

Arun

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 158 OF 2017

IN

NOTICE OF MOTION NO. 1022 OF 2014

IN

SUIT NO. 573 OF 2014

WITH

NOTICE OF MOTION NO. 70 OF 2019

IN

APPEAL NO. 158 OF 2017

IN

NOTICE OF MOTION NO. 1022 OF 2014

IN

SUIT NO. 573 OF 2014

WITH

NOTICE OF MOTION NO. 5 OF 2021

IN

APPEAL NO. 158 OF 2017

IN

NOTICE OF MOTION NO. 1022 OF 2014

ARUN
RAMCHNDRA
SANKPAL

Digitally signed
by ARUN
RAMCHNDRA
SANKPAL
Date: 2022.10.11
10:45:39 +0530

IN
SUIT NO. 573 OF 2014
WITH
NOTICE OF MOTION NO. 1030 OF 2017
IN
APPEAL NO. 158 OF 2017
IN
NOTICE OF MOTION NO. 1022 OF 2014
IN
SUIT NO. 573 OF 2014
WITH
NOTICE OF MOTION NO. 1036 OF 2017
IN
APPEAL NO. 158 OF 2017
IN
NOTICE OF MOTION NO. 1022 OF 2014
IN
SUIT NO. 573 OF 2014
WITH
NOTICE OF MOTION (L) NO. 833 OF 2019
IN
APPEAL NO. 158 OF 2017
IN
NOTICE OF MOTION NO. 1022 OF 2014
IN

SUIT NO. 573 OF 2014

1. **DIPESH MEHTA,**
Indian inhabitant, having address at
Dhoop Chhaon, Plot No.201, Road
No 28, Bandra (West), Mumbai 400
050.
2. **VIKRAM MALIK,**
Indian inhabitant, having address at
801, Shivtirth Estate No.2, Bhulabhai
Desai Road, Opp Heera Panna,
Mumbai 400 026.
3. **JEANNETTE ANAND,**
Indian inhabitant, residing at 14,
Shreyas Building, Marine Drive,
Mumbai 400 020.
4. **MARION PANJWANI,**
Indian inhabitant, having address at
93/B, Miramar Building, Behind St
Stephens Church, 3, Nepean Sea
Road, Mumbai 400 026.

... APPELLANTS
(ORIG. DEFENDANTS)

~ VERSUS ~

1. **GERALD SHIRLEY,**
Indian inhabitant, residing at
701, Lok Nirman, 3A, Ambedkar
Road, Khar (West), Mumbai 400 052
2. **ALON MOOLEMAN**
Indian inhabitant, carrying on
business at Block No. 11/B, Ground
Floor, The Parel Cotton Press Factory
Premises, Mumbai 400 012.
3. **GIOVANNI AUTUNNO,**
Indian inhabitant, residing at Genesis
Villa, St Francis Avenue,

Santacruz (West), Mumbai 400 054.

4. **ANYA LEHRA,**
Indian inhabitant, residing at A-502,
Fine Touch Building, M Shetty Marg,
Agripada, Mumbai 400 008.
5. **LALIT AGRAWAL,**
Indian inhabitant, having address at C-
402, Green Woods, Andheri-Kurla
Road, Opp Chintamani Plaza,
Chakala, Andheri (East), Mumbai 400
093.
6. **THE COLLECTOR OF MUMBAI,**
Mumbai City Collectorate, Old
Customs House, Fort, Mumbai 400
001
7. **THE CHARITY
COMMISSIONER,**
Dharmaday Ayukta Building,
3rd floor, Dr Annie Besant Road,
Worli, Mumbai 400 018.

...RESPONDENT
(ORIG. PLAINTIFF)

APPEARANCES

FOR THE APPELLANTS	Mr Rumi Mirza, with Kaushal Thakker & Geetika Rajpa, i/b Prashant P Kulkarni.
FOR RESPONDENT	Mr Shiraz Rustomjee, Senior Advocate, with Archit Jayakar, Divya Tyagi, Pooja Yadav & Parita Mashruwala, i/b Jayakar & Partners.
FOR RESPONDENTS NOS. 6 & 7	Mr Himanshu B Takke, AGP.
FOR THE APPLICANT IN	Mr Aditya Pratap.

**NMA(L) No. 833 Of
2019**

**WITH
APPEAL NO. 347 OF 2016
IN
NOTICE OF MOTION NO. 1022 OF 2014
IN
SUIT NO. 573 OF 2014
WITH
NOTICE OF MOTION NO. 71 OF 2019
IN
APPEAL NO. 347 OF 2016
IN
NOTICE OF MOTION NO. 1022 OF 2014
IN
SUIT NO. 573 OF 2014
WITH
NOTICE OF MOTION (L) NO. 307 OF 2016
IN
APPEAL NO. 347 OF 2016
IN
NOTICE OF MOTION NO. 1022 OF 2014
IN
SUIT NO. 573 OF 2014**

LALIT AGRAWAL,
an adult, Indian Inhabitant,
Residing at C-402, Green Woods, Andheri-
Kurla Road, Opp Chintamani Plaza, Chakala,
Andheri (East), Mumbai 400 093.

...APPELLANT
(ORIG. DEFENDANT)

~ VERSUS ~

1. **THE BREACH CANDY
SWIMMING BATH TRUST,**
A public charitable trust, registered
under the provisions of the
Maharashtra Public Trusts Act, 1950
having Registration No.E/1780 and
having its office at 66, Bhulabhai Desai
Road, Mumbai 400 026.
2. **GERALD SHIRLEY,**
an adult, Indian Inhabitant,
residing at 701, Lok Nirman, 3A
Ambedkar Road, Khar (West),
Mumbai 400 052.
3. **ALON MOOLEMAN,**
an adult, Indian Inhabitant,
carrying on business at Block No.
11/B, Ground Floor, The Parel Cotton
Press Factory Premises, Mumbai 400
012.
4. **GIOVANNI AUTUNNO,**
an adult, Indian Inhabitant,
residing at Genesis Villa, St Francis
Avenue, Santacruz (West), Mumbai
400 054.

5. **ANYA LEHRA,**
Indian Inhabitant, residing at A-502,
Fine Touch Bldg, M Shetty Marg,
Agripada, Mumbai 400 008.
6. **DIPESH MEHTA,**
an adult, Indian Inhabitant,
residing at Dhoop Chhaon, Plot No.
201, Road No. 28, Bandra (West),
Mumbai 400 050.
7. **VIKRAM MALIK,**
an adult, Indian Inhabitant,
residing at 801, Shivtirth Estate No.2,
Bhulabhai Desai Road, Opp Heera
Panna, Mumbai 400 026.
8. **JEANNETTE ANAND**
an adult, Indian Inhabitant,
residing at 14, Shreyas Building,
Marine Drive, Mumbai 400 020.
9. **MARION PANJWANI,**
an adult, Indian Inhabitant,
residing at 93/B, Miramar Building,
Behind St Stephens Church, 2,
Nepean Sea Road, Mumbai 400 026.
10. **BENNO LUEKE,**
an adult, Indian Inhabitant,
residing at Flat No. 901/902, 9th
floor, Vastu Cooperative Housing
Society Ltd, Dr RE Thadani Marg,
Worli, Mumbai 400 030.
11. **MUMBAI CITY COLLECTOR,
STATE OF MAHARASHTRA,**
Old Customs House, Fort, Mumbai
400 001.

**12. OFFICE OF THE CHARITY
COMMISSIONER, STATE OF
MAHARASHTRA,**
exercising powers under the
Maharashtra Public Trusts Act, 1950
and having office at Dharmadaya
Ayukta Bhavan, Dr Annie Besant
Road, Worli, Mumbai 400 018.

... RESPONDENTS
(ORIG. PLAINTIFFS)

APPEARANCES

FOR THE APPELLANTS	Mr Chirag Mody, with Gaurav Mehta, Prachi Garg, Ashwini Hariharan and Shivani Khanwilkar, i/b DSK Legal.
FOR RESPONDENT	Mr Sharan Jagtiani, Senior Advocate, with Archit Jayakar, Priyank Kapadia, Siddharth Joshi, Divya Tyagi, Pooja Yadav & Parita Mashruwala, i/b Jayakar & Partners.
FOR RESPONDENTS NOS. 11 & 12	Mr Himanshu B Takke, AGP.

WITH
APPEAL NO. 324 OF 2014
IN
NOTICE OF MOTION NO. 1022 OF 2014
IN
SUIT NO. 573 OF 2014

1. **DIPESH MEHTA,**
Indian Inhabitant having address at
Dhoop Chhaon, Plot No. 201,
Road No. 28, Bandra (West),
Mumbai 400 050.
2. **VIKRAM MALIK,**
Indian Inhabitant having address at
801, Shivtirth Estate No.2, Bhulabhai
Desai Road, Opp Heera Panna,
Mumbai 400 026.
3. **LALIT AGARWAL,**
Indian inhabitant having address at
C-402, Green Woods, Andheri-Kurla
Road, Opp Chintamani Plaza,
Chakala,
Andheri (East), Mumbai 400 093.
4. **JEANNETTE ANAND,**
Indian Inhabitant, residing at 14,
Shreyas Building, Marine Drive,
Mumbai 400 020.
5. **MARION PANJWANI,**
Indian Inhabitant, having address at
93/B, Miramar Building, Behind St
Stephens Church, 3, Nepean Sea
Road,
Mumbai 400 026.
6. **BENNO LUEKE,**
Indian Inhabitant, having address at
Flat No. 901/902, 9th floor,
Vastu Coop Hsg Soc Ltd,
Dr RE Thadani Marg, Worli,
Mumbai 400 030.

... APPELLANTS
(ORIG. DEFENDANTS)

~ VERSUS ~

1. **GERALD SHIRLEY,**
Indian inhabitant, residing at 701,
Lok Nirman, 3-A, Ambedkar Road,
Khar (West), Mumbai – 400 052.
2. **ALON MOOLEMAN,**
Indian inhabitant carrying on business
at Block No. 11/B, Ground Floor, The
Parel Cotton Press Factory Premises,
Mumbai 400 012.
3. **GLOVANNI AUTUNNO,**
Indian inhabitant, residing at Genesis
Villa, St Francis Avenue,
Santacruz (West), Mumbai 400 054.
4. **ANYA LEHRA,**
Indian inhabitant, residing at A-502,
Fine Touch Bldg, M Shetty Marg,
Agripada, Mumbai – 400 008.

... RESPONDENTS
(ORIG. PLAINTIFFS)

APPEARANCES

FOR THE APPELLANT	Mr Rumi Mirza, with Kaushal <i>Thakker & Geetika Rajpa, i/b</i> <i>Prashant P Kulkarni.</i>
FOR RESPONDENTS	Mr Shiraz Rustomjee, Senior Advocate, with Archit Jayakar, <i>Divya Tyagi, Pooja Yadav &</i> <i>Parita Mashrumwala, i/b</i> <i>Jayakar & Partners.</i>

AND
APPEAL NO. 323 OF 2014
IN

NOTICE OF MOTION NO. 202 OF 2014

IN

SUIT NO. 111 OF 2014

1. **DIPESH MEHTA,**
Indian Inhabitant having address at
Dhoop Chhaon, Plot No. 201, Road
No. 28, Bandra (West), Mumbai 400
050.
2. **VIKRAM MALIK,**
Indian Inhabitant having address at
801, Shivtirth Estate No.2, Bhulabhai
Desai Road, Opp. Heera Panna,
Mumbai 400 026.
3. **LALIT AGARWAL,**
Indian Inhabitant having address at
C-402, Green Woods, Andheri-Kurla
Road, Opp Chintamani Plaza,
Chakala, Andheri (East), Mumbai 400
093.
4. **BENNO LUEKE,**
Indian Inhabitant having address at
Flat No. 901/902, 9th Floor, Vastu,
Dr RE Thadani Marg, Worli,
Mumbai 400 030.
5. **JEANNETTE ANAND,**
Indian Inhabitant having address at
14, Shreyas Building, Marine Drive,
Mumbai 400 020.
6. **MARION PANJWANI,**
Indian Inhabitant having address at
93/B, Miramar Building, Behind
St Stephens Church, 3, Nepean Sea
Road, Mumbai 400 026.

