have any documents to show the same in her custody. Therefore the evidence led by the Plaintiffs that the Trust has been paying the municipal property tax in respect of the Suit Properties and the contents of the property tax invoices and receipts have gone unchallenged and unrebutted by the Defendant, and must be accepted.

26.13 Coming to next of the Suit Properties set out in the schedule annexed as Exhibit A to the Plaint in the High Court Suit i.e. the land bearing C. S. No. 450, the property card in respect of the same (Exhibit P-87) stands in the name of the trustees of the Trust as the beneficial owners thereof.

2614. The Plaintiffs have tendered the registered deed of conveyance dated 29th November 1916 (Exhibit P-7) executed by Bai Hirabai in favour of Cooverji Banaji, Dorabjee Davar, Sorabjee Banaji, Navroji Framjee and Framjee Banaji as Trustees of the Trust, the relevant portions of which are as follows :

“THIS INDENTURE made the 29th day of November in the Christian year nineteen hundred and sixteen Between Bai Hirabai daughter of Dinshaji Merwanji Irani and wife of Jamshedji Merwanji Tarachand of Bombay Parsi inhabitant the administratrix of the property and credits of Sorabji Kawasji Pathan deceased hereinafter unless otherwise designated called “the Vendor” (which expression shall where the context so requires or admits be deemed to include the heirs executors and administrators of the First part, Cooverjee Nanabhoy Banajee of Bombay Parsi inhabitant hereinafter unless otherwise referred to called “the Purchaser” of the Second part and Dorabji Cowasji Dawar Cooverjee Nanabhoy Banajee, Sorabjee Nanabhoy Banajee, Nowrojee Jehangeerjee Framjee and Framjee Dadabhoy Banajee all of Bombay Parsi inhabitants the Trustees of the Banajee Limjee Agiary or Fire Temple hereinafter called “the Trustees” (which expression shall be deemed to include (the survivors or survivor of them and other the trustees or trustee for the time being of the said Banajee Limjee Agiary or Fire Temple) of the Third part Whereas Sorabji Kawasji Pathan late of Bombay Parsi inhabitant was during his lifetime and at the date of his death hereinafter mentioned seized and possessed as absolute owner of the land and hereditaments situate at Nanabhoy Lane also called Nanabhoy Cross Lane within the Fort of Bombay particularly described in the Schedule hereto and hereinafter expressed to be hereby granted And Whereas the said Sorabji Kawasji Pathan died intestate at Bombay on or about the 2nd day of February 1897 And whereas Letters of Administration of the Property and credits of the said Sorabjee Kawasjee Pathan were on the 21st day of December 1901 granted by the High Court of Judicature at Bombay to the Vendor limited until one of the next-of-kin of the said deceased should obtain Letters of Administration of the said property and credits granted to him or her from the said Court And Whereas no next-of-kin of the said deceased Sorabjee Cawasjee Pathan has yet come forward to obtain Letters of Administration to his Estate And Whereas the Vendor has agreed with the Purchaser for the absolute sale of the hereditaments and

premises for the price or sum of Rupees Three hundred as earnest and in part payment of the purchase money on the 22nd day of September 1916 And Whereas the Purchaser is desirous that the said land hereditaments and premises should be conveyed to and be held by the Trustees on behalf of and for the benefit of the Banajee Limjee Agiary or Fire Temple as part of the endowment for the said Fire Temple and has requested the Vendor that the said land hereditaments and premises shall be so conveyed to the Trustees Now This Indenture Witnesseth that in pursuance of the said Agreement and in consideration of the sum of Rupees three hundred paid by the Purchasers to the Vendor as earnest money as aforesaid and of the further sum of Rupees Twenty-seven hundred upon the execution hereof paid by the Purchaser to the Vendor (the receipt of which sums of Rupees Three hundred and Rupees Twenty-sever hundred making together the total sums of Rupees Three thousand the Vendor doth hereby acknowledge) the Vendor at the request and by the direction of the Purchaser testified by his being a party to and executing these presents doth hereby grant unto the Trustee all that piece or parcel or land with the messuage or dwelling house standing thereon situate at Nanabhai Lane also called Nanabhoy Cross Lane within the Fort of Bombay more particularly described in the Schedule hereto and delineated on the Plan thereof hereto annexed Together with all buildings yards courts areas sewers, drains, water courses, lights, liberties, privileges, easements and appurtenances whatsoever to the said hereditaments and premises belonging or in anywise appertaining as usually held or enjoyed therewith or reported to belong, or be appurtenant thereto and all estate right title, interest, claim and demand of the Vendor as such administratrix as aforesaid unto or upon the said premises and every part thereof To Have And To Hold the said hereditaments and premises hereinbefore expressed to be hereby granted (unto and for the use of the Trustees in Trust to hold the same as an endowment for the Banajee Limjee Agiary or Fire Temple and to apply the nett rents and income thereof for or towards the general expenses of the said Agiary and the Vendor doth hereby

for herself her heirs executors and administrators covenant with the Trustees that she the Vendor has not at any time heretofore done or knowingly omitted or suffered or been party or privy to anything whereby or by means whereof the said hereditaments and premises hereinbefore expressed to be hereby granted or any part thereof are is or may be encumbered or affected in any manner whatsoever or whereby she the Vendor is in anywise prevented from granting the said premises in manner aforesaid”

26.15 The Plaintiffs have produced registered deeds of appointment of new trustees of the Trust dated 18th August 1924 (Exhibit P-15), 22nd July 1939 (Exhibit P-16), 29th June 1942 (Exhibit P-17), 9th July 1951 (Exhibit P-18), 30th October 1972 (Exhibit P-20), 23rd June 1976 (Exhibit P-19) and 8th June 2004 (Exhibit P-21). The schedule of each of these registered deeds reflect the property at C. S. No. 450 as belonging to the Trust. The Schedule 1 register of the Trust (Exhibit P-4) maintained by the office of the Charity Commissioner under the provisions of sections 18 to 21 of the Maharashtra Public Trusts Act, 1950, also reflects the property at C.S. No. 450 as the property of the Trust. Thus, there is contemporaneous evidence that the Trustees of the Trust across various years have always treated this as the property of the Trust, and assigned and vested the same unto all incoming Trustees.

26.16 The Plaintiffs have tendered Original Receipt No. 2872290 dated 31st December 2013 in the amount of Rs. 3,476/- for payment of property tax in respect of building No.14 standing on property bearing C.S.No.450 (Exhibit P-30). PW-1 has

referred to this document in paragraph 11 e of his Affidavit in lieu of examination in chief dated 4th September 2014. Even in this case, there is no cross examination on this aspect by the Defendant. I have already drawn an inference that the Defendant does not have any documents to show that she has paid the property tax in respect of any of the Suit Properties. The Plaintiffs evidence of payment of property tax in respect of the property at C. S. No. 450 has gone unchallenged and unrebutted.

26.17 The Plaintiffs have thus produced title documents and statutory records in respect of the property at C. S. No. 450 forming part of the Schedule of Properties at Exhibit A to the High Court Suit.

26.18 Coming to the next of the Suit Properties set out in the schedule annexed as Exhibit A to the Plaint in the High Court Suit i.e. the land bearing C. S. No. 403, the property register card in respect of the same stands in the name of the Trustees of the Trust as the beneficial owners thereof (Exhibit P-1 Colly).

26.19 The Plaintiffs have tendered the registered Deed of Conveyance dated 2nd December 1926 by one Cassum Motee in favour of the then Trustees of the Trust (Exhibit P-9), the relevant portions of which are quoted as follows :

“THIS INDENDURE MADE AT Bombay this Second day of December in the Christian year Nineteen hundred and twenty-six Between Cassum Motee of Bombay Halai Memon Mahomedan Inhabitant hereinafter called “the Vendor” (which expression shall unless repugnant to the context or meaning thereof include his heirs executors and administrators) of the First part, Kaikhasro Pestonji Davar also of Bombay

Parsi Inhabitant of the Second part and Dorabji Cawasji Dawar, Sorabjee Nanabhoy Banajee, Framjee Dadabhoy Banajee, Hormusjee Nanabhoy Banajee and Kaikhasro Pestonji Davar all of Bombay, Parsi Inhabitants the present Trustes of the Banajee Limjee Agiary or Fire Temple in Bombay hereinafter called "the Purchasers" (which expression shall unless repugnant to the context or meaning thereof be deemed to include the survivors or survivor of them and the heirs executors and administrators of such survivor their or his assigns) of the Third Part WHEREAS the Vendor is absolutely possessed of or otherwise well and sufficiently entitled for an estate equivalent to an estate in fee simple in possession free from all incumbrances to the land hereditaments and premises described in the schedule hereto and hereinafter expressed to be hereby granted AND WHEREAS the Vendor agreed with the said Kaikhasro Pestonji Davar for the absolute sale of the said hereditaments and premises and the inheritance thereof in possession free from all incumbrances at the price of Rupees Fourteen thousand (Rs.14,000/-) and received Rupees Five hundred (Rs.500/-) as earnest money on the 1st day of October 1926 AND WHEREAS the said Agreement was entered into by the said Kaikhasro Pestonji Davar as agent for and on behalf of the Purchasers and the sum of Rupees Five hundred paid as earnest money as aforesaid was money belonging to the Purchasers as the said Kaikhasro Pestonji Davar doth hereby admit AND WHEREAS the said Kaikhasro Pestonji Davar has requested the Vendor to execute a Conveyance of the said hereditaments and premises direct to the Purchasers which the Vendor has agreed to do upon the said Kaikhasro Pestonji Davar joining in these presents in the manner hereinafter appearing

NOW THIS INDENTURE WITNESSETH that in pursuance of the said Agreement and in consideration of the sum of Rupees Five hundred paid as earnest money to the Vendor by the said Kaikhasro Pestonji Davar on behalf of the Purchasers on the 1st day of October 1926 and of the further sum of Rupees Thirteen thousand and five hundred on or before

the execution of these presents to the Vendor paid by the Purchasers out of funds held by them as Trustees of the said Banajee Limjee Agiary or Fire Temple (the receipt of which sums of Rupees Five hundred and Rupees thirteen thousand five hundred making together the sum of Rupees Fourteen thousand (Rs.14,000/-) the Vendor doth hereby acknowledge and from the same does hereby release the Purchasers) He the Vendor doth hereby grant, convey and assure and the said Kaikhasro Pestonji Davar doth hereby confirm unto the Purchasers All That piece or parcel of land hereditaments and premises more particularly described in the Schedule hereto and delineated on the Plan thereof hereto annexed TOGETHER WITH all houses, out houses, edifices, buildings, yards, compounds, sewers, trees, drains, ways, paths, passages, gullies, wells, water, water-courses rights, lights, liberties, privileges, easements advantages and appurtenances whatsoever to the said hereditaments and premises belonging or in anywise appertaining or usually held or occupied therewith or reputed to belong or be appurtenant thereto TOGETHER ALSO with the full benefit of the covenant for production of a certain Indenture of Gift bearing date the 3rd day of October 1906 and expressed to be made between Nusserwanjee Hormasjee Mehta of the one part and Bhikhaiji widow of Maneckji Dadabhoy Bhagat of the other part contained in an Indenture of Conveyance dated 8th January 1921 and expressed to be made between Bai Bhikhaiji Maneckji Bhagat of the first part and Pirojsha Pallanji Paul of the second part and Simon Reuben by the third part AND ALL the estate, right title and interest property claim and demand whatsoever of them the Vendor and the said Kaikhasro Pestonji Davar respectively in to and upon the said premises and every part thereof TO HAVE AND TO HOLD the said land hereditaments and premises hereinbefore expressed to be hereby granted unto and to the use of the Purchasers as such Trustees as aforesaid for ever upon the trusts and with and subject to the powers and provisions contained in the Deed of Constitution of the said Banajee Limjee Agiary or Fire Temple or other

Deed or Deeds Supplemental thereto AND the Vendor doth hereby covenant with the Purchasers that notwithstanding any act deed or thing by the Vendor done or executed or Knowingly suffered to the contrary he the Vendor now has good right in himself to grant the hereditaments and premises hereby granted or expressed so to be unto and to the use of the Purchasers in manner aforesaid AND THAT THEY the Purchasers shall and may at all times hereafter peaceably and quietly possess and enjoy the said hereditaments and premises and receive the rents and profits thereof without any lawful eviction interruption claim or demand whatsoever from or by the Vendor or by any person or persons lawfully or equitably claiming from under or in trust for him AND that free from all incombrances whatsoever created made or suffered by the Vendor or any person or persons lawfully or equitably claiming as aforesaid. AND FURTHER that the Vendor and all persons having or lawfully or equitably claiming any estate, right, title or interest in the said hereditaments and premises or any part thereof from under or in trust for the Vendor shall and will from time to time and at all times hereafter at the request and costs of the Purchasers do and execute or cause to be done and executed all such acts deeds and things whatsoever for further and more perfectly assuring the said hereditaments and premises and every part thereof unto and to the use of the Purchasers in manner aforesaid as shall or may be reasonably required.”

26.20 The Plaintiffs have produced registered deeds of appointment of new trustees of the Trust dated 22nd July 1939 (Exhibit P-16), 29th June 1942 (Exhibit P-17), 9th July 1951 (Exhibit P-18), 30th October 1972 (Exhibit P-20), 23rd June 1976 (Exhibit P-19) and 8th June 2004 (Exhibit P-21). The schedule of each of these registered deeds reflect the property at C. S. No. 403 as belonging to the Trust. The Schedule 1 register

of the Trust (Exhibit P-4) maintained by the office of the Charity Commissioner under the provisions of sections 18 to 21 of the Maharashtra Public Trusts Act, 1950, also reflects the property at C.S. No. 403 as the property of the Trust. Thus, there is contemporaneous evidence that the Trustees of the Trust across various years have always treated this as the property of the Trust, and assigned and vested the same unto all incoming Trustees.

26.21 The Plaintiffs have tendered Original Receipt No. 2872496 dated 31st December 2013 in the amount of Rs. 18,966/- for payment of property tax in respect of building No.13 standing on property bearing C.S.No. 403. PW-1 has referred to this document in paragraph 11a of his Affidavit in lieu of examination in chief dated 4th September 2014. Even in this case, there is no cross examination on this aspect by the Defendant. I have already drawn an inference that the Defendant does not have any documents to show that she has even paid the property tax in respect of any of the Suit Properties. The Plaintiffs evidence of payment of property tax in respect of the property at C. S. No. 403 has gone unchallenged and unrebutted.

26.22 The Plaintiffs have thus produced title documents and statutory records in respect of the property at C. S. No. 403 forming part of the Schedule of Properties at Exhibit A to the High Court Suit.

26.23 Coming to the next of the Suit Properties set out in the schedule annexed as Exhibit A to the Plaint in the High Court Suit i.e. the land bearing C. S.

No. 405, the property register card in respect of the same (Exhibit P-1 Colly). The Plaintiffs have tendered three registered Indentures of Conveyance dated 15th April 1885 (Exhibit P-11), 15th April 1885 (Exhibit P-10) and 16th January 1886 (Exhibit P-81), by which the Trust acquired the property forming part of C. S. No. 405.