7. **BINAIFER JANI**,
Indian Inhabitant having address at
Jani Niwas, Hanuman Building,
Katrak Road, Wadala, Mumbai 400
031.
8. **NANIK MULCHANDANI**,
Indian Inhabitant having address at
Silvan Roche, 21, Carmichael Road,
Mumbai 400 026.
9. **SANDEEP MEHTA**,
Indian Inhabitant having address at
Le Chateau, 9th Floor,
15th Road TPS-III, Bandra (West),
Mumbai 400 050.

...APPELLANTS
(ORIG. DEFENDANTS)

~ VERSUS ~

1. **GERALD SHIRLEY**,
Indian Inhabitant, residing at 701,
Lok Nirman, 3-A, Ambedkar Road,
Khar (W), Mumbai 400 052.
2. **ALON MOOLEMAN**,
Indian Inhabitant, carrying on
business at Block No.11/B, Ground
Floor, The Parel Cotton Press Factory
Premises, Mumbai 400 012.
3. **GIOVANNI AUTUNNO**,
Indian Inhabitant, residing at Genesis
Villa, St Francis Avenue,
Santacruz (West), Mumbai 400 054.
4. **ANYA LEHRA**,
Indian Inhabitant, residing at A-502,
Fine Touch Bldg, M Shetty Marg,
Agripada, Mumbai 400 008.

5. **IVANA PEROVIC**,
Indian Inhabitant, residing at
Palacimo, 6th Floor, Warden Road,
Mumbai 400 036.
6. **AMANDA PADAMSEE**,
Indian Inhabitant, residing at 2502,
Hilla Towers, 'B' Wing, 121 Dr SS
Rao Road, Lalbaug, Mumbai.
7. **MOHIT HARCHANDRAI**,
Indian Inhabitant, residing at 11,
Bayview Ridge Road, Malabar Hill,
Mumbai 400 006.
8. **DANIEL SHAH**,
Indian Inhabitant, residing at C/o. Ms
Ivanna Perovic Palacimo, 6th Floor,
Warden Road, Mumbai – 400 036.
9. **REENA JAGTIANI**,
Indian Inhabitant, residing at 16, Palm
Court, 152, MK Road, Opp Oval
Maidan, Mumbai 400 020.

...RESPONDENTS
(ORIG. PLAINTIFFS)

APPEARANCES

FOR THE APPELLANTS

Mr Rumi Mirza, *with Kaushal
Thakker & Geetika Rajpa, i/b
Prashant P Kulkarni.*

FOR RESPONDENT

Mr Shiraz Rustomjee, Senior
Advocate,
*with Archit Jayakar, Divya
Tyagi, Pooja Yadav & Parita
Mashruwala, i/b Jayakar &
Partners.*

**CORAM : G.S.Patel &
Gauri Godse, JJ**

DATED : 3rd October 2022

ORAL JUDGMENT (Per GS Patel J):-

SECTIONS

A.	BACKGROUND & LITIGATION HISTORY	14
B.	QUESTIONS FOR DETERMINATION IN THE APPEALS	31
C.	APPELLATE INTERFERENCE IN INTERIM OR INTERLOCUTORY ORDERS	33
D.	JURISDICTION	38
E.	THE CONSTITUTION OF THE BREACH CANDY CLUB, MEMBERSHIP, AND MANAGEMENT	68
F.	SUMMARY AND FINAL DIRECTIONS.....	87

A. BACKGROUND & LITIGATION HISTORY

1. This common order and judgment will dispose of a group of Appeals and their associated Notices of Motion. There are four Appeals before us:

- (i) Appeal No. 158 of 2017, where the Appellant is now only one Dipesh Mehta (there were originally three others, but they have withdrawn from the Appeal and

accepted the impugned order) is against an interim order (SC Gupte J) dated 29th October 2015 in a Notice of Motion in Suit No 573 of 2014;

- (ii) Appeal No. 347 of 2016 by one Lalit Agarwal against the same order of Gupte J in a Notice of Motion in Suit No. 573 of 2014.
- (iii) Appeal No. 323 of 2014 is by Dipesh Mehta against an order of 7th May 2014 (Mrs RS Dalvi J) in a Notice of Motion in Suit No 573 of 2014.
- (iv) Appeal No. 324 of 2014, again by Dipesh Mehta (and originally others) also against the order of 7th May 2014 in a Notice of Motion in Suit No 111 of 2014.

2. The litigation history is complex. It has gone through many twists and turns over the last seven years. The litigation has also taken an unconscionable amount of the Court's time given the narrow nature of the controversy before us.

3. What we are concerned with is an elite membership Club in South Mumbai. This is the Breach Candy Swimming Bath. It is operated by the Breach Candy Swimming Bath Trust, a public charitable Trust registered under the Provisions of Maharashtra Public Trust Act 1950 ("MPT Act"). As we shall presently see, though the Trust is registered under the MPT Act, there is also a constitution and, perhaps unlike many other public charitable trusts, there is a governance according to this constitution. That governance includes a definition of various types or classes or categories of membership, provision for elections to the

management, etc. The Trust is not also registered as a society under the Societies Registration Act 1860. Even so, there is this constitution that controls day-to-day management, operations and control of the Club itself.

4. First, about the Club itself. On 1st March 2015, shortly after this litigation commenced, there appeared in the English literary magazine, *Granta*, most illuminating article by Samanth Subramanian captioned, simply, ‘Breach Candy’. It has an engaging introduction to the Club itself, and, in particular, the configuration of the main swimming pool for which it is well-known. There is in this article also quite an introduction to the litigation that was then afoot in this very Court before one of the learned Single Judges. For our purposes, as an overview of the Club, the following extract should be sufficiently descriptive (there are far more colourful passages in the article, but prudence demands we leave those out).

If you climb onto the diving platform of the pool at the Breach Candy Club, and if you turn your back to the ocean expiring upon the rocks a few yards away, you look up into Mumbai. Or perhaps Mumbai looks down upon you, from its skyscraping fastnesses, the buildings rising higher and higher, pressing down upon the low, easy profile of the club, crowding it into the sea. To the left is the egg-white hulk of the Breach Candy Hospital; to the right, an apartment complex of similar height, painted a cheerful blue. In the distance hovers Antilia, the twenty-seven-floor, billion-dollar home of India’s richest man. Much closer — right across the road from the club, in fact — is the stillborn residence of a slightly poorer tycoon, a textile baron. For years now, it has been shrouded in green netting because, rumour has it, Antilia’s owner was so affronted by the

thought of another luxury mansion sharing the skyline that he stalled the permits it required. At night, when the rest of the buildings burn with light, the textile baron's house stands dark and cold, like a big rotten tooth. There, further away, are the Imperial Towers, twin condominiums sixty floors high, the tallest buildings in India. On a Diwali night, a friend told me, he had attended a party on the twentieth floor of one Imperial Tower or the other, and from the balcony, amid the fireworks, the city looked like Fallujah during the Iraq war. Not that he had been to Fallujah during the Iraq war, but somehow Mumbai seems to prod you into reaching only for the most fevered comparisons. Yet another skyscraper is under construction, a crane perched atop its shell. And curiously, nearer to earth, are a gabled roof and a pointed, clay-coloured turret — a turret! — that belong to Windsor Villa, where Salman Rushdie lived as a boy during the 1950s, and from where, as he wrote in *Midnight's Children*, he could spot pink people 'cavorting in the map-shaped pool of the Breach Candy Club, from which we were, of course, barred'. This very pool, in other words, the one excavated in the outline of undivided India, such that Kashmir lies right below your feet as you stand atop the diving platform.

The minute I saw the pool, I realized that its designers had missed a trick. It should have been laid out, really, so that the western coast of Pool India was aligned with the western coast of Real India, given that the club perched so conveniently on the shore. That way, when the sun doused itself in the Arabian Sea every evening, both Indias would have slipped in clean parallel into night. Instead, Pool India has been rotated a quarter-turn counterclockwise, so that a large lawn stretches away to its west, near Pakistan, while a smaller lawn and cafe sit roughly in Myanmar. The restaurant and bar are in southern Afghanistan. Sri Lanka is the kiddies' pool.

...

By virtue of its outline, the pool is able to inject a charged symbolism into any consideration at all of the club's affairs. In building the pool during the Raj, for instance, the British were emphasizing their ownership of India, their iron control over its borders and its topography. After 1947, when India gained its independence, the club insisted that it would continue to restrict membership to Europeans only, not quite ready to hand India — the pool, the country — over to its people. In the late 1960s, when protesters picketed the entrance to the club, demanding that Indians be made members as well, they were trying to wrest India — the country, the pool — out of the persisting fug of colonialism.

And so to the present, to the events that began in 2012, when the erection of a wall next to the kiddies' park precipitated a schism within the club. Nominally, at least, the factions were tussling over the club's arch commandment: that while Indians can become 'ordinary' members, only Europeans can become trust members, therefore entitled to serve on the managing committee and steer its business. Once, this rule could safely be said to favour white Europeans and no one else; today, in theory, its ambit includes Indians with European passports, but white people still fill most of this upper tier of membership. This is a deliciously shocking situation, so fat with political incorrectness that a brawl seemed proper and justified. But then the matter took on broader contours. There was a legal battle. There were signs of an old elite rattled by, and ready to be contemptuous of, the brazenness of new money. There were rumbles of fraud and corruption, of a mania for land and of politicians flexing their muscles in the shadows, until we appeared to be talking not of the Breach Candy Club but of India herself, the country once again in perfect congruence with the pool.

The kiddies' park — as the members of the club uniformly call it, even in stodgy legal documentation — is a square of land, measuring just under an acre, lying to one side of the parking lot. The very presence of a park, in a city starved of open space, is a marker of a rarefied world. This park contains the expected facilities: a couple of see-saws, a jungle gym, a set of swings, a slide that shoots you straight to the ground and another that passes you through a couple of curls on your way down. A metal shelter must once have housed a merry-go-round, but it now stands vacant, and gusts of sea breeze rattle its roof. A security guard sits at a desk in one corner, watching over the children at play. Not that anybody expects grievous breaches of peace in a kiddies' park, but it is pro forma today in India to strew security guards thickly through any establishment, protecting nothing except the fancy that the premises are worth protecting.

In the early summer of 2012, the club's members noticed strange changes being made to the kiddies' park. More than a dozen old, sturdy trees around the park's periphery had already been chopped down some months previously. Now a ten-foot wall sprang up, separating the park from the rest of the club. The turf sustained fresh damage, as if it had been dug up. A new concrete road, wide enough to accommodate a truck, was laid from the gate to the park. A club gardener testified that at least some of this work had occurred under the cover of night, lending it all the rank scent of skulduggery.

...

There are clubs like the Breach Candy Club all over the Indian subcontinent: relics of the Raj, institutions that were set up as boltholes for the British, where they could retreat to row or swim or play cricket or race horses. The activity, really, was secondary; foremost, these clubs were English

corners of foreign fields, intended to keep the tumult of India at bay. Within their grounds, at least temporarily, the rituals of life could be enacted as they might have been in London or Shropshire or Edinburgh. To press home that illusion, Indians were originally not allowed as members and only rarely as guests; as liveried waiters or turbaned doormen, of course, they were welcome. The clubs carried their air of unmatched privilege even into the early twentieth century, when the rules of membership began to ease. ‘You do not know what prestige it gives to an Indian to be a member of the European Club,’ Dr Veraswami says in George Orwell’s *Burmese Days*. ‘In the Club, practically he iss a European. No calumny can touch him. A Club member iss sacrosanct.’ Even Indians, it appeared, wished to be insulated from India.

...

The Breach Candy Club — or, to give it its formal name, the Breach Candy Swimming Bath Trust — was born out of the complications of pre-Suez travel. Before the canal was built, European travellers journeyed across the narrow Isthmus of Suez and waited at Aden to be collected by the next steamer bound for India. To lodge these passengers — the women, in particular — Bombay’s Europeans raised funds and built a hostel in Aden. Once the Suez Canal opened, though, ships made directly for India, eliminating the need altogether for a transit in Aden. The hostel, having thus fallen into disuse, was sold for 7,300 rupees; when this take was pooled with another 2,000 rupees in custody of the British Resident at Aden, the caretakers of the steamer fund now had 9,300 rupees. Bombay’s municipal commissioner suggested, in 1875, that the money be spent to spruce up a cemetery, but at a meeting of the city’s Europeans that March, this idea was roundly rejected. Plumping for the joys of life rather than the prettification of

death, the conclave decided instead to buy itself a new saltwater pool.

Accordingly, Benjamin Disraeli's Secretary of State for India marked out five acres on Bombay's shore and donated them to the swimming bath. 'It gave one an idea,' an Indian member of the Bombay Municipal Corporation would later grumble, 'that the Secretary of State for India . . . had been disposing of land as if it was his ancestral property.' The name 'Breach Candy' had already stuck to this segment of the coast; it was said to be an anglicised corruption of the Hindustani words burj khadi, which referred to the temple tower (or burj) and the creek (khadi) in the locality. I could find no record of the people who were living here at that time; the club's official history is confident that this neighbourhood of Bombay was 'a barren wilderness'. A tarred shed functioned as the first bathhouse. In 1927, a new indoor pool was sunk; the following year, work began upon the outdoor, India-shaped pool, which cost 13,600 rupees. Eight years later, in settling a lawsuit, the Bombay High Court prised the facilities out of the custodianship of the municipal authorities and handed them over to the newly constituted Breach Candy Swimming Bath Trust.

5. The 1st Plaintiff in Suit No. 573 of 2015 is the Trust itself. It is not a Respondent in some of these Appeals. Plaintiffs Nos. 2, 3, 4 and 5 were Gerald Shirley, Alon Mooleman, Giovanni Autunno and Anya Lehra. The 1st Defendant was Dipesh Mehta. Defendants Nos. 2, 4 and 5 were Vikram Malik, Jaenette Anand, and Marion Panjwani. Malik, Anand and Panjwani are, admittedly, today in-charge of the governance of the Club. The circumstances in which this happened are described later. The original 3rd Defendant is one

Lalit Agrawal. The 6th Defendant, who is not before us in the Appeals, is Benno Lueke.

6. The story begins in early 1965. On 26th February of that year, a new constitution for the Breach Candy Swimming Bath Trust was approved at a General Meeting. This constitution had the consent of the State of Maharashtra. On 15th March 1967, the City Civil Court approved this constitution of the Trust by a judgment and decree it passed in Suit No. 448 of 1967. That constitution came into effect on 1st May 1967. It is said to have governed the affairs of the Trust since then. This constitution has been printed in booklet form and is widely circulated to members. We note this at the beginning because there was, very recently — in fact, during the course of these proceedings in the trial court — a controversy that arose about the sudden appearance, or more accurately, surfacing, of a radically different constitution. This has been commented in one of the impugned orders below. That second version is also said to have emanated from the City Civil Court proceedings of 1967. Importantly, in the second order impugned before us, all agreed not to proceed on the basis of this second version of the constitution but only on the basis of the one that was in circulation after the 15th March 1967 judgment and decree of the City Civil Court, i.e., the constitution which was in circulation in printed or booklet form. We will return to an analysis of this constitution presently.

7. For the next four or five decades after 1967, everyone followed this original or first-version constitution. There were periodic

change reports, and these were filed with the Charity Commissioner by previous committees relying on the printed booklet.

8. In 2010, Dipesh Mehta claimed to have been properly appointed to the managing committee of the Club. We use the expression ‘managing committee’ loosely for convenience and accuracy; the actual terminology in the constitution is different, and more than somewhat confusing. There is a good deal of controversy about Mehta’s entry into the Club as a member to begin with. This has received some comment from the learned Single Judge in one of the orders under challenge before us. We will be addressing that shortly to the extent necessary.

9. In April 2011, some members noticed that Mehta and Malik together with one Dr Rohit Barman now claimed to be “Custodian Trustees” in substitution of the original Custodian Trustee, HSBC Bank. About a month later, Agrawal also claimed to being on the managing committee. For whatever reason, this situation continued until the mid-2013. The original Plaintiffs — Shirley et al — contend that they found a ‘fraud’ by the Appellants (and this means Mehta, Malik, Anand and Panjwani). Our concern is not about this alleged fraud itself but what followed. Shirley and his fellow Plaintiffs, together with 54 other members of the Club, requisitioned a, Extraordinary General Meeting (“EGM”). They said that in doing so, they followed the procedure set out in the Club’s constitution. The managing committee refused to call the EGM by a communication of 13th August 2013. Between August and September 2013, 30 requisitioning members reaffirmed their

demand for an EGM. Finally, on 26th September 2013 a public notice was issued in the Times of India scheduling the EGM on 21st October 2013. On 19th October 2013, the names of the persons proposing the resolution was submitted to the Trust. The EGM was held on 21st October 2013. It was attended by 54 ‘Trust Members’ — we will come to the definitions of class of membership shortly. There was a quorum. All four Appellants—Mehta, Malik, Anand and Panjwani — were removed from the managing committee. Appointed in their stead were Shirley, Mooleman, Autunno and Lehra, the original Plaintiffs. These resolutions were said to be unanimous or by majority. And it is these resolutions that lie at the heart of the controversy before us.

10. Six days later, the Plaintiffs and five other members received letters saying that they were suspended from membership of the Club and were restrained from entering the Trust premises.

11. This resulted in the nine suspended members (the four individual Plaintiffs and the other five suspended members) filing in November 2013, Suit No. 111 of 2014 challenging their suspension. We call this the “**Suspension Suit**”. The Plaintiffs filed Notice of Motion (L) No. 2234 of 2014 for interim relief in the Suspension Suit.

12. In December 2013, Mehta et al (original Defendants Nos. 1, 2, 4 and 5) filed a Notice of Motion challenging the jurisdiction of the High Court to entertain the Suspension Suit. This is a challenge that

is canvassed before us even today, both in the Suspension Suit and in the later suit that then followed.

13. Despite the result of the EGM, Mehta, Malik, Anand and Panjwani did not step down from the managing committee. They continued to function as members of the managing committee. On 5th March 2014, the Plaintiffs (the Trust and the four individuals, Shirley et al) filed Suit No. 573 of 2014 to restrain Mehta and the Appellants from preventing the individual Plaintiffs from functioning as members of the managing committee. We call this the “**EGM Suit**”. The Plaintiffs also filed also filed Notice of Motion No. 1022 of 2014 inter alia for an injunction restraining Mehta et al from acting or holding themselves out as being the Club’s management committee. Mehta and the other Appellants filed an Affidavit in Reply in the Notice of Motion, in which they once again raised a challenge to the jurisdiction of the High Court to hear the EGM Suit.

14. This resulted in a learned Single Judge of this Court, Ms Justice RS Dalvi, framing a preliminary issue of jurisdiction. This was evidently a preliminary issue in both the Suspension Suit and the EGM Suit. (It is also obviously at this time that Mr Subramanian visited the Court and sat in on the proceedings before Mrs Justice Dalvi, briefly described later in the same essay). On 7th May 2014, Ms Justice Dalvi passed an order deciding the preliminary issue of jurisdiction. In the Suspension Suit, she held, and this our reading although it may not be that of the Appellants, that the Suspension Suit related to the civil rights of the parties and that the High Court

had jurisdiction. In the EGM Suit, she held that while the High Court had jurisdiction to try the suit, no relief could be granted until the change report filed pursuant to the EGM was “decided” by the Charity Commissioner. This has been the subject of much attention from Mr Mirza, learned Counsel for the Appellants.

15. In June 2014, Mehta et al filed two Appeals. These are Appeals Nos. 323 of 2014 and 324 of 2014, both assailing Ms Justice Dalvi’s order. In both Appeals, the challenge was that the High Court had no jurisdiction at all and that both the Suspension Suit and the EGM Suit were entirely barred by the operation of the MPT Act. Never ones to shy away from a good fight, the original Plaintiffs — Shirley et al — filed Cross Appeal (L) No. 393 of 2014. They also challenged Ms Justice Dalvi’s finding in the EGM Suit which held that though the EGM Suit was maintainable, it could be tried only after the Charity Commissioner ‘decided’ the change report. The 7th May 2014 order on the preliminary issue thus had the remarkable effect of making both sides almost equally unhappy. Those Appeals came up on 27th August 2014. Appeals No. 323 and 324 of 2014 filed by Mehta and others were admitted, but there was no stay. In the Cross Appeal filed by Shirley and others, there came to be passed an order holding that their “Motion was bound to be heard”. This obviously meant, and we have no other way of seeing it, that the Motion filed by Shirley and others in the EGM Suit would have to be taken up. The Appeal Court left contentions open and, importantly, expressly allowed a defence to be taken based on, or citing, Ms Justice Dalvi’s finding on jurisdiction.

16. On 7th October 2014, the Notice of Motion in the EGM Suit was up for directions. It was fixed on 30th October 2014 for final hearing. A week later, Mehta and other filed a further Affidavit in Reply. This also proceeded on the basis of the original or first-version constitution. In a further Rejoinder, Shirley and others questioned the eligibility of Mehta to serve on the managing committee. The matter was mentioned on 30th October 2014 and re-scheduled to 11th November 2014. A week before the adjourned date, on 7th November 2014, Mehta and others filed an Affidavit in which, for the first time, they said that they had now come upon a new version of the constitution of the Club. They maintained that this document was the 'original' constitution. The document itself had handwritten changes and portions struck through in red ink. The case placed by Mehta and others was that nobody had noticed this document for the last five decades until November 2014. How it came to light was also decidedly odd. The request was that the Court should proceed on the basis of this recently revealed document. Between the two versions, there is a crucial difference regarding who can and who cannot serve on the managing committee. The matter was at that time before one of us (GS Patel, J) sitting singly. The order made by that bench was to call for the records of Suit No. 448 of 1967 from the City Civil Court with a direction that these be sealed in this Court. Further Affidavits were filed in December 2014 and ultimately the matter was stood over to January 2015. The matter was partly heard (again before GS Patel, J). An order came to be passed permitting Mehta and Agrawal to file individual Affidavits in Reply. Mehta's Affidavit of 7th February 2015 related to how he claimed to have acquired membership of the Club, a matter that directly affects his eligibility to serve on the

managing committee. Ultimately, the matter was heard on various dates and then adjourned to March 2015. On 2nd April 2015, Mehta resigned as the purported chairman of the managing committee. Another person was sought to be appointed in his place. On 8th April 2015, Mr Justice SC Gupte, sitting singly, accepted Mehta's resignation (along with that of another), but did not accept the appointment of the new chairman. On 18th July 2015, after a hearing that lasted for seven days, Mr Justice Gupte reserved orders in the Plaintiffs' Notice of Motion in the EGM suit.

17. On 29th October 2015, Mr Justice Gupte passed an order. This is in challenge before us. He allowed the Plaintiffs' Notice of Motion in the EGM Suit in terms of prayer clauses (a), (b) and (c). He held that the EGM of 21st October 2013 had been validly called, conducted and held, and that the Plaintiffs (Shirley and others) were properly and duly elected to the managing committee. Mehta and others sought a stay. Mr Justice Gupte said that there could not be a stay for Mehta and Agrawal as they had no right to be on the managing committee. He also observed that their initial entry into the Club as members was itself doubtful, and further observed that the records of the Club were unsafe in their hands. The parties were asked to come back that afternoon after working out a temporary arrangement. Later that day, at the request of Mehta and others, the operative portion of that order was stayed for six weeks on condition that Mehta and Agrawal did not act as members of the managing committee. Appellants Nos. 2, 3 and 4, that is to say Malik, Anand and Panjwani, were permitted act as an interim committee. The Plaintiffs were to be given full access to the records of the Trust. An important direction was that it was the original, first-version

constitution (the one without the handwritten alternations) that would govern. It seems that just after this Shirley and other were told that the original records of the Trust were removed or were being removed. The matter was mentioned again, and Mr Justice Gupte appointed a Court Commissioner to visit the premises of the Club and verify this. He was to submit a report within a week.

18. Mehta, Malik, Anand and Panjwani appealed. By this time, part of the action has shifted to the Gamdevi Police Station. The police filed a charge-sheet against Agrawal on the basis that his membership form was forged. Agrawal was therefore removed as an Appellant. Mehta, Malik, Anand and Panjwani continued as the four Appellants.

19. This was Appeal No. 158 of 2017. The matter was adjourned on several dates. On 23rd December 2015, Agrawal was directed to be added as a Respondent. Parties were asked to arrive at a workable solution. This was not possible. The interim committee continued. We will pass over the other directions issued at that time. Then Agrawal filed his own Appeal No.347 of 2016 against Mr Justice Gupte's order, and also challenged the order of the interim committee removing him from management.

20. On 11th February 2016, Malik, Anand and Panjwani entered into consent terms with Shirley, Mooleman, Autunno and Lehra. By this, Malik, Anand and Panjwani agreed to the stay of Mr Justice Gupte's order being vacated, i.e., they accepted Mr Justice Gupte's order. Ultimately, on 27th April 2016, Malik, Anand and Panjwani

withdrew from the Appeal. The consent terms had been placed before the Court on a previous occasion, 7th March 2016. No order was made on the consent terms and the withdrawal by Malik, Anand and Panjwani does not seem to have been based on the consent terms.