26.24 The Plaintiffs have produced registered deeds of appointment of new trustees of the Trust dated 16th June 1905 (Exhibit P-13), 9th October 1916 (Exhibit P-14), 18th August 1924 (Exhibit P-15), 22nd July 1939 (Exhibit P-16), 29th June 1942 (Exhibit P-17), 9th July 1951 (Exhibit P-18), 30th October 1972 (Exhibit P-20), 23rd June 1976 (Exhibit P-19) and 8th June 2004 (Exhibit P-21). The schedule of these registered deeds reflect the property at C. S. No. 405 as belonging to the Trust. The Schedule 1 register of the Trust (Exhibit P-4) maintained by the office of the Charity Commissioner under the provisions of sections 18 to 21 of the Maharashtra Public Trusts Act, 1950, also reflects the property at C.S. No. 405 as the property of the Trust. Thus, there is contemporaneous evidence that the Trustees of the Trust across various years have always treated this as the property of the Trust, and assigned and vested the same unto all incoming Trustees.

26.25 The Plaintiffs have tendered Original Receipt No. 5523807 dated 20th June 2012 in the amount of Rs.4,855/- for payment of property tax in respect of building No.17 standing on property bearing C.S.No.405. PW-1 has referred to this document in paragraph 11b of his Affidavit in lieu of examination in chief dated 4th September

2014. Even in this case, there is no cross examination on this aspect by the Defendant. I have already drawn an inference that the Defendant does not have any documents to show that she has even paid the property tax in respect of any of the Suit Properties. The Plaintiffs evidence of payment of property tax in respect of the property at C. S. No. 403 has gone unchallenged and unrebutted.

26.26 The Plaintiffs have thus produced title documents and statutory records in respect of the property at C. S. No. 405 forming part of the Schedule of Properties at Exhibit A to the High Court Suit.

26.27 As noted above, each of the Suit Properties finds place in the Schedule 1 register of the Trust (Exhibit P-4) maintained by the office of the Charity Commissioner under the provisions of sections 18 to 21 of the Maharashtra Public Trusts Act, 1950. Under Section 18 of the Maharashtra Public Trust Act, 1950, a public trust is required to be registered with the office of the Deputy or Assistant Charity Commissioner. The Trustee or Trustees must apply for registration under the prescribed format with the prescribed information being disclosed one of which is the list of the moveable and immoveable properties of the Trust. Under Section 19 of the Act, once an application for registration of a Trust is made, the Deputy or Assistant Charity Commissioner is required to make an inquiry *inter alia* as to whether the Trust exists and whether the property described is the property of the Trust. After completion of the inquiry, the Deputy or Assistant Charity Commissioner is

required to give his findings thereon under Section 20 of the Act. Under Section 21 of the Act, the Deputy or Assistant Charity Commissioner is to make entries in the Register in respect of such Trusts maintained under Section 17 of the Act. In the present case the Trust has been registered and the suit properties have been mentioned therein as the properties of the Trust. This would necessarily have to be after the requisite inquiries under the provisions of the Maharashtra Public Trusts Act, 1950. The same has not been challenged by the Defendant though she claims ownership to the Suit Properties.

26.28 Apart from the above, PW-1 has deposed to expenses incurred by the Trust towards maintenance and repairs of the Suit Properties in paragraph 12 of his Affidavit dated 4th September 2014 in lieu of examination in chief. He has tendered various receipts and tax invoices referred to therein as evidence of the same (Exhibits P 34 to P 49). Further, in paragraph 13 of the same Affidavit, he has deposed to the persons employed by the Trust for managing the day to day activities of the Suit Properties and has tendered cash vouchers issued in the names of such employees (Exhibits P-51 to P-80). He has not been cross examined by the Defendant on this evidence at all. The Defendant has not produced any evidence to show that she is maintaining the Suit Properties in any manner. Thus, this evidence too stands unchallenged and unrebutted by the Defendant. Therefore, it must be accepted that

the Trust is maintaining the Suit Properties and employing staff for carrying out the day to day activities for the same.

26.29 There is therefore overwhelming evidence that the title of the Suit Properties vests in the Trust through its Trustees.

27. Ms. Khobragade for the Defendant has contended that there is no evidence of the existence of the Trust. In view of the evidence on record and the discussion and findings mentioned above, this submission must be rejected. There is once again overwhelming material on record to demonstrate the existence of the Trust. The Trustees have tendered the Trust Deed, registered titled documents in favour of the Trust through its Trustees, registered deeds of appointment of new Trustees of the Trust, registration of the Trust under the Parsi Public Trust Registration Act, 1936 (Exhibit P-22) and the Maharashtra Public Trusts Act, 1950, property cards in favour of the Trust through its Trustees and property tax receipts in favour of the Trust through its Trustees. Hence, I am unable to accept the submission that the Trust doesn't exist.

27.1 Ms. Khobragade's attempt to state that the Trust has been described as 'Banaji Limji Agiary' in some documents and 'Banaji Limji Fire Temple' in others to try and oust the existence of the Trust cannot be accepted. It is well known, and judicial notice can be taken of the fact, that an 'Agiary' is the term by which a Fire Temple is known. A Fire Temple / Agiary is a place of worship where members of the

Parsi / Irani Zoroastrian community go to offer prayer. It is a temple which houses the Holy Fire which is worshipped by members of the Parsi / Irani Zoroastrian community. The Agiary in this case is known as the Banaji Limji Agiary / Banaji Limji Fire Temple. Therefore, there is no controversy if the Trust is called by either of these name in any of the documents on record.

27.2 Coming to Ms. Khobragade's argument that the Plaintiffs are not validly appointed trustees of the Trust, I am afraid that is not a question that I can decide in these proceedings. Mr. Tamboly has correctly submitted that under Section 22 of the Act, the power to decide change reports and to record whether or not a trustee has or has not been validly appointed vests with the Assistant/Deputy Charity Commissioner. The change reports recording the appointment of the Plaintiffs as Trustees of the Trust have been tendered by PW-1 in evidence (Exhibits P-2 and P-3). Under Section 80 of the Maharashtra Public Trust Act, 1950, no Civil Court has jurisdiction to decide or deal with any question which is to be decided or dealt with by the officer appointed under that Act. Therefore, once the relevant change reports are on record, this Court cannot go behind the same in these proceedings.

28. The Full Bench of this Court in **Keki Pestonji v. Khodadad Merwan Irani** (supra) held as follows :

“15....in order that the jurisdiction of the Civil Court to decide or deal with a question may be barred under S.80, it is necessary both that by or under the Act the particular question has to be decided or dealt with by an officer

or authority under the Act and the decision of such officer or authority has been made final and conclusive by the Act. The word 'or' which originally appeared in section 80 before the last clause "in respect of which the decision or order has been made final and conclusive" had evidently crept in through oversight. It has been deleted by Maharashtra Act XX of 1971, probably, to make clear what was not sufficiently clear."

"16.....If in order to afford that relief it is necessary for the Court to decide or deal with a question which by or under the act is to be decided or dealt with by an officer or authority appointed under the Act, the Civil Court's jurisdiction in that behalf is ousted. Such questions must be left to the sole and exclusive decision of the authorities specified in the Act, whether they are questions of fact or of law and whether they are simple or complicated. It is true that ouster of jurisdiction of Civil Courts is not to be readily inferred and the normal rule is the one contained in section 9 of the Code of Civil Procedure that Civil Courts have jurisdiction to try all suits of a civil nature. But this rule is subject to the exception contained in that section itself and the exception is that the cognizance of certain suits by Civil Courts may be expressly or impliedly barred. Section 80 contains an express provision of ouster and though its dual conditions must be satisfied strictly before the decision of a question can be barred from the cognizance of a normal jurisdiction, it would be wrong to import into that provision any extraneous or collateral considerations, as for example whether the question involved is simple or complicated. If law provides that a question must be decided by a particular authority to the exclusion of the Civil Courts, that authority cannot throw up its hands in despair and refuse to decide the question on the ground that it involves consideration of intricate problems. Nor, indeed, can the Civil Court displace the jurisdiction of that authority by arrogating to itself the sole power to decide complicated questions. Once the normal presumption arising under section 9 of the Civil Procedure Code is overborne, there is no scope for limiting the jurisdiction of an exclusive forum to simple and straightforward questions.

What must therefore be considered here is whether the two conditions of section 80 are satisfied.”

29. The Division Bench of this Court in the case of **Charu K. Mehta v/s Lilavati Kirtilal Mehta Medical Trust & Ors.** (supra) held as follows :

“38. Section 80 of the Maharashtra Public Trusts Act, 1950 contains an express bar to the jurisdiction of a Civil Court, but that is subject to the satisfaction of dual conditions. The existence of those conditions must be strictly established before an ouster of jurisdiction can result. The correct test in law to apply is whether the controversy which is sought to be raised before the civil Court requires an adjudication of a matter or question which has to be decided or dealt with by an officer or authority under the Act while exercising his power under the Act and whether such a decision is made final or conclusive. In determining this issue, the Court has to consider the substance and not merely the form in which the claim before the civil Court is made and the underlying object of seeking the real relief. If the question which is raised in the present case in the Originating Summons, is required to be determined or dealt with by an authority under the Act whose decision on such a matter is final and conclusive, the jurisdiction of the Civil Court would have to be held to have been ousted.

40. Under section 22(3) if the Deputy or Assistant Charity Commissioner is satisfied after enquiry that a change has occurred in any of the entries recorded in the register, he is required to record a finding together with the reasons therefor. An appeal against such a finding is provided to the Charity Commissioner. The entries in the register have to be amended by the Deputy or Assistant Charity Commissioner in accordance with the finding and where an appeal or application has been filed against the finding in accordance with the final decision therein. The amendments in the entries so made are final and conclusive, subject to a further amendment on the occurrence of a change or any cancellation of an entry. The entries which the

Deputy or Assistant Charity Commissioner makes have, therefore, to be in accordance with the finding which he arrives at in the course of the enquiry. Finality attaches to the entries made in the register. The finality is subject to an appeal against the findings and upon a final decision of the competent authority on an appeal or application, the entries in the register would have to be brought in conformity with those findings. The basic underlying principle is that though the finality which is prescribed is in respect of the entries made in the register, the entries are only consequential to the findings of the competent authority. If the submission of the plaintiff were to be accepted, that would lead to an incongruous situation in which the bar under section 80 to the entertainment of a question by the Civil Court would be attracted in respect of the entries, but not as regards the findings on the basis of which the entries were made. Such a construction cannot be adopted. As the Supreme Court has noted in the *Church of North India*, the Maharashtra Public Trusts Act, 1950 is a special law which confers jurisdiction upon the Charity Commissioner and other authorities named therein and the provisions of the Act and the scheme thereof “leave no manner of doubt that the Act is a complete code in itself”. [(2005) 10 SCC 760 at para 82 page 788]

41. The learned Single Judge held that the Deputy or Assistant Charity Commissioner cannot under the act entertain an application for interpreting a deed of trust simpliciter and hence an Originating Summons would not be barred under section 80 of the Maharashtra Public Trusts Act, 1950. With the greatest respect, this approach misses the essence of the bar under section 80. Under the provision, the bar is on a civil Court deciding or dealing with any question which under the Act has to be decided or dealt with by an officer or authority and whose decision is made final and conclusive. When the Assistant Charity Commissioner entertains a change report under section 22, the question which he has to deal with or decide in the course of the enquiry and in respect of which finality attaches is excluded from the jurisdiction of the Civil Court under section 80. To hold that the

Assistant Charity Commissioner cannot entertain an application in the nature of an Originating Summons for construction of a deed of trust is to beg the question. The bar under section 80 attaches to a civil Court dealing with or deciding a question which the Assistant Charity Commissioner is required to decide or deal with, and with finality. Once the two requirements of section 80 are fulfilled, the bar is attracted. We are hence of the view that on the construction of section 80, the learned Single Judge applied an erroneous test.

50. In every one of the change reports which have been filed before the Assistant Charity Commissioner, the interpretation of the relevant provisions of the deed of trust is directly in issue and is a question which is required to be decided or dealt with by him in pursuance of the enquiry under section 22(3). The mode of succession to the office of trustees under the deed of trust and the validity of the appointments made is in issue. These are questions which have to be dealt with and decided by the Assistant Charity Commissioner in the course of his enquiry in the change reports. The entries which the Assistant Charity Commissioner would make in consequence of his findings on whether or not a change has taken place in the office of trustees are made final and conclusive. An overall reading of the plaint would also make it abundantly clear, that what the plaintiff seeks is not - as suggested by Counsel - a pure or abstract question of interpretation of the clauses of the Deed of Trust. There are live disputes between the parties - disputes over the appointment of trustees, the mode of succession and the validity of meetings - which are the subject matter of change reports, which are pending. For the purpose of determining jurisdiction, it is evident from a bare reading of the averments contained in the plaint that the change reports are pending. The Originating Summons does not raise only questions of interpretation. Matters which are pending before the Assistant Charity Commissioner are sought to be brought before this Court in the guise of an Originating Summons. In this view of the matter, the jurisdiction on an Originating Summons under Rule 238 would attract the bar under section 80

of the Maharashtra Public Trust Act, 1950 in respect of the questions which are required to be decided or dealt with by the Assistant Charity Commissioner and to which finality attaches.”

30. I am bound by the aforesaid decisions of this Court. Once the Assistant Charity Commissioner has entertained a change report under section 22 of the Maharashtra Public Trusts Act, 1950, finality attaches to his decision and is excluded from the jurisdiction of the Civil Court under section 80 of that Act. Hence, I decline to enter into the disputes raised by the Defendant qua the validity of the appointments of the Plaintiffs as Trustees of the Trust.

31. I now come to the case set up by the Defendant claiming title to the Suit Properties. It is the Defendant's case that she is the ultimate beneficiary of the Suit Properties by virtue of being the sole beneficiary under the Will of Banoo Nariman Shroff. According to her, the Suit Properties were owned by S. N. Banaji, the father of Banoo Nariman Shroff. The Defendant is the ultimate beneficiary of all the properties of Sorabji Nanabhoy Banaji as his estate vested in his son Nanabhoy Sorabji Banaji and subsequently Nanabhoy Sorabji Banaji's estate vested in his sister Banoo Nariman Shroff. Since the Defendant is the beneficiary to the estate of Banoo Nariman Shroff, she is the owner of all of the Suit Properties. This, in a nutshell, is the Defendant's case on her alleged title to the Suit Properties.

32. There are number of reasons why the Defendant's case on title cannot be accepted. The same are set out as follows :

32.1 The Defendant has miserably failed to prove that any of the Suit Properties belonged to any of Sorabji Nanabhoy Banaji, Nanabhoy Sorabji Banaji or Banoo Nariman Shroff. There is not a shred of evidence on record to demonstrate that any of Sorabji Nanabhoy Banaji, Nanabhoy Sorabji Banaji or Banoo Nariman Shroff owned any of the Suit Properties in their individual capacities.