21. In all this time, the interim order continued. In June 2016, Malik, Anand and Panjwani signed a Memorandum of Understanding with Shirley and the three others. This was broadly on the same lines as the consent terms with the express undertaking by Malik, Anand and Panjwani that they accepted Mr Justice Gupte's order and withdrew from the Appeal against his order.

22. On 22nd September 2016 matters took a slightly different turn. A Division Bench appointed a special committee comprising a former Judge of the Supreme Court, former Judge of this Court and a representative of the accounting and consultancy firm, Ernst & Young, to run the day-to-day affairs of the Trust. This special committee received a request to admit new members to increase club revenues. That request was communicated to the Court by the special committee. The Court declined. The Appeals from Mr Justice Gupte's order was admitted on 4th July 2017. Directions were passed regarding audit. Ultimately, on 15th October 2018, the Division Bench accepted the resignation of the members of the special committee and restored the status-quo ante, i.e., the position regarding the management of the Club as it stood on the date the special committee was appointed. But, by this time, Malik, Anand and Panjwani were no longer Appellants. They had, as we have

noted, signed consent terms and later the MoU. For this reason, the Division Bench set the parties at liberty to make such application for modification or variation as they thought fit. This resulted in Notices of Motion being filed in the Appeals. After this, the Appellants (Mehta and others) were directed to implead the Charity Commissioner and the Collector as parties. There are other Motions regarding funds and so on that were taken out and listed but we are not now concerned with those since we are disposing of the appeals finally.

23. This, briefly, is the state of affairs before us.

B. QUESTIONS FOR DETERMINATION IN THE APPEALS

24. The questions that we are asked to decide are broadly only two. The first is the jurisdictional challenge. This itself is at two levels. The first part is whether this Court has any jurisdiction at all. The second is that if this Court does have jurisdiction, is that jurisdiction restricted or limited as Mrs Justice Dalvi held, in the sense that it can be exercised only after the Charity Commissioner ‘decided’ or, to put it more accurately to reflect Mr Mirza’s submission, ‘validated’ the change report that followed the EGM. The second major aspect is whether the interlocutory order that Mr Justice Gupte made was a reasonably possible view based on the usual incidents required at an interlocutory stage; establishing a prima facie, assessing balance of convenience and an assessment of

where lies the more irretrievable prejudice. Part of the discussion on the second aspect will also necessarily touch upon an examination of the provisions of the constitution, and, inescapably, the claims of Mehta (the surviving Appellant in one Appeal) and Agrawal (who has an independent Appeal) to having been validly taken in as members of the Club and thereafter being properly appointed to the managing committee. These aspects are covered by Mr Justice Gupte's order.

25. Before we proceed, we note a peculiarity. At that time when Mr Justice Gupte passed his order, Ms Justice Dalvi's findings on jurisdiction were still in operation. As we have noted, in the two Suits, it was in two parts. In the EGM Suit she had held that while this Court had jurisdiction, the trial could not proceed until the Charity Commissioner had 'decided' the change report filed following the EGM. This was the landscape as it stood before Mr Justice Gupte, with the additional aspect that Ms Justice Dalvi's order had to be read as interpreted or modified by the Division Bench. In fact, this is one of Mr Mirza's threshold submissions: that Mr Justice Gupte was entirely bound by Ms Justice Dalvi's order, his being a Bench of coordinate strength. In effect, Mr Mirza submits, Mr Justice Gupte purported to sit in review or appeal over Ms Justice Dalvi's order, something he could not possibly have done. This, in his submission vitiates the entirety of Mr Justice Gupte's final order. He points out that in Mr Justice Gupte's order there is a statement or finding by Mr Justice Gupte himself saying that he was bound by Ms Justice Dalvi's order. If this be so, Mr Mirza submits, Mr Justice Gupte could not have gone further and could not have passed the order that he did.

26. In any case we must bear in mind that what Mr Justice Gupte had before him was an interlocutory application. It seems to us even more inconceivable that pending a so-called ‘finding’ being returned by the Charity Commissioner even urgent interlocutory or interim relief should be denied or kept on hold. This is the finding of Mr Justice Gupte inter alia in paragraph 10, with which we agree. His observations in paragraph 11 that the principles of Order 39 and Section 151 must apply.

C. APPELLATE INTERFERENCE IN INTERIM OR INTERLOCUTORY ORDERS

27. Over three decades ago, in a case that came up from the Madras High Court in an intellectual property passing off dispute, the Supreme Court defined the limits of appellate power in appeals from interlocutory orders. In paragraph 14 of *Wander Ltd & Anr v Antox India Pvt Ltd*,¹ the Supreme Court said:

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material

1 1990 (Supp) SCC 727.

and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph*: (SCR 721) :

“... These principles are well established, but as has been observed by *Viscount Simon in Charles Osention & Co. v. Johnston* ‘...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.’”

The appellate judgment does not seem to defer to this principle.”

(Emphasis added)

28. *Wander v Antox* has held the field ever since. Its principle has been repeatedly reaffirmed. In *Mohd Mehtab Khan v Khushnuma Ibrahim Khan*,² a case where a Division Bench of this Court granted

2 (2013) 9 SCC 221.

interim relief in an appeal against an order of the learned Single Judge, the Supreme Court said in paragraph 20:

20. In a situation where the learned trial court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the appellate court could not have interfered with the exercise of discretion by the learned trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The appellate court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the appellate court was wrong in its conclusions what is sought to be emphasised is that as long as the view of the trial court was a possible view the appellate court should not have interfered with the same following the virtually settled principles of law in this regard as laid down by this Court in *Wander Ltd. v. Antox India (P) Ltd.* [1990 Supp SCC 727]

(Emphasis added)

29. The appeals court must not ‘usurp the jurisdiction of the Single Judge’; it must confine itself to an adjudication of whether the impugned order was or was not justified in the facts and

circumstances of the case.³ When considering an application for interim relief, a Single Judge is not expected and is in fact not permitted to conduct mini-trial. It is the *prima facie* case that is to be assessed.⁴

30. Very recently, in *Shyam Sel & Power Ltd & Anr v Shyam Steel Industries Ltd*,⁵ the Supreme Court reaffirmed the law in *Wander Ltd* and *Monsanto*.⁶ the Supreme Court *inter alia* said that to intervene, the appellate court must discuss how the view taken by the trial judge was either perverse or impossible. The appellate court is not duty-bound to pass a suitable interim order pending the trial of the suit. As to *Wander v Antox*, the Supreme Court said:

35. ... **This judgment has been guiding the appellate courts in the country for decades while exercising their appellate jurisdiction considering the correctness of the discretion and jurisdiction exercised by the trial courts for grant or refusal of interlocutory injunctions.**

36. Though the learned Judges of the Division Bench of the High Court have on more than one occasion referred to the judgment of this Court in *Wander Ltd. (supra)*, **they have not even, for namesake, observed as to how the discretion exercised by the learned Single Judge was exercised arbitrarily, capriciously or perversely.**

(Emphasis added)

3 *Monsanto Technology LLC v Nuziveedu Seeds Ltd*, (2019) 3 SCC 381.

4 *SM Dychem Ltd v Cadbury India Ltd*, (2000) 5 SCC 573; *Anand Prasad Agarmalla v Tarkeshwar Prasad & Ors*, (2001) 5 SCC 568; *Zenith Mataplast Pvt Ltd v State of Maharashtra & Ors*, (2009) 10 SCC 388.

5 2022 SCC OnLine SC 313.

6 Paragraphs 11, 29, 31, 34, 35, 36.

31. Decisions of the Supreme Court bind us. *Wander v Antox* is an undisturbed precedent of long-standing. Every principle of stare decisis applies. We ourselves have applied the *Wander v Antox* principle — some say ruthlessly — in the recent past. We have yet to see a single authority to show that the principle is no longer good law.

32. In *Word Crest Advisors LLP v Catalyst Trusteeship Ltd & Ors*,⁷ we set out this law and then went on to explain our understanding of its implications. To summarize: If the view of the Single Judge is a reasonably possible view and is one that is not arbitrary, perverse or capricious the appellate court cannot and will not interfere. This means that when a defendant challenges an interlocutory order, the burden lies heavily on him to establish that the injunctive or other interlocutory order made by the Single Judge was not even reasonably possible, or that it was demonstrably perverse, arbitrary, or capricious. Conversely, if a plaintiff is in appeal from a refusal of an interlocutory relief, the plaintiff's task in an appeal is to show that the relief sought *could not possibly* have been refused and had to have been granted. It is, therefore, clearly not enough to show that some other view was possible or preferable. It is also not enough to show merely that the appellant is either aggrieved or even simply prejudiced by an interlocutory order. In our view, it is also not enough in an appeal from an interlocutory order for a plaintiff in appeal to show that there is *some* prima facie case. A plaintiff in appeal must be able to demonstrate that there is so overwhelming a

⁷ 2022 SCC OnLine Bom 1409; followed recently inter alia in *Pradip R Kamdar & Anr v Rajiv Sanghvi & Ors*, Appeal (L) No 24347 of 2022, decided on 23rd September 2022.

prima facie case that interlocutory relief could not possibly have been denied. Conversely, a defendant in appeal must be able to demonstrate that the plaintiff had not even a vestige of a prima facie case and there was no possibility at all of ever granting him any form of interlocutory relief. This is the challenge before the appellants, and it is with these principles firmly in mind that we approach the cases at hand.

D. JURISDICTION

33. We turn first to Mr Mirza's submissions regarding the jurisdiction of this court. His submission is fundamental. The Breach Candy Swimming Bath Trust, though a club, and though it has a constitution, is registered as a Trust under the MPT Act. Nobody has denied this fact. None can. This automatically means, he submits, that provisions of the MPT Act apply with full force and effect to the Trust. In particular, the provisions regarding the bar of a Civil Court's jurisdiction, as also the provisions requiring prior consent of the Charity Commissioner must necessarily operate. He invites attention to Section 80 of the MPT Act. It reads thus:

“80. Bar of jurisdiction.— 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, and in respect of which the decision or order or such officer or authority has been made final and conclusive.”

34. This is worded in more or less the same fashion as similar jurisdiction ouster clauses we find elsewhere (even for example under the Companies Act 2013). The law in this regard has long been settled. Such clauses are to be strictly and narrowly construed. The ouster of a Civil Court's jurisdiction is not to be readily inferred: *Dhulabhai & Ors v State of Madhya Pradesh & Anr.*⁸ But it is also settled that a jurisdictional ouster clause is necessarily constrained by its terms, that is to say, it is only that which an authority under the jurisdiction-ousting statute can do that is taken away from the jurisdiction of a Civil Court. If civil rights are canvassed and these lie outside the frame of the jurisdiction-ousting legislation, then a civil court's jurisdiction is not ousted. This is the settled position and is not contentious.

35. Mr Mirza's submission is that the complaints in the Suspension Suit and the EGM Suit must both be read and understood for what they really are. They are nothing but attempts by Shirley and others to gain control over the 'administration, management, properties and assets' of the public Trust. If that be so, he submits, both Suits are entirely barred on a plain reading of Section 80. These are matters that can be decided by, and only by, the authorities designated under the MPT Act.

36. In any case, he submits, there are the provisions of Sections 50 and 51 of the MPT Act also to be considered. These Sections reads as follows:

8 (1968) SCR (3) 662.

“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 to precede from a trustee, ex-trustee, alienee or any other person but not a person holding adversely to the public trust, trespasser, licensee or tenant.
- (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 beneficiaries 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 situated, 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 or property or of the interest therein shall be allocated to any particular object of the trust;
- (h) ***
- (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 alternations 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) declaration 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 relief 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 alternation 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.

51. Consent of Charity Commissioner for institution of suit.—

(1) If the persons having an interest in any public trust intend to file a suit of the nature specified in section 50, they shall apply to the Charity Commissioner in writing for his consent. If the Charity Commissioner after hearing the parties and making such enquiries (if any) as he thinks fit is satisfied that there is a prima facie case, he may within a period of six months from the date on which the application is made, grant or refuse his consent to the institution of such suit. 57 The order of the Charity Commissioner refusing his consent shall be in writing and shall state the reasons for the refusal.

(2) If the Charity Commissioner refuses his consent to the institution of the suit under sub-section (1) the persons applying for such consent may file an appeal to the

Divisional Commissioner in the manner provided by this Act.

(3) In every suit filed by persons having interest in any trust under section 50, the Charity Commissioner shall be a necessary party.

(4) Subject to the decision of the Divisional Commissioner in appeal under section 71, the decision of the Charity Commissioner under sub-section (1) shall be final and conclusive.”

37. It is Mr Mirza’s submission that if either of the Suits alleges that there is a breach of trust, negligence or misconduct by Mehta and others, or seeks an injunction, the prior permission of the Charity Commissioner is required, particularly if the reliefs fall among those enumerated in Section 50. Perhaps by means of the EGM or even otherwise these Suits seek the removal of Mehta and Agrawal (among others) as Trustees, the appointment of the Plaintiffs as Trustees, the vesting in them of Trust assets, and so on. Section 51 of the MPT Act requires that those who propose to sue for reliefs as set out in Section 50 must apply to the Charity Commissioner for his permission. If that permission is refused, an appeal lies. The one thing that is not possible, he submits, is to seek permission, get a refusal and then to proceed to sue in a civil court. He submits that this is precisely what the Plaintiffs have done today.

38. While on this, he submits that the suits seek only an injunction without a declaration that is undoubtedly necessary. This cannot be used as a device, he submits, to bring the suit into the jurisdiction of a Civil Court if it is otherwise barred, whether under Section 80 or want of permission under Sections 50 and 51.

39. In regard to the Suspension Suit, Mrs Justice Dalvi held that the Suit was itself competent. She did so on the basis that what was being sought by the Plaintiffs in the EGM Suit was a civil right. This is a right that emanates from or is an incident of having obtained membership of and being a member of the Club under the constitution. When viewed from this perspective, and we see no reason to take any other view, it is not possible to accept Mr Mirza's submission that there is an *absolute* jurisdictional bar under Section 80 or even that the prior permission of the Charity Commissioner was required for filing such a suit. We propose to discuss some of the incidents of membership of an organisation such as a Club a little later in this judgment while dealing with the second aspect of the matter.

40. But in the EGM Suit, Ms Justice Dalvi was persuaded to hold that the Charity Commissioner did have some jurisdiction and that was a jurisdiction under Section 22 of the MPT Act. That section reads thus:

“22. Change:

(1) Where any change occurs in any of the entries recorded in the register kept under section 17, the trustee shall, within 90 days from the date of the occurrence of such change, or where any change is desired in such entries in the interest of the administration of such public trust, report such change or proposed change to the Deputy or Assistant Charity Commissioner in charge of the Public Trusts Registration Office where the register is kept. Such report shall be made in the prescribed form.

(1A) Where the change to be reported under sub-section (1) relates to any immovable property, the trustee shall,

along with the report, furnish a 18 memorandum in the prescribed form containing the particulars (including the name and description of, the public trust) relating to any change in the immovable property of such public trust, for forwarding it to the Sub-Registrar referred to in sub-section (7) of Section 18.

Such memorandum shall be signed and verified in the prescribed manner by the trustee or his agent specially authorized by him in this behalf.

(2) For the purpose of verifying the correctness of the entries in the register kept under section 17 or ascertaining whether any change has occurred in any of the particulars recorded in the register, the Deputy or Assistant Charity Commissioner may hold an inquiry in the prescribed manner.

Provided that, in the case of change in the names and addresses of the trustees and the managers or the mode of succession to the office of the trusteeship and managership, the Deputy or Assistant Charity Commissioner may pass order provisionally accepting the change within period of fifteen working days and issue a notice inviting objections to such change within thirty days from the date of publication of such notice.

Provided further that, if no objections are received within the said period of thirty days, the order accepting the change provisionally under the first proviso shall become final and entry thereof shall be taken in the register kept under section 17 in the prescribed manner.

Provided also that, if objections are received within the said period of thirty days, the Deputy or Assistant Charity Commissioner may hold an enquiry in the prescribed manner and record a finding, as provided by sub-section (3) of this section, within three months from the date of filing objections.

(3) If the Deputy or Assistant Charity Commissioner, as the case may be, after receiving a report under sub-section (1) and holding an inquiry, if necessary, under sub-section (2), or merely after holding an inquiry under the said sub-section (2), is satisfied that a change has occurred in any of the entries recorded in the register kept under section 17 in regard to a particular public trust, or that the trust should be removed from the register by reason of the change, resulting in both the office of the administration of the trust and the whole of the trust property ceasing to be situated in the State, he **shall record a finding with the reasons therefore to that effect and if he is not so satisfied he shall record a finding with reasons therefore accordingly.** Any such finding shall be appealable to the Charity Commissioner. The Deputy or Assistant Charity Commissioner shall amend or delete the entries in the said register in accordance with the finding which requires an amendment or deletion of entries and if appeals or applications were made against such finding, in accordance with the final decision of the competent authority provided by this Act. The amendments in the entries so made subject to any further amendment on occurrence of a change or any cancellation of entries, shall be final and conclusive.

(3A) The Deputy or Assistant Charity Commissioner may, after such detailed and impartial inquiry and following such procedure as may be prescribed, de-register the trust on the following grounds:—

- (a) when its purpose is completely fulfilled; or
 - (b) when its purpose becomes unlawful;
- or
- (c) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise; or

(d) when the trust, being revocable, is expressly revoked; or

(e) when the trustees are found not doing any act for fulfilling object of the trust:

Provided that, no trust shall be de-registered under clause (e) unless its trustees have committed default in reporting the change under sub-section (1) in submission of the audited accounts as prescribed by sub-section (2) of section 33 or sub-section (1A) of section 34 or in making any other compliance prescribed by or under this Act for a period of five years from the last date of reporting the change, submission of the accounts or making the compliance, as prescribed by this Act or the rules made thereunder, as the case may be.

(3B) The Deputy or Assistant Charity Commissioner may take over the management of properties of the trust de-registered under subsection (3A)d and pass such necessary orders for the same as he deems fit and may, if he considers it expedient, dispose them of by sale or otherwise and deposit the sale proceeds in the Public Trusts Administration Fund established under section 57.

(4) Whenever an entry is amended or the trust is removed, from the register under sub-section (3), the Deputy or Assistant Charity Commissioner, as the case may be, shall forward the memorandum furnished to him under sub-section (1A), after certifying the amended entry or the removal of the trust from the register, to the sub-register referred to in sub-section (7) or section 18 for the purpose of filing in Book No. I under section 18 of the Indian Registration Act, 1908, in its application to the State of Maharashtra.

22A. Further inquiry by Deputy or Assistant Charity Commissioner: If at any time after the entries are made in the register under section 21, 22 or 28, it appears to the

Deputy or Assistant Charity Commissioner that any particular relating to any public trust, which was not the subject matter of the inquiry under section 19 or sub-section (3) of section 22 or section 28 as the case may be, has remained to be enquired into, the Deputy or Assistant Charity Commissioner, as the case may be, may make, further inquiry in the prescribed manner, record his make, further inquiry in the prescribed findings and make entries in the register in accordance with the decision arrived at or if appeals or applications are made as provided by this Act, in accordance with the decision of the competent authority provided by this Act. The provisions of section 19, 20, 21 and 22 shall, so far as may be, apply to the inquiry, the recording of findings and the making of entries in the register under this section.

22B. Registration of trust property in the name of public trust, which has already been registered, etc.:

- (1) In the case of a public trust,
 - (a) which is deemed to have been registered under this Act under section 28, or
 - (b) which has been registered under this Act before the date of the coming into force of the Bombay Public Trusts (Amendment) Act, 1955 (hereinafter referred to as the said date) on application made under section 18, or
 - (c) in respect of which an application for registration has been made under section 18 and such application was pending on the said date, the trustee of such public trust shall within three months from the said date make an application in writing for registration of the property of the public trust in the name of such trust and shall state in the application the name of the public trust.

(2) Such application shall be signed and verified in the prescribed manner by the trustee or his agent specially authorized by him in this behalf and made to the Deputy or Assistant Charity Commissioner who made entries in respect of such public trust in the register kept under section 17 or with whom the application for registration of the public trust was pending, as the case may be.

(3) On receipt of such application, the Deputy or Assistant Charity Commissioner shall—

(a) in the case of a public trust which is deemed to have been registered under section 28, or which has been registered under 21 this Act before the said date specify the name of the public trust against the entries made in respect of such trust in the register kept under section 17, and

(b) in the case of a public trust the application for registration of which was pending on the said date specify the name of the public trust at the time of making entries under section 21 in respect of such public trust in the register kept under section 17.

22C. Registration of particulars of immovable property of trusts already registered with certain officers and authorities.—

(1) In the case of a public trust,

(a) which is deemed to have been registered under this Act under section 28 read with Schedule A, or

(b) which has been registered under this Act before the coming into force of the Bombay Public Trusts (Amendment) Act, 1955 (hereinafter referred to as the said date) on an application made under section 18, or

(c) in respect of which an application has been made under section 18 and such application was pending on the said date,

the trustee of such public trust shall within three months from the said date send a memorandum in the prescribed form containing the particulars, including the name and description of the public trust, relating to the immovable property of such public trust to the officers specified in sub-section (7) of section 18 or the purpose of filing in Book No. I under section 89 of the Indian Registration Act, 1908, in its application to the State of Maharashtra.

Such memorandum shall be signed and verified in the prescribed manner by the trustee or his agent specially authorized by him in this behalf.

(2) In the case of a public trust deemed to have been registered under section 28 read with Schedule AA, the provisions of sub-section (1) shall apply with the modification that the said date shall refer to the date of the coming into force of the Bombay Public Trusts (Unification and Amendment) Act, 1959. (Bom. VI of 1960).”

(Emphasis added)

41. What Mr Mirza submits is based on sub-section (3). He does not, he clarifies, say that every time a change report is filed, a formal enquiry is necessary. There may be one, but this is discretionary. Whether arrived at after an enquiry or without an enquiry, what is inevitable is that there must be a *finding*. The change report must be filed with the Charity Commissioner, but the mere filing has no effect until there is a ‘finding’ returned by the Charity Commissioner. To give this submission its appropriate heft, Mr

Mirza says that what is essentially required under Section 22 is a ‘validation’ by the Charity Commissioner of every change report.

42. He deconstructs the Plaintiffs’ case in the EGM Suit thus: That there was an EGM, though after some initial reluctance, is a historical fact that none can deny. Some members attended that EGM, again a matter of record. Some things were said and done at that EGM, also a matter of record. But whether those actions were validly taken and whether the result of the EGM was valid in law is, in his submission, exclusively the subject of a finding to be returned by the Charity Commissioner under Section 22.

43. Mr Mirza’s submission runs like this. The obligation to file a change report is clear from sub-section (1). There is a time limit provided. Sub-section (2) then tells us that to verify the correctness of entries made in the register (with which we are not concerned) or ‘ascertaining whether any change has occurred in any of the particulars recorded in the register’ the Deputy or Assistant Charity Commissioner may hold an enquiry. This is not an inevitability, and it may or may not have a bearing on what follows in sub-section (3). In that sub-section there is a reference to sub-section (2). The sub-section says that if the Deputy or Assistant Charity Commissioner is satisfied that a change ‘has occurred in any of the entries recorded in the register kept under Section 17 in regard to a particular public Trust’ then the Deputy or Assistant Charity Commissioner “*shall record a finding with reasons therefore to that effect ...*” This means that there has to be a subjective satisfaction by the Charity Commissioner of the occurrence of a change. That must result in a

finding being recorded. The requirement of sub-section 3 is mandatory. The word used is 'shall' and it relates to recording a finding. More importantly, the finding must relate to the occurrence of a change. Therefore, in his submission, if the result of the EGM was precisely such a 'change' then a 'finding' on the occurrence of that change was mandatory, inescapable and had to be recorded by the Charity Commissioner. Without such a finding, there was simply no cause of action or locus because there was until then merely a vote at an EGM, but this was inconsequential and totally immaterial absent such a finding.