32.2 On the contrary, each of Sorabji Nanabhoy Banaji, Nanabhoy Sorabji Banaji and Banoo Nariman Shroff have in one way or another acknowledged that the Suit Properties or part of them, belong to the Trust. Sorabji Nanabhoy Banaji was a party to the registered Deeds of Appointment of Trustees dated 18th August 1924 (Exhibit P-15), 22nd July 1939 (Exhibit P-16), 29th June 1942 (Exhibit P-17). Nanabhoy Sorabji Banaji was a party to the Deeds of Appointment of Trustees dated 9th July 1951 (Exhibit P-18), 30th October 1972 (Exhibit P-20), 23rd June 1976 (Exhibit P-19). Each of these deeds to which Sorabji and Nanabhoy were parties have reflected the Suit Properties (which had vested / been acquired by the Trust on the dates on which the respective deeds had been entered into) as the properties of the Trust. That apart, in paragraph 5 of the copy of the will dated 27th September 1983 of Nanabhoy Sorabji Banaji tendered by the Defendant (Exhibit D-3) it is stated that the landlords of Banaji Mansion (standing on C.S. No. 405 i.e. one of the Suit Properties) are the Trust and

that Nanabhoy is a tenant of one room situated in that building. Further, in paragraph 8 of the will dated 1st December 1983 of Banoo Nariman Shroff tendered by the Defendant (part of the Probate at Exhibit D-1) it is stated even by Banoo Shroff that the landlords of Banaji Mansion are the Trust and that she is a tenant of one room situated in that building. Thus, it is absolutely clear that the persons from whom the Defendant is claiming title to the Suit Properties have themselves unequivocally maintained that the same belong to the Trust and they have never set up title in themselves. This itself is sufficient for the Defendant's case on her alleged title to the Suit Properties to fail.

32.3 When confronted with the wills of Nanabhoy and Banoo and the admissions therein that the Trust is the landlord of Banaji Mansion, the Defendant in answer to questions 10 and 12 of her cross examination contended that what is stated therein is incorrect. The Defendant has disowned the very documents on the basis of which she claims title to the Suit Properties. The Defendant cannot have it both ways. She cannot approbate and reprobate. She cannot seek to rely upon documents but disown portions thereof which are contrary to the case set up by her.

32.4 Ms. Khobragade's contention that once the Defendant has obtained Probate from this Court in respect of the will of Banoo Nariman Shroff, and once the schedule of assets to the same have been amended to include the Suit Properties, the same vest in the Defendant, cannot be accepted. It is well settled that the Probate

Court is not concerned with questions of title to the properties mentioned in the will in question (paragraph 8 of decision of the Supreme Court in the case of *Delhi Development Authority vs Mrs. Vijaya C. Gurshaney*⁵). Only a competent Civil Court can properly determine questions of title.

32.5 The documents on which the Defendant relies to contend that the Suit Properties stand in the name of Sorabji Nanabhoy Banaji viz the property cards and municipal bills do not help her cause at all. Wherever his name appears on such documents, it is always in his capacity as a trustee and not in his individual capacity. That would undoubtedly be the case considering that Sorabji Nanabhoy Banaji was himself in his lifetime a serving Trustee of the Trust and had always treated the Suit Properties as the assets of the Trust as found above.

32.6 Apart from the above, I find that the Defendant's actions are contrary to her own pleaded case that she is the owner of the Suit Properties. The Defendant has herself accepted the Trust as the landlord of Banaji Mansion standing on C. S. No. 405 on different occasions as pointed out by Mr. Tamboly. The Defendant has paid rent in respect of her husband's premises situated on the 3rd floor thereof. PW-1 in paragraph 10 of his first Affidavit in lieu of examination in chief dated 4th September 2014 has deposed to the fact of the Defendant tendering rent to the Trust. He was not cross examined on this aspect, nor has the Defendant led any evidence to rebut this

5 (2003) 7 SCC 301

position. Hence the same stands established. That apart, it has come out from the further evidence led by PW-1 as well as the evidence of PW-2, both of which have been set out in detail above, that the Defendant addressed a letter dated 31st July 2015 to the Plaintiffs referring to them as landlords of Banaji Mansion (Exhibit P-83). Thereafter in furtherance of the directions of the Plaintiffs in their letter dated 28th October 2015 (Exhibit P-84), the Defendant issued 2 cheques of Rs. 50,000/- (Exhibits P-85 and 86) each as her contribution to the repair work in respect of the portion of Banaji Mansion between the 2nd and 3rd floor which had collapsed. The Defendant has not applied to lead any further evidence to rebut this oral and documentary evidence led by the Plaintiffs. Therefore, it can be concluded that the Defendant does not dispute that even during the pendency of these Suits, the Defendant has referred to the Plaintiffs as the landlords of Banaji Mansion, though it is her pleaded case that she is the owner of that property.

32.7 The Defendant's conduct speaks volumes and goes a long way in showing that she does not really consider herself to be the owner of at least one of the Suit Properties viz. Banaji Mansion situated on C.S. No. 405.

32.8 For all of the aforesaid reasons, I find that the Plaintiffs have established the Trust's title to the Suit Properties described in the Schedule annexed as Exhibit A to the Plaint in the High Court Suit, and the Defendant has failed to prove her alleged title to the same. I accordingly answer Issue No. 1 (in the High Court Suit) in favour of

the Plaintiffs and Issue No. 6 (in the City Civil Court Suit) against the Defendant (Bakhtawar Jijina).

33. **Issue Nos. 2 and 3 in the High Court Suit and Issue No. 7 of the City Civil Court Suit :**

2. Whether the Plaintiffs prove that Banaji Limji Agiary Trust is in possession of the properties which are the subject matter of these Suits?

3. Whether the Plaintiffs prove that the Defendant is attempting to interfere with or disturb their possession in respect of the properties which are the subject matter of these Suits?

7. Whether the Plaintiff proves that she is entitled to restrain the Defendants from dealing with or disposing of or creating third party rights in, or parting with possession of any of properties which are the subject matter of these Suits?

33.1 Since all of these issues deal with the aspect of possession of the Suit Properties, they are discussed and decided together as follows.

33.2 It is submitted by Mr. Tamboly on behalf of the Plaintiffs that the Trust is in long and settled possession of the suit properties. The Trust has been maintaining the Suit Properties and paying municipal taxes and repair cess in respect thereof as is evidenced by the receipts in respect of the same (Exhibit P 26 to P 33). Similarly, payment vouchers to the staff of the Agiary and its outhouses are evidence

of expenses incurred by the Trust in maintaining the properties (Exhibits P 51 to P 80). The Plaintiffs' witness PW-1 Shri Adi Burjor Banaji has deposed to the Municipal receipts issued for payment of Municipal Taxes at paragraph 11 of his Affidavit in lieu of examination-in-chief, and to the management and payment to employees at paragraph 13 of his Affidavit in lieu of examination-in-chief. He was not cross-examined on either of these two aspects and these aspects must accordingly be treated as established and uncontested by the Defendant.

33.3 According to Mr. Tamboly, the Defendant has nowhere claimed to be in possession of the Suit Properties in any of the pleadings filed by her or in her Affidavit in lieu of examination in chief. In fact, according to him, the Defendant's own prayers in the City Civil Court Suit are an admission on her part that the Plaintiffs / the Trust is in possession of the suit properties.

33.4 Mr. Tamboly contended that once it is admitted by the Defendant that the Plaintiffs are in possession of the Suit Properties, and if this Court finds in favour of the Plaintiffs on their claim to title to the Suit Properties, the Defendant should be restrained from in any manner trying to interfere with the Plaintiffs possession thereof.

33.5 On the other hand, Ms. Khobragade on behalf of the Defendant contended that the Plaintiffs case in respect of possession of the Suit Properties

cannot be accepted. It was argued that payment of municipal taxes cannot prove title or possession.