44. On first principles, it is difficult to accept Mr Mirza's formulation. We are also not in agreement with the reasoning of Mrs Justice Dalvi that until there was a finding recorded by the Charity Commissioner on the result of the EGM, the trial could not proceed. Section 22, to our mind, requires an intimation to the Charity Commissioner of a change having occurred. Nobody really has any control over what the Charity Commissioner will do with that change report, or more importantly, when he will do it. Let us leave aside the peculiarity of this 'Club', essentially an association of persons self-governed by a constitution but registered as a Trust, and consider instead a situation that arises in the case of what we may be forgiven for calling a 'regular' public charitable trust, i.e., a body that has trustees, a class of beneficiaries in the public interest as required by Section 9, but without a separate constitution beneath it. When trusteeship changes, whether by reason of resignation or death, new trustees are appointed. These changes are intimated to the office of the Charity Commissioner. Those changes take effect *at once*. The rest is a ministerial act by the Charity Commissioner. If

an enquiry is thought fit under sub-section (2), then undoubtedly the Deputy or Assistant Charity Commissioner will issue notices to parties, give hearings and so on. But the legislature has not anywhere in the scheme of Section 22 either used the word 'validate', nor by express words said that a change that is reported under sub-section (1) is ineffective and cannot be acted upon unless there is a 'finding' recorded under sub-Section 3.

45. The reason a finding is required is clear from other Sections of the MPT Act namely Sections 17, 18, 19, 20 and 21. They read thus:

“17. Books, Indices and Registers: In every Public Trusts Registration Office or Joint Public Trusts Registration Offices, it shall be the duty of the Deputy or Assistant Charity Commissioner in charge to keep and maintain such books, indices and other registers as may be prescribed.

18. Registration of Public Trusts:—

(1) It shall be the duty of the trustee of a public trust to which this Act has been applied to make an application for the registration of the public trust.

(2) Such application shall be made to the Deputy or Assistant Charity Commissioner of the region or sub-region within the limits of which the trustee has an office for the administration of the trust or the trust property or substantial portion of the trust property is situated, as the case may be.

(3) Such application shall be in writing, shall be in such form and accompanied by such fee as may be prescribed.

(4) Such application shall—

- (a) in the case of a public trust created before this Act was applied to it, be made, within three months' from the date of the application of this Act, and
- (b) in the case of a public trust created after this Act comes into force, within three months' of its creation.

(5) Such application shall inter alia contain the following particulars:—

- (ai) the designation by which the public trust is or shall be known (hereinafter referred to as the name of the public trust),
- (i) the names and addresses of the trustees and the manager,
- (ii) the mode of succession to the office of the trustee,
- (iii) the list of the movable and immovable trust property and such description and particulars as may be sufficient for the identification thereof,
- (iv) the approximate value of the movable and immovable property,
- (v) the gross average annual income of the trust property estimated on the income of three years immediately preceding the date on 15 which the application is made or of the period which has elapsed since the creation of the trust, whichever period is shorter,
- (vi) the amount of the average annual expenditure in connection with such public trust estimated or the expenditure incurred within the period to which the particulars under clause (v) relate.

(vii) the address to which any communication to the trustee or manager in connection with the public trust may be sent,

(viii) such other particulars which may be prescribed.

Provided that, the rules may provide that in the case of any or all public trusts it shall not be necessary to give the particulars of the trust property of such value and such kind as may be specified therein.

(6) Every application made under sub-section (1) shall be signed and verified in the prescribed manner by the trustee or his agent specially authorized by him in this behalf. It shall be accompanied by a copy of an instrument of trust, if such instrument had been executed and is in existence.

(6A) Where on receipt of such application, it is noticed that the application is incomplete in any particulars, or does not disclose full particulars of the public trust, the Deputy or Assistant Charity Commissioner may return the application to the trustee, and direct the trustee to complete the application in all particulars or disclose therein the full particulars of the trust, and resubmit it within the period specified in such direction; and it shall be the duty of the trustee to comply with the direction.

(7) It shall also be the duty of the trustee of the public trust to send a memorandum in the prescribed form containing the particulars, including the name and description of the public trust, relating to the immovable property of 16 such public trust, to the Sub-Registrar of the sub-district appointed under the Indian Registration Act, 1908, in which such immovable property is situate for the purpose of filing in Book No. 1 under section 89 of that Act.

Such memorandum shall be sent within three months from the date of creation of the public trust and shall be signed and verified in the prescribed manner by the trustee or his agents specially authorized by him in this behalf.

19. Inquiry for Registration: On the receipt of an application under section 18, or upon an application made by any person having interest in a public trust or on his own motion, the Deputy or Assistant Charity Commissioner shall make an inquiry in the prescribed manner for the purpose of ascertaining—

- (i) whether a trust exists and whether such trust is a public trust,
- (ii) whether any property is the property of such trust,
- (iii) whether the whole or any substantial portion of the subject-matter of the trust is situate within his jurisdiction,
- (iv) the names and addresses of the trustees and manager of such trust,
- (v) the mode of succession to the office of the trustee of such trust,
- (vi) the origin, nature and object of such trust,
- (vii) the amount of gross average annual income and expenditure of such trust, and
- (viii) any other particulars as may be prescribed under sub-section 5 of section 18.

20. Findings of Deputy or Assistant Charity Commissioners: On completion of the inquiry provided for under Section 19, the Deputy or Assistant Charity Commissioner shall record his findings with the reasons therefore as to the matters mentioned in the said section,

and may make an order for the payment of the registration fee.

21. Entries in Register:

(1) The Deputy or Assistant Charity Commissioner shall make entries in register kept under section 17 in accordance with the findings recorded by him under section 20 or if appeals or applications are made as provided by this Act, in accordance with the final decision of the competent authority provided by this Act.

(2) The entries so made shall, subject to the provisions of this Act and subject to any change recorded under the following provisions, be final and conclusive.

46. The most important of these is the integrity of the Charity Commissioner's entries in the register. These cannot be changed at will, and it is for this purpose that the finding under Section 22(3) is required. The finding is not any sense of the word a *validation* of what was done or whether it was properly done or not. If the change report is challenged, i.e., if a trustee for example is removed and he challenges his removal, that may require an enquiry under sub-Section (2) and a more formal adjudication resulting in a completely separate kind of finding under sub-section (3).

47. The narrative that we have set out above shows that the EGM results have been indeed communicated to the Charity Commissioner within the stipulated period of 90 days. What has happened since? Nobody knows. The matter is still pending seven or eight years later with the Charity Commissioner. It seems to us unthinkable to suggest that a change report might be on hold for the better of a decade, but that, following Mr Mirza's formulation, the

change cannot be acted upon in all that time, or that those who have been removed will be allowed to continue during all that time with full control over the assets, properties, and management of the Trust.

48. The order on jurisdiction held, in our view correctly, that the suits agitated civil rights. The prayers in the EGM Suit are important, because it is here that there was a qualified order on jurisdiction. The prayers read:

“(a) That this Hon’ble Court be pleased to pass an Order of Injunction restraining the Defendants, jointly and/or severally (and whether by themselves or through their servants/agents/employees/nominees or otherwise), from trespassing on to the property of the Trust, in their illegal and assumed capacity as the Managing Committee;

(b) That this Hon’ble Court be pleased to pass an Order of Injunction restraining the Defendants from usurping the office of the Managing Committee, continuing to act in such illegal and assumed capacity and from holding themselves out as members of the Managing Committee / Trustees of the Trust;

(c) That this Hon’ble Court be pleased to pass an Order of Injunction restraining the Defendants, jointly and/or severally from preventing the Plaintiffs from carrying out their duties and from acting as the Managing Committee of the 1st Plaintiff Trust, in any manner whatsoever and from exercising any of their rights/prerogatives in that capacity;

(d) That this Hon’ble Court be pleased to pass an Order and Decree directing the Defendants to jointly and/or severally pay the 1st Plaintiff Trust, a sum of Rs. 1,25,00,000/- as compensatory damages for the loss caused

to the Trust for illegally acting as the Managing Committee of the Trust from 21 October 2013;

49. The reliefs sought in the Notice of Motion in the EGM suit are these:

“(a) That pending the hearing and final disposal of this Suit, this Hon’ble Court be pleased to pass an Order restrain the Defendants or any of them (whether by themselves or through their servants / employees / agents / nominees) from preventing and/or obstructing the Plaintiffs from carrying on all such duties, functions, responsibilities and obligations in their capacity as the Managing Committee of the Trust and in accordance with the Constitution and Bye Laws of the Trust, including issuing all requisite letters and correspondence to the auditor(s), concerned police station(s), banks and financial institutions, custodian trustee(s), contractors, employees, agents, scribes and all other concerned persons/authorities about the change in the management of the Trust and of the fact that the Plaintiff Nos. 2 – 5 are the new Managing Committee;

(b) That pending the hearing and final disposal of this Suit, this Hon’ble Court be pleased to pass an Order of Injunction jointly and severally restraining the Defendants their agents, servants, managers or employees, from in any manner acting, posing, representing or behaving as the Managing Committee of the 1st Plaintiff Trust, in any manner whatsoever;

(c) That pending the hearing and final disposal of this Suit, this Hon’ble Court be pleased to pass an Order of Injunction jointly and severally restraining the Defendants, their agents, servants, managers or employees from preventing the Plaintiffs to continue to act as the Managing

Committee of the Trust and for that purpose, to the operate bank accounts, operate the website, hold meetings, disband and appoint sub-committee(s), enter into contracts, address letters, enforce rules and regulations to uphold the Constitution, conduct full audit and present to the members, deal with the staff, procure supplies, carry out repairs and renovations, finalise accounts, admit/refuse pending membership applications, commence legal proceedings, add to the number on the Managing Committee and do all such other things as may be required of the Managing Committee of the Trust in accordance with the Constitution and Bye-Laws of the Trust;

(d) That pending the hearing and final disposal of this Suit, this Hon'ble Court be pleased to pass an Order directing the Defendants to submit a statement, of the income and expenditure incurred on behalf of the 1st Plaintiff Trust during the time that they were illegally posing as the Managing Committee, from 21 October 2013 upto the date of the filing of this Suit;

(e) That pending the hearing and final disposal of this Suit, this Hon'ble Court be pleased to pass an Order directing the Defendants to submit a list of all the new members purported to have been admitted by the Defendants after 21 October 2013 upto the date of the filing of this Suit together with the details and particulars (including instrument numbers and the bank details) of all the monies paid by such new persons to become members;

(f) that pending the hearing and final disposal of this Suit, this Hon'ble Court be pleased to pass an order restraining the Defendants from in any manner whatsoever, utilizing any the funds of the Trust for any purpose whatsoever, including but not limited to defending this present Suit, engaging counsel, firms advocates or otherwise;

(g) that pending the hearing and final disposal of this Suit, this Hon'ble Court be pleased to pass an order directing the Defendants to handover/cede physical occupation and/or control of the office of the Managing Committee of the Trust, including all the cupboards, computers, registers, data, books of account, lists, forms, contracts, documents and all other materials and items that are in the possession of the Defendants or in the Trust office, so as to enable the Plaintiff Nos. 2 – 5 to take over charge as the Managing Committee of the Trust.”

50. Every one of these prayers relates to membership of the Club under the first-version constitution, and to Mehta et al claiming to be validly taken to membership and then validly appointed to the managing committee. From this perspective, these are therefore all clearly civil rights being agitated, not rights of trustees in their capacity as trustees of a public trust. The change report is an incident of the form of registration that the club took; but the origins of the rights claimed lie in membership of the club under the constitution. In the Suspension Suit, the matter is even simpler, because the rights being agitated there by the Plaintiffs were purely civil rights regarding their suspension from membership with nothing whatever to do with trusteeship.

51. The authorities Mr Mirza cites are all on the question of jurisdiction of a Civil Court. In particular, he lays emphasis on the decisions in *Vinodkumar M Malavia v Maganlal Mangaldas Gameti*;⁹ *Gaud Saraswat Brahmin Temple Trust v Vasudeo Shetye*,¹⁰ and *Rajiv*

9 (2013) 15 SCC 394.

10 2010 SCC OnLine Bom 580.

Mehta v Rekha Sheth.¹¹ These judgments follow the decision of the Supreme Court in *Church of North India v Lavajibhai Ratanjibhai*.¹² In *Church of North India*, the Supreme Court held if a question arises and which is outside the purview of the MPT Act, *or* relates to a matter unconnected with administration, *or* possession of trust property, the civil court may have jurisdiction. There is no universal or absolute principle that once there is a public trust, no civil suit can ever lie under any circumstances. The basis of the EGM Suit is the resolution of the general body at that EGM. The injunction sought is in relation to that EGM general body resolution. The EGM Suit does not ask the court to decide the validity of the resolution, but proceeds on the basis that the resolution is valid. Until the resolution is otherwise held to be invalid, it must be given effect to. It does not hang in abeyance pending a ‘finding’ by the Charity Commissioner. This was view Khanwilkar J (as he then was) took in *Chembur Trombay Education Society v DK Marathe*¹³ (on which Gupte J relied in paragraph 17 of his order). Paragraphs 10 and 11 of *Chembur Trombay Education Society* are relevant. There, too, there was a general body resolution. The Court held that a change is effective on the date of resolution of general body. Section 22 is only meant to ascertain whether change has occurred or not. If the competent authority is satisfied that the change has *not* occurred, only then will the change have to be undone and status quo ante restored. The prior registration (what Mr Mirza calls ‘the finding’) of any change is not condition precedent for the change to

11 2014 SCC OnLine Bom 400.

12 (2005) 10 SCC 760.

13 2011 SCC OnLine Bom 842.

come into effect. In paragraph 10, Khanwilkar J relied on the Supreme Court decision in *Managing Committee Khalsa Middle School v Mohinder Kaur*¹⁴ to hold that prior registration of every reported change is not a condition precedent before that change takes effect. In the *Khalsa Middle School* case, the Supreme Court was examining Section 12A of the Societies Registration Act, 1860 (and Sections 18 and 19 of the Companies Act, 1956). This is in pari materia with Section 22 of the MPT Act. The Supreme Court held in paragraph 11 that there is no requirement in the Act that an alteration in the governing Rules and Regulations must be registered. Hence, it could not be held that registration of an amendment to the Rules and Regulations was a condition precedent for the amendment to take effect.

52. Khanwilkar J's view in *Chembur Trombay Education Society* was affirmed by a Division Bench of this Court in *Ganesh Thawre v Central Hindu Military Education Society*,¹⁵ while dealing squarely with Section 22 of the MPT Act. In paragraphs 10 to 13 (of the SCC OnLine Report), the Division Bench specifically affirmed the view Khanwilkar J took in his decision in *Chembur Trombay Education Society*. In the *Ganesh Thawre* case, the Division Bench specifically noted the reliance in the *Chembur Trombay Education Society* judgment on the Supreme Court decision in the *Khalsa Middle School* decision.

14 1993 Supp (4) SCC 26.

15 2007 SCC OnLine Bom 667.

53. The decision in *Ganesh Thawre* is by a Division Bench of this Court. That was a bench of coordinate strength. *Ganesh Thawre* is, therefore, binding on us. We are shown nothing to distinguish the *Ganesh Thawre* case, nor to suggest that it no longer good law, or that it was a decision render per incuriam.

54. Mr Mirza's proposition that every change reported is ineffective unless it is first 'validated' by the Charity Commissioner is, therefore, not the correct position in law.

55. If this be so, then there was never any question of the EGM Suit's trial being deferred until the Charity Commissioner 'decided' the change report.

56. The consequence of this discussion is that we reject entirely, including to the limited extent accepted by Mrs Justice Dalvi, the challenge to jurisdiction. Once we accept her finding that what is being canvassed by the Plaintiffs is an enforcement of their civil rights then there is no question of a jurisdictional ouster. After this, once we have held that there is no substance to the argument that no change is effective pending a 'finding' under Section 22(3), then nothing remains of the jurisdictional challenge.

57. Consequently, we affirm the finding of Ms Justice Dalvi in her order of 7th May 2014 in the two Notices of Motion in the Suspension Suit and the EGM Suit on the preliminary issue that this Court does have jurisdiction. We reverse her finding that the

EGM Suit cannot proceed to trial pending a ‘finding’ by the Charity Committee on the change report following the EGM.

58. The situation before us is markedly different from the one before Gupte J. We have before us a full-spectrum challenge to the order on jurisdiction by Mrs Dalvi J. Gupte J had to take it as he found it. He — correctly — read her order to mean that, at best, the *trial* could not proceed pending a decision (‘finding’) by the Charity Commissioner. He dealt with this squarely in paragraph 10 of his order, and held that Mrs Dalvi J’s order did not, and could not in law, mean that no *interlocutory* order could be passed. The jurisdiction of a civil court is plenary. A final trial may well have to be deferred. But the power of the Court to fashion an interim order in the interest of justice cannot, by that reason, be denuded. Interlocutory orders are meant to mitigate the risk of injustice; to protect him against injury suffered by a violation of his civil rights, and for which he may not readily be compensated in damages at the trial should be finally succeed.¹⁶ In a given situation, a denial of interim or interlocutory relief results is irreversible and terminal — the plaintiff’s rights may be extinguished. Order 39, Rules 1 and 2 of the Code of Civil Procedure, 1908 (“CPC”) and Section 151 give a civil court wide latitude to make an order that *justice* demands: *Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal*.¹⁷ Ideally, what the law prescribes should coincide with what justice needs. But a requirement of law can never be seen as the implacable enemy of what justice demands. The best should never be the enemy of the

16 *Gujarat Bottling Co Ltd v Coca Cola Company*, (1995) 5 SCC 545.

17 1962 Supp (1) SCR 450 : AIR 1962 SC 527.

good. Yet Section 151 is part of a *procedural* code: it cannot be used to take away substantive rights, the Supreme Court ruled in the three-Judge bench decision in *Padam Sen & Anr v State of UP*.¹⁸ In many cases, the final disposal of the suit is stayed, often under Section 10 of the CPC. Yet, courts have held that even in such cases, the power to grant interim relief continues. This is on the same jurisprudential basis, viz., the power to do what justice demands, and to prevent a final, or fatal, extinguishment of the rights claimed, rendering the suit infructuous. Gupte J noted with care the extensive learning on this aspect.¹⁹

59. The Privy Council decision in what is popularly called ‘the Bhowal Sanyasi’ case, *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy & Ors*²⁰ is of course well known. The trial court had decreed that astonishing suit for immovable property. An appeal was dismissed (by a special three-judge bench). An application for leave to appeal to the Privy Council had not till then been filed. An application was made for an order of status quo. The question before a Division Bench of the Calcutta High Court in *Ramendra Narayan Roy & Anr v Smt Bibhabati Debi & Ors*²¹ was whether the

18 (1961) 1 SCR 884 : AIR 1961 SC 218; cited and applied in *Manohar Lal Chopra*.

19 *Senaji Kapurchand v Pannaji Devichand*, 1921 SCC OnLine Bom 113 : AIR 1922 Bom 276; *Rameshwar v Vth Additional District Judge, Basti*, 1998 SCC OnLine All 390 : AIR 1999 All 1; *Nanda Kishore Singh v Ram Gulam Sahu*, 1912 SCC OnLine Cal 89 : (1912) 40 Cal 955; *Sailendra Nath Das v Saroj Kumar Das*, 1934 SCC OnLine Cal 135 : AIR 1934 Cal 823; *Jewan Ram Gangaram & Co v Commissioners for Port of Calcutta*, 1939 SCC OnLine Cal 291 : AIR 1939 Cal 308.

20 1946 SCC OnLine PC 30 : (1947) 49 Bom LR 246 : AIR 1947 PC 19.

21 1941 SCC OnLine Cal 138 : AIR 1942 Cal 488.

High Court had the power to make an interim order for maintaining status quo before that application for leave to appeal to the Privy Council was filed, and until that application was filed and an order obtained from the appropriate court. The Division Bench in terms held that the High Court had ‘inherent power’, which it would exercise in a proper case, to make an interim order maintaining the status quo. This was an auxiliary power the Court exercises in aid of the power which the court dealing with the application for leave to appeal would have and might exercise.²²

60. Consequently, even if Mrs Dalvi J’s order is upheld, it would really make no difference at all to the exercise of discretion at the interim stage by Gupte J. Hearing an application for interim relief, he always had the power to grant appropriate relief; and his order does not fall afoul of the *Padam Sen* formulation. As it happens, we have reversed Mrs Dalvi J’s finding, so the question is academic. But even otherwise, this must result in a complete negation of Mr Mirza’s submission that in view of Mrs Dalvi J’s order on the preliminary question of jurisdiction, Gupte J could not have made the interim order that he did.

61. Appeals Nos 323 of 2014 and 324 of 2014 are disposed of accordingly.

62. This concludes the discussion on the two-part jurisdictional challenge.

²² The Division Bench drew inter alia on the decisions in *Nanda Kishore Singh*, and *Sailendra Nath Das*, *supra*.

E. THE CONSTITUTION OF THE BREACH CANDY CLUB, MEMBERSHIP, AND MANAGEMENT

63. We turn now to the second major head, a discussion on the features of the (first-version) constitution of the Club, membership categories and management. A copy of this first-version constitution is at page 289 in Volume C-2. One of the peculiarities of this constitution is that it makes a distinction between Europeans, persons from a foreign country, and other inhabitants of Mumbai. Some anguish has been expressed elsewhere about this form — and has received some condemnation — but we make it plain that this is of no concern to us. We are not here dealing with a public law issue or any larger principle. This is in the realm of private law, and no aspect of public law arises before us.

64. Further, the jurisprudence regarding court interventions in matters pertaining to the affairs and management of self-governing private clubs is well settled. Whatever be the personal views of an independent observer, the fact is that this constitution, in this form, received judicial sanction from a court of law in 1967. We must accept it as it stands. It is the constitution that will remain until those who are authorised to effect a change succeed in doing so — if they are so minded. We leave it at that.

65. The relevant definitions in Article 2 are these:

“(2) ‘Member’ shall mean a person who is a beneficiary of the Trust under the Principal Indenture, or, alternatively, a person other than a beneficiary, who, in either case, shall

have been admitted by the Committee to enjoy the benefits under the trust, as hereinafter provided: Provided Always that nothing anywhere herein contained in these Articles shall be deemed to constitute a Club under the Trust;

(3) **“European” shall mean a person from a European country and being a citizen of a European country;**

6(a) ...

(b) ...

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

(c) **‘Ordinary Member’ shall mean a person duly admitted as such by the Committee in terms of Article 6 hereof;**

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

(9) **‘Members of the Committee’ shall mean the Ordinary Trustees for the time being or the Ordinary Trustees assembled at a meeting of the Committee as the case may be;**

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

(Emphasis added)

66. Then come the Articles regarding membership.

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

5. Any person from a foreign country and being a citizen of a foreign country and an inhabitant of Bombay shall, unless any addition to the over all membership at any time of the Trust would, in the opinion of the Committee, whose opinion in that behalf shall be final and binding, interfere with the amenities and comforts of existing members, be eligible, on payment of the requisite Entrance Fee and Annual Subscription, if any, prescribed by the Committee, for admission by the committee as a Foreign Member of the Trust at the sole discretion of the committee, subject always, however, to such maximum number of such members from each foreign country as the Committee may from time to time decide.

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

67. Admission to membership is governed by Articles 10 and 11, which read thus:

“10.(a) Every person seeking admission to membership, other than Trust of [*sic*] Visiting Membership, of the Trustee for any year shall require to be recommended **in writing by three members of the Trustee of whom not less than two shall be Trust Members and such person shall apply in written to the Committee and shall be subject to secret ballot in the manner from time to time prescribed by the Committee in the Bye-Laws of the Trust. Applications for admission shall be in the prescribed form and shall be signed by the Applicant and by each of the members recommending him for membership and shall be submitted**, together with the requisite Entrance Fee and Annual Subscription, if any, to the Committee through the Honorary Secretary.

(b) In the case of persons seeking admission as Trust or Visiting Members of the Trust, application shall be made and dealt with in the manner and form from time to time prescribed by the Committee in that behalf in the Bye-Laws of the Trust.

11. The eligibility of a prospective member shall be determined by the Committee whose decision in that behalf shall be final and binding, Provided always that, in determining such eligibility aforesaid, the Committee shall at all times have regard, inter alia and without prejudice to the generality of the forgoing, to the capacity of the Trust premises and to the amenities and comforts of the existing members.”

(Emphasis added)

68. Eligibility is separately provided in Article 14:

“14 (a) A Trust Member shall, on payment of all such daily admission or other charges, if any, as may from time to time be prescribed by the Committee have the right to the full and unrestricted use of the Trust premises and shall, as and so long as he shall duly observe the constitution and Bye-Laws of the Trust and shall conduct himself in a proper and fitting manner at all times and shall continue to pay the requisite Annual Subscription as herein provided, he re-admitted as a Trust Member from year to year by the Committee as long as he shall remain inhabitant of Bombay : Provided Always that a Trust Member shall have the right to introduce into the Trust premises not more than two guests on any one day, but on not more than two occasions in any one month : Provided Further that, in respect of any guest to introduced by Trust Member hereunder, such Trust Member shall be required to pay on behalf of such guests introduced by him, all such daily readmission or other charges, if any, as may from time to time be prescribed by Committee in that behalf.