33.6 I am in agreement with the submissions made by Mr. Tamboly. I have already noted my findings above regarding the oral and documentary evidence led by PW-1 qua payment of municipal taxes, expenses incurred in maintaining the Suit Properties and payments made to the staff of the Trust, and the fact that this evidence has gone unchallenged and unrebutted by the Defendant. Moreover it has been correctly pointed out that it is not even the Defendant's case that she is in possession of the Suit Properties. It has correctly been pointed out that her prayers in the City Civil Court Suit amount to an admission that the Trust is in possession of the Suit Properties. The prayers in the City Civil Court Suit read as follows :

“(a) That this Hon'ble Court be pleased to restrain the Defendants, their agents, servants and / or person/s claiming by under or through them by an order of permanent injunction restraining the Defendants from in any manner inducting any third party and / or dealing with disposing off or **parting with possession** of the any gala/ shop/ office/ residential premises as also creating any tenancy or transferring tenancy or inducting third party in any capacity whatsoever or altering terms and conditions of evicting tenant in suit premises viz

	b) Building No.	Cadastral Survey No.	Structure size	Description
01	13	400	G+1	G= Occupied
				1= Occupied
02	14	450	G+4	G= Occupied

				1= Occupied
				2= Occupied
				3=vacant
				4=vacant
03	15	405	Ground	Godown
04	16	450	G+4	G= Occupied
				1= Occupied
				2= Occupied
				3=vacant
				4=vacant
05	17	400	G+3	G= Occupied
				1= Occupied
				2= Occupied
				3=Occupied by Plaintiff
06	18	450	Ground	G Occupied
07	21	405	G+1	G= Occupied
				1= Occupied

b) that this Hon'ble Court may be pleased to restrain the Defendants, their Agents, servants, employees and / or person/s claiming by under or through them by an order of injunction of this Hon'ble Court from in any manner inducting any third party and / or dealing with or **parting with possession of the suit premises as mentioned in prayer clause (a) herein above.**

[emphasis supplied]

33.7 The Defendant is clearly seeking to restrain the Plaintiffs from *inter alia* parting with possession of the Suit Properties. This is a clear admission on her part that the Plaintiffs are in possession of the Suit Properties. In any event, the Defendant does not even claim to be in possession of the Suit Properties, nor has she led any evidence in this regard. Even without the Defendant's admission, the Plaintiffs have produced sufficient evidence to demonstrate that they are in possession of the Suit

Properties and are maintaining the same. The Plaintiffs have asserted in paragraph 51 of the Plaint in the High Court Suit that they are in possession of the Suit Properties. In response to the same, in paragraph 70 of the Defendant's Written Statement in the High Court Suit, the Defendant has admitted that the Plaintiffs are in possession of the Suit Properties.

33.8 Therefore, there can be no manner of doubt about the Plaintiffs possession of the Suit Properties as Trustees of the Trust.

33.9 Once I have returned a finding in favour of the Plaintiffs qua the Trust's title to the Suit Properties, and once it is an admitted and established position before me that the Trust is in possession of the Suit Properties, I must answer Issue No. 2 in the High Court Suit in favour of the Plaintiff.

33.10 In so far as Issue No. 3 is concerned, the Plaintiffs have asserted in paragraph 43 of the High Court Suit that the Defendant on the strength of the amended Probate of the will of Banoo Nariman Shroff is attempting to get many of the immovable properties of the Trust transferred to her name. The Defendant has responded to paragraph 43 of the High Court Suit in paragraph 63 of her Written Statement, where she admits that on account of the amendment to the said Probate, she has made representations to certain authorities. Thus, it is an admitted position that the Defendant has made attempts in the past to try to get the Suit Properties

transferred in her name. This would in turn amount to an attempt to interfere with the Plaintiffs possession of the Suit Properties by trying to first get the same transferred in her name. Accordingly, Issue No. 3 is answered in favour of the Plaintiffs.

33.11 In so far as Issue No. 7 framed in the City Civil Court Suit is concerned, once I have found that the Trust is the owner of the Suit Properties, and once the same are found to be in the Trust's possession, the Issue must be answered in favour of the Plaintiffs and against the Defendant (Bakhtawar Jijina).

34. **Issue No. 4**

Whether the Defendant proves that the executants of the Deed of Poll dated 9th June 1876 were not Trustees but mere managers?

34.1 Ms. Khobragade on behalf of the Defendant has contended that a perusal of the recitals of the Trust Deed show that the Trustees of the Trust do not own the Suit Properties but are mere managers of the same.

34.2 On the other hand, Mr. Tamboly on behalf of the Plaintiffs contended that this submission is factually incorrect. The operative portion of the Trust Deed at Exhibit P-5 itself states that the properties and monies of the Trust vest in the then trustees. Every conveyance deed under which the remaining immovable properties of the Trust were purchased, state that they vest in the Trustees of the trust. Every

subsequent registered Deed of Appointment of Trustees records that the properties of the Trust vests in the Trust and the Trustees. The records of the Charity Commissioner including Schedule I which has been produced in this Court confirm that the Plaintiffs are Trustees of the properties of the Trust and not mere managers thereof. The Defendant has not led any evidence or produced any material to prove that the Trustees appointed under the Trust Deed were managers and not Trustees of the Agiary Property.

34.3 The Trust Deed is a registered instrument and I have already rendered my findings above qua the correctness of the contents thereof. A perusal of the same clearly establishes that the executants of the Trust Deed were the custodians of the properties and assets of the Trust and not mere managers of the same. Accordingly, Issue No. 4 is answered against the Defendant.

35. Additional issue :

(i) Whether the Defendant proves that the Suit as filed, is not maintainable for the reasons set out by the Defendant in her Written Statement?

36. This Issue relates to the High Court Suit. In respect of this Issue, Ms. Khobragade for the Defendant submitted as follows :

36.1 The resolution of the Trust authorizing the filing of this Suit has not been produced in evidence. Hence, the Suit as filed is bad in law. That apart there is no sufficient authority in the Plaintiffs to file the present Suit. In support of this, Ms. Khobragade relied upon the judgment of the Privy Council in the case of **Man Mohan Das v Janaki Prasad**⁶ to contend that a trustee cannot delegate his power and that all the Trustees must act jointly. Ms. Khobragade also relied upon the judgment in the case of **Atmaram Ranchodbhai v Ghulamhusein Gulam Mohiyaddin**⁷ to contend that in such circumstances the suit would stand defeated. She further contended that all the Trustees of the Trust have not been made parties to the Suit.

36.2 Ms. Khobragade submitted that Plaintiff No. 3 has belatedly been made a party to the High Court Suit. Such amendment cannot relate back to the date of filing of the Suit. The cause of action according to her as per the Plaint, to file the High Court Suit arose in 1991 and hence the Suit is barred by limitation. In support of her contention that even the amendment is barred by the law of limitation, she placed reliance on the judgment of this Court in the case of **Dattaram V. Dharwadkar v/s Ghanshyam G. Bhende**⁸.

6 AIR 1945 PC 234

7 AIR 1973 Guj 113

8 2001 (1) Mah. L.J. 43

36.3 Ms. Khobragade relied upon the judgment of the Supreme Court in the case of **Vidhyadhar v/s Manikrao**⁹ to contend that a Defendant can raise any legitimate plea to defeat the suit of a Plaintiff.

36.4 Ms. Khobragade next contended that the Suit would require permission of the Charity Commissioner under section 51 of the Maharashtra Public Trusts Act, 1951 before being filed, and failure to obtain the same renders the Suit defeated. In support of this submission, she relied upon the judgment of this Court in the case of **Rajgopal Ragunathdas Somani v Ramachandra Hajarimal Jhavar**¹⁰.

37. In response, Mr. Tamboly for the Plaintiffs submitted as follows :

37.1 The present suit is one for declaration of title and injunction in favour of the Plaintiffs as Trustees of the Banaji Limjee Agiary Trust against the Defendant, who is claiming title to the trust properties as vesting in her and adversely to the Trust. The requirement for taking the Charity Commissioner's permission as contemplated under section 50 of the Act does not apply to the present Suit filed by Trustees. The bar of filing a suit by a third party, who is alien to the Trust, without taking the permission of the Charity Commissioner, does not apply to Trustees of a Trust.

9 (1999) 3 SCC 573

10 (1966) 69 Bom. L.R. 472

37.2 Mr. Tamboly relied upon a decision of this Court in **Gurusiddappa Tipanna Muger v. Miraj Education Society, Miraj**¹¹ to contend that a Suit of the present nature does not require permission of the Charity Commissioner under section 50 of the Maharashtra Public Trusts Act, 1950 prior to institution.

37.3 Mr. Tamboly further relied upon the same decision of this Court in the case of *Rajgopal Ragunathdas Somani vs Ramchandra Hajarimal Jhavar (supra)* cited by Ms. Khobragade to contend that suits by trustees against persons who are strangers to the trust and who set up title adverse to the trust, are not covered by section 50 of the Maharashtra Public Trusts Act, 1950.

37.4 Mr. Tamboly further contended that in 1971, section 50 of the Maharashtra Public Trusts Act, 1950 was amended to read as it does today. A Division Bench of this Court in the case of **Amirchand Tulsiram Gupta vs Vasant Dhanaji Patil**¹² held that the amendment to section 50 had no impact to the legal position that suits by Trustees of a trust are not covered by that section. He submitted that the Division Bench reiterated the legal position propagated in the aforesaid two decisions that a suit by Trustees of a trust is maintainable even without permission of the Charity Commissioner.

11 1961 (63) Bom. LR 312

12 1992 (2) Bom C.R. 22

37.5 Mr. Tamboly accordingly submitted that the present Suit having been filed by the Trustees of the Trust to protect the Suit Properties from the adverse claims of the Defendant, a private third party, the permission of the Charity Commissioner was not required before instituting the same.

37.6 Mr. Tamboly argued that without prejudice to the above submissions, assuming that the permission of the Charity Commissioner is required before instituting a suit in relation to a public trust in cases falling under section 50(iv), the declaration / injunction sought for must fall under one or more of the categories mentioned in (a) to (q) of that sub section. In the absence of the same, the permission of the Charity Commissioner is not required before instituting a Suit. Reliance was placed by him on the decision of a learned Single Judge of this Court in the case of *Gerald Shirley vs Dipesh Mehta*¹³ in support of this submission. He submitted that the reliefs claimed in the present suit do not fall under (a) to (q) of section 50(iv) of the Act. Hence the question of obtaining the Charity Commissioner's permission before filing the present Suit, did not arise and there was requirement of obtaining such permission under that provision before filing the High Court Suit.

37.7 In response to the Defendant's submission that the present Suit has been filed without sufficient authority, it was contended by Mr. Tamboly that all the original Plaintiffs in their capacity as Trustees have affirmed the Plaint as well as

¹³ (2014) 4 Bom CR 778

signed the Vakalatnama in favour of their Advocates on Record. This is enough to demonstrate that all the Trustees of the Trust have unanimously decided to file the present Suit. The Defendant has failed to show that a separate resolution is required to be annexed to the Plaint, either from the documents on record, or as a matter of law, before the Suit can be stated to be properly filed. The Defendant has not led any evidence to show how the present suit has been filed allegedly without authority. Once all the Trustees of the Trust have signed the Plaint at the time of instituting the same, then the question of them requiring any further authority from themselves does not arise.

38. The objections raised by the Defendant to the maintainability of the Suit are two – fold. The first is on the ground that the Plaintiffs lack the necessary authority to institute the Suit, and the second is on the ground of want of Charity Commissioner’s permission under section 50 of the Maharashtra Public Trusts Act, 1950.

39. Dealing with the first objection, I find that the same is not credible, simply because the High Court Suit has been affirmed by all the Plaintiffs at the time of institution of the Suit. The Vakalatnama in favour of the Plaintiffs Advocates on record has also been signed by all the Plaintiffs at the time of institution of the Suit. Therefore, this is not a case of one of the Trustees of the Trust acting on behalf of

some or all of the rest. Hence, once all the original Plaintiffs have signed for themselves at the time of instituting the Suit, I fail to see what further authority they require. In this context I must note that I have already declined to entertain the Defendant's objections to the validity of the Plaintiffs appointments as Trustees of the Trusts, as the same is not within this Court's jurisdiction as found above.

40. It cannot be said that the Trustees have not acted jointly or that they have delegated their authority or power as trustees to others.

41. Ms. Khobragade's submission that as per the averments in the Plaint, the cause of action arose in the year 1991, or that the High Court Suit is barred by limitation, cannot be accepted. In paragraph 42 of the High Court Suit, the Plaintiffs have stated that they came to know of the fact that the Defendant had amended the schedule to the Probate of the will of Banoo Nariman Shroff on 28th August 2012 when the Defendant disclosed the same during the course of the City Civil Court Suit. Moreover, the Defendant filed the City Civil Court Suit in August 2011 where she has set up title in the Suit Properties unto herself. The High Court Suit is filed by the original Plaintiffs on 20th February 2014 claiming title to the Suit Property. Therefore, the Suit has been filed well within a period of three years of the cause of action arising as per the averments in the High Court Suit. I do not find any averment therein to support Ms. Khobragade's submission that the same discloses that the cause of action

arose in 1991. The Suit has been filed well within time. Therefore, I do not see how the judgment in the case of **Dattaram V. Dharwadkar v/s Ghanshyam G. Bhende** (*supra*) would be applicable in the facts of this case for the proposition canvassed by Ms. Khobragade.

42. Coming to Ms. Khobragade's contention that the High Court Suit is not maintainable as the Charity Commissioner's permission has not been taken under section 50 of the Maharashtra Public Trusts Act, 1950 before instituting the same, I am not in agreement with the same.

43. Section 50 of the Maharashtra Public Trusts Act, 1950, reads as follows :

“50. Suit by or against or relating to public trusts or trustees or others. — In any case, —

- (i) where it is alleged that there is a breach of a public trust, negligence, misapplication or misconduct on the part of a trustee or trustees,
- (ii) where a direction or decree is required to recover the possession of or to follow a property belonging or alleged to be belonging to a public trust or the proceeds thereof or for an account of such property or proceeds from a trustee, ex-trustee, alienee, trespasser or any other person including a person holding adversely to the public trust but not a tenant or licensee,
- (iii) where the direction of the Court is deemed necessary for the administration of any public trust, or
- (iv) for any declaration or injunction in favour of or against a public trust or trustee or trustees or beneficiary thereof,

the Charity Commissioner after making such enquiry as he thinks necessary, or two or more persons having an interest in case the suit is under sub-clauses (i) to (iii), or one or more such persons in case the suit is under sub-clause (iv) having obtained the consent in writing of the Charity Commissioner as provided in section 51 may institute a suit whether contentious or not in the Court within the local limits of whose jurisdiction the whole or part of the subject-matter of the trust is situate, to obtain a decree for any of the following reliefs:—

- (a) an order for the recovery of the possession of such property or proceeds thereof;
- (b) the removal of any trustee or manager;
- (c) the appointment of a new trustee or manager;
- (d) vesting any property in a trustee;
- (e) a direction for taking accounts and making certain enquiries;
- (f) an order directing the trustees or others to pay to the trust the loss caused to the same by their breach of trust, negligence, misapplication, misconduct or wilful default;
- (g) a declaration as to what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
- (h) a direction to apply the trust property or its income cypres on the lines, of section 56 if this relief is claimed along with any other relief mentioned in this section;
- (i) a direction authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged or in any manner alienated on such terms and conditions as the court may deem necessary;
- (j) the settlement of a scheme, or variations or alterations in a scheme already

settled;

(k) an order for amalgamation of two or more trusts by framing a common scheme for the same;

(l) an order for winding up of any trust and applying the funds for other charitable purposes;

(m) an order for handing over of one trust to the trustees of some other trust and deregistering such trust;

(n) an order exonerating the trustees from technical breaches, etc.

(o) an order varying, altering, amending or superseding any instrument of trust;

(p) declaring or denying any right in favour of or against a public trust or trustee or trustees or beneficiary thereof and issuing injunctions in appropriate cases; or

(q) granting any other relief as the nature of the case may require which would be a condition precedent to or consequential to any of the aforesaid reliefs or is necessary in the interest of the trust:

Provided that no suit claiming any of the reliefs specified in this section shall be instituted in respect of any public trust, except in conformity with the provisions thereof:

Provided further that, the Charity Commissioner may instead of instituting a suit make an application to the Court for a variation or alteration in a scheme already settled:

Provided also that the provisions of this section and other consequential provisions shall apply to all public trusts, whether registered or not or exempted from the provisions of this Act under sub-section (4) of section 1.”

44. The Division Bench judgment of this Court in the case of **Rajgopal Ragunathdas Somani vs Ramchandra Hajarimal Jhavar** (*supra*) cited by Ms.

Khobragade actually goes against the Defendant. The Division Bench of this Court has held that the provision of section 50 of the Bombay Public Trusts Act is analogous to section 92 of the Code of Civil Procedure, 1908. Its provisions were never meant to act as a curb upon the normal powers of trustees in the matter of instituting suits. The Division Bench held that the Trustee being the legal owner of the trust property can file a suit to recover trust property without any restriction. Section 50 was intended to permit persons interested in the trust to sue, in case the trustees failed in their duties, however with the permission of the Charity Commissioner so as to avoid frivolous litigation. It was held that suits by trustees against persons who are strangers to the trust and who set up title adverse to the trust, are not covered by section 50. This judgment would be applicable to the facts of the present case where the Plaintiffs have instituted the High Court Suit in their capacity as Trustees of the Trust to protect the Suit Properties from the Defendant who is a third party claiming an adverse interest therein.

45. In *Gurusiddappa Tipanna Mugeru v. Miraj Education Society, Miraj* (supra) a learned Single Judge of this Court in the context of the un-amended provision of section 50 of the Bombay Public Trusts Act, 1950 held as follows :

“The underlying object of Section 50 of the Act is to put an embargo on frivolous litigations and the consent of the Charity Commissioner is regarded as a sort of safety valve for avoiding acrimonious and frivolous litigations. Ordinarily, the trustees of a trust can institute a suit against a third person for the recovery of the trust property..... It is

significant to note that Section 50 of the Act does not contemplate a suit by the trustees as such. It contemplates a suit either by the Charity Commissioner or two or more persons having an interest in the trust provided that they had obtained consent in writing of the Charity Commissioner. If Mr. Sukthankar's argument is accepted, it will lead to startling results viz., that in respect of all charities spread over the vast territories of the Bombay State, it is open to the Charity Commissioner to file a suit on behalf of the trusts against trespassers or third persons. Ordinarily, suits against third persons who claim title in themselves must be filed by the trustees who are legal owners and as such represent, the beneficiaries. The Charity Commissioner is a public functionary and cannot ordinarily represent the trust in disputes between the trust on the one hand and a private person on the other. It is only in respect of disputes arising out of administration of and management of the public trusts that the Charity Commissioner comes into the picture and Section 50 of the Act, provides that the Charity Commissioner or two or more persons interested in the trust can file a suit for the various reliefs that have been set out in Sub-clauses (a) to (h) of Clause (iii) thereof. **In my opinion, the relief claimed in the present suit raises a dispute between the trust, which happens to be a public trust vis., the plaintiff, on the one side and a private person, who claims title in himself, on the other. It is not necessary for the institution of such a suit to obtain the consent of the Charity Commissioner. The consent of the Charity Commissioner under Section 50 of the Act is necessary for persons who are not trustees but who are merely interested in the trust property."**

[Emphasis supplied]

46. It is therefore clear, the suits of the present nature are not covered by Section 50 of the Maharashtra Public Trusts Act, 1950.

47. For all of the aforesaid reasons, I find that the Defendant has not demonstrated her case that the High Court Suit is not maintainable, and the additional Issue is answered against her.

CONCLUSION

48. I am summarizing my findings on the Issues in both these Suits as follows :

Issue No.	Issue	Answer
1.	<u>Issues in Suit No.236 of 2014 (the High Court Suit):</u> Whether the Plaintiffs prove that they, as Trustees of Banaji Limji Agiary Trust, are the owners of, and are well and sufficiently entitled, to the immovable properties which are the subject matter of these Suits?	Yes
2.	Whether the Plaintiffs prove that Banaji Limji Agiary Trust is in possession of the properties which are the subject matter of these Suits?	Yes
3.	Whether the Plaintiffs prove that the Defendant is attempting to interfere with or disturb their possession in respect of the properties which are the subject matter of these Suits?	Yes
4.	Whether the Defendant proves that	No

	the executants of the Deed of Poll dated 9 th June 1876 were not Trustees but mere managers?	
5.	What order?	Suit decreed in terms of prayers (a) to (d) of High Court Suit
Additional issue (i)	Whether the Defendant proves that the Suit as filed, is not maintainable for the reasons set out by the Defendant in her Written Statement?	No
	<u>Issues in transferred Bombay City Civil Court Suit No.2546 of 2011 (the City Civil Court Suit):</u>	
6.	Whether the Plaintiff proves that as the proving sole executor of, and the universal legatee under the last Will and Testament of late Banoo Nariman Shroff, the Plaintiff is entitled to claim interest in respect of the properties which are the subject matters of these Suits?	No
7.	Whether the Plaintiff proves that she is entitled to restrain the Defendants from dealing with or disposing of or creating third party rights in, or parting with possession of any of properties which are the subject matter of these Suits?	No

8.	To what reliefs, Plaintiff is entitled?	None
9.	What order?	City Civil Court Suit dismissed

49. In view of the findings on all the Issues rendered above, the City Civil Court Suit filed by the Defendant i.e. Bakhtawar Jijina is dismissed with costs, and the High Court Suit filed by the Plaintiffs is decreed with costs in terms of prayer clauses (a) to (d) which read thus :

- a) that it be declared that the Plaintiffs, as Trustees of the Banaji Limji Agiary Trust are the owners of and are entitled to the properties described in the Schedule annexed as Exhibit "A" hereto;*
- b) that it be declared that the deceased Banoo Nariman Shroff, never had any right, title or interest in any of the immovable properties described in the schedule annexed as Exhibit A hereto;*
- c) that it be declared that the Defendant has no right, title or interest in any of the immovable properties described in the schedule annexed as Exhibit A hereto;*
- d) that this Hon'ble Court be pleased to grant a permanent order and injunction:*
 - (i) Restraining the Defendant by herself or by her servants and agents by permanent order and injunction of this Hon'ble Court from in any manner entering upon the properties described in Exhibit "A"*

- hereto or any part thereof or from in any manner interfering with or disturbing the Plaintiffs' possession of the properties described in Exhibit "A" hereto or any part hereof;*
- (ii) *Restraining the Defendant by herself or by her servants and agents from in any manner dealing with, disposing off, transferring, alienating, encumbering, or creating any third party right in respect of the properties more particularly described in Exhibit "A" hereto or any part thereof;*
- (iii) *Restraining the Defendant from holding herself out as the owner of or has having any right title or interest of any nature whatsoever in any of the immovable properties described in Exhibit "A" hereto or any part thereof*

50. It is clarified that the injunction granted as per prayer clause (d) (i) above will not come in the way of the Defendant accessing the individual tenements in her possession in Banaji Mansion, subject of course to the outcome of the trespass action filed by the Plaintiffs against her in respect of the same.

(S.J.KATHAWALLA, J.)

51. The learned Advocates appearing for the parties have made a request that the Prothonotary be directed to handover to them original documents tendered by them in Court in these Suits upon them replacing the same by copies authenticated

by the respective Advocates and also furnishing undertakings to the effect that they shall produce the originals as and when called upon by the Court to do so. Ordered accordingly.

(S.J.KATHAWALLA, J.)