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

(c) An Honorary or Honorary Life Member shall have the right to the full and unrestricted use of the Trust

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

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

(Emphasis added)

69. Now we come to the question of trusteeship and management covered by Articles 17 to 20. The powers of the ordinary trustees and other provisions are to be found in Articles 21 to 24, of which Article 21 is important. These read:

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

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

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

(b) The Chairman of the Committee referred to in sub-Article (a) hereof shall hold office from the conclusion of the meeting of the Committee at which he is elected as such until the conclusion of the first meeting of the Committee following upon the Annual General Meeting of the trust next following, but shall be eligible for re-election.

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

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

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

21. The Ordinary Trustees shall, at any and all times and from time to time, have the right to add to their number, within the limits prescribed in Article 17 thereof, and shall also have the right to co-opt, but as advisers only, to the Committee any person or persons whatsoever as they may, in their sole discretion, think fit :

Provided Always that any person above referred to so co-opted to the Committee hereunder shall act in an advisory capacity only and shall not have any right to attend or vote at Meetings of the Committee or any sub-Committee.

(Emphasis added)

70. Articles 32 and 33 deal with General Meetings and, for completeness, are set out below.

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

(i) the requisition shall state the object of the meeting and shall be signed by the requisitionists and deposited at the offices of the Trust and may consist of several

documents in like form, each signed by one or more requisitionists :

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

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

33. Fourteen days’ notice of every Annual General Meeting and twenty one days’ notice of every Extraordinary General Meeting specifying the place, date and time of meeting, and in the case of any special business to be transacted thereat, the general nature of such business shall be given to the Trust Members by a notice published in newspaper in the English language circulating in Bombay : Provided that in the case of an Extraordinary General Meeting at which no business is to be transacted requiring the passing of a Special Resolution, less than twenty-one days’ notice may be given if the Chairman or the Committee decide that the nature of the business to be transacted thereat is of sufficient urgency to require the giving of such shorter notice.”

(Emphasis added)

71. For our purposes, the scheme of this constitution contemplates distinct types of membership. The first is a Trust member. Such a member is defined in Article 4 as a European inhabitant of Bombay. We pass over the provision for foreign

members in Article 5 and Honorary Members and Honorary Life Members in Articles 8 and 9. The result is this—

- (a) Only European inhabitants of Mumbai can be Trust Members, under Article 4.
- (b) Only persons from a foreign country, and who are citizens of that foreign country, but inhabitants of Mumbai can be Foreign Members. So says Article 5.
- (c) Under Article 6, an Ordinary Member is an inhabitant of Mumbai who is neither a Trust Member nor a Foreign Member. Ordinary Members are the indigenous tribe. Article 6 is therefore some sort of residuary Article covering non-Europeans and non-foreigners.

72. But what are their respective rights and obligations? One of the incidents or privileges of membership is the right to participate in the management of the Club, to stand for elections and to vote. But it has long been held that this is not an inherent right but has to be specifically conferred by the constitution by which a body of persons chooses for its own governance. There is no law that requires every class of membership of a body such as this to have exactly equal rights. A classification is always permissible if that is what the constitution in fact contemplates. As we noted earlier everyone proceeded on the footing that it was this constitution that would govern and would be the subject of the discussion before the Gupte J.

73. The distinction becomes immediately apparent when we turned to Article 17. This tells us that *only Trust Members* — European inhabitants of Mumbai — can be ‘Ordinary Trustees’ of the Club. There is obviously a certain amount of confusion in the nomenclature. We have Trust Members. We have Ordinary Members. And we have Ordinary Trustees. But only Trust Members — Europeans — can be Ordinary Trustees. Ordinary Members can never be Ordinary Trustees. Perhaps the only reason for this nomenclature is to distinguish Ordinary Trustees from Custodian Trustees. The other likely reason is that it might have been more palatable to refer them as Ordinary Trustees rather than *European Trustees*, which is what they are. Whatever be the effect, extraordinary or not, the consequence is one: only Europeans can be Trust Members and only Europeans can ever be Ordinary Trustees of the Club. This is not denied by either Mehta or Agrawal before us.

74. The management of the Trust is in a Committee of Ordinary Trustees under Article 19. Article 18 is the one on which Mr Mirza places reliance. This deals with removal of Trustees. It is his submission that an Ordinary Trustee (a Trust member, a European) has under Article 18 the right to appoint ‘any person’ to fill any vacancy in the Trusteeship. His case is that Mehta ascended to Ordinary Trusteeship via this route. He is not a Trust Member. That much is certain. He could never *be* a Trust Member. That is also certain. But he is ‘any person’ (though he maintains he is special and not just any old person) within the meaning of Article 18 and this is how he came to be an Ordinary Trustee. He was first an advisor to the Committee of Ordinary Trustees, apparently

rendering legal advice. He then acquired both membership and elevation — so to speak — to the Committee.

75. It is Articles 18, 20 and 21 that, as Mr Justice Gupte said, bear scrutiny. Article 21 provides for the power of Ordinary Trustees. They can add to their number periodically within the limits prescribed in Article 17. This requirement is that there must be no less than three and no more than 10 such Ordinary Trustees. Can a Trust Member appoint a non-Trust member as an Ordinary Trustee? To be, or not to be; that is the question, says Mr Mirza. He and Mr Mody maintain that an Ordinary Member may indeed ascend to Ordinary Trusteeship. Shirley and others cry foul, and say foul is never fair and fair is never foul; that it is impossible that Mehta and Agrawal should take root as Ordinary Trustees but by the fair weather that they made for themselves.

76. According to Mr Rustomjee and Mr Jagtiani for Shirley et al, what Article 21 requires is simply this. That there need not be a general meeting or an election for the appointment of Ordinary Trustees. They can appoint Trust Members as Ordinary Trustees but must do so within the upper and lower limits specified in Article 17. What Mehta and Agrawal say is that it is not so much a question of numbers but more an issue of who can be taken to Ordinary Trusteeship. The emphasis as we have noted from Mr Mirza is in Article 18, on the words ‘any person’.

77. We believe the submission from Mr Mirza and Mr Mody is misplaced and is a total misreading of the Articles. The two words

‘any person’ cannot be read in isolation. In any case, the expression is ‘any person *as aforesaid*’, and this is clearly a reference to the Trust Members spoken of in the earlier portion of Article 18. It is difficult to accept Mr Mirza’s submission because otherwise Article 18 would run directly counter to the prescription that only Trust Members can be Ordinary Trustees. This is clear also from other intrinsic evidence in the constitution. What Mr Mirza cannot explain is the conflict between his interpretation and Article 14(b) set out above. This prohibits Ordinary Members — indigenous Mumbaikars — from even attending or voting at any General Meeting, let alone serving on the committee or any sub-committee of the Club.

78. If we view it like this, then there is no explanation at all as to how Mehta and Agrawal could ever have even come to hold office as Ordinary Trustees of the Club.

79. Incidentally, and pausing here for a moment to return to a threshold argument, unless Mehta and Agrawal are able to show that their acquisition of membership, and their claimed appointment to Ordinary Trusteeship was *exactly* in terms of the constitution without any conflict, there can be no question of any ‘change report’ being subjected to a finding. It is pointless to say that Mehta’s name was in the register once. When asked to explain these two aspects, he simply cannot.

80. Mr Justice Gupte considered the question of whether such a Suit for only an injunction without an accompanying declaration

could lie and whether Shirley and others could claim interim relief regarding possession. The Defendants contended relying on the decision of *Anathula Sudhakar v P Buchi Reddy & Ors*²³ under the Specific Relief Act that a declaration was necessary. Mr Justice Gupte dealt with this aspect of the matter in paragraph 28 and held, and we believe correctly, that the law does not invariably require a declaration to sustain a claim for a perpetual injunction. *Anathula Sudhakar* was on a different point, whether it was necessary to claim a declaration and possession where injunction was merely a consequential relief.

81. Then Gupte J proceeded to the questions of balance of convenience and irretrievable prejudice. For this, he turned to an examination of how Mehta and Agrawal had respectively claimed to have acquired membership of the Club to begin with. Mehta's case remains inexplicable. Mr Justice Gupte doubted that he could ever been admitted to Ordinary Membership of the Trust. He is clearly not eligible to be a Trust Member. There is no record *at all* of his admission to Ordinary Membership — a quite *extraordinary* circumstance. All he has is some season ticket register that shows a number against his name. He cannot show that he paid an entrance fee. He cannot name his proposer or seconder. There are no minutes of the balloting committee. There are no receipts of an annual subscriptions. Mehta claims to have been a member since 1986 but he is a member without a record. The only documents that Mehta has is that his name featured in some minutes of Annual General Meetings. There is nothing to show that he was admitted to

23 (2008) 4 SCC 594.

Ordinary Membership of the Club, other than his repeated assertions. Consider the provisions of Article 10(a). Candidates must be recommended in writing by three members of the Trust. No less than two must be Trust Members. The person must apply in writing to the committee. There is a secret ballot. There is a prescribed admission form. It must be signed not only by the candidate but by all the recommending members. It must be tendered with entrance fee and the annual subscription through the Honorary Secretary. None of this can Mehta show. All records, we are asked to believe, are conveniently lost, or destroyed. We are told that no membership records before 2002 have been preserved. Why not, we are not told. Mr Justice Gupte found it strange. So do we. Convenience is seldom persuasive and never a substitute for proof, even *prima facie*.

82. But it gets worse. Mehta is not even consistent only in his inconsistency. He is unclear even of the date or year of his admission to membership. As we have noted, admission required recommendations from three members, at least two of whom had to be Trust Members. Obviously these were persons Mehta had to have known. It is indeed very peculiar that Mehta does not know who his friends of the time were and cannot name them. In one place, he says that he was appointed to the committee at an AGM of 12th December 2005. Elsewhere, he says this was on 14th December 2004. In a change report of 2007, Mehta himself says that he was an advisor before 10th November 2006 and therefore become a Trustee after that date. In an Affidavit filed in 2009 with the Charity Commissioner, he says his appointment was of 18th January 2007, although there is no resolution to this effect. Then there is reliance

on a newsletter of October 2012 which says that Mehta stood appointed to the committee in a process that begin in 2002 and some how meandered along until 2007. Here he names two committee members, although both have since filed Affidavits disavowing his membership. In addition, there are statements by his erstwhile fellow Defendants, Malik, Anand and Panjwani, significantly distancing themselves from Mehta. As Mr Justice Gupte said, there are six “potential” dates but there is not a single minute of a meeting on record to show how, whether by co-option or appointment, Mehta could ever have become a Committee member. This is quite apart from his complete lack of eligibility to begin with. He was not even eligible to membership. To say as Gupte J did, that the material is contradictory and unreliable, is to put it at its mildest.

83. Since Malik, Anand and Panjwani, original Defendants Nos. 2, 4 and 5 have withdrawn the Appeal, we do not deal with them.

84. This leaves Agrawal, original 3rd Defendant. His entry into membership is, if anything, even more colourful than Mehta’s. Agrawal relies on a membership form in some proceeding before the Charity Commissioner. Before the Gamdevi Police, a force that has been unduly troubled by these members, this form is said to be a forgery. The form itself is said to have been filled up in February 2003. It gives a Gmail address. Gmail did not then exist. It gives an eight digit telephone number that was activated in July 2003, several months later (and deactivated in May 2010). It is said to have been signed in the form of recommendation by a person whose daughter said that her mother’s signature on the form was forged and that

she, her mother and family did not even know Agrawal. The second signature on the form was by another member, since deceased. Her son also told the police that her signature too was forged, and even they did not know Agrawal. A third so-called signatory went to the Gamdevi Police in person and denied that the signature on Agrawal's form was hers. She said that she had never signed Agrawal's membership form. That membership form of February 2003 had a seven-digit telephone number although by that time all telephone numbers had been moved to eight digits. Agrawal's daughters' (also shown as applicants) ought to have been minors below 10 at the time, but the photographs showed young ladies much older. It seems that this form lay around until it was approved in 2010 — and that approval came, somewhat unsurprisingly, from Mehta. There is another controversy about the so-called interview, the minutes of which have also been doubted.

85. Agrawal has been at some pains to try and explain these strange circumstances, but one may be forgiven for feeling entering the Breach Candy Club seems at one time to have been very much like Alice stepping through the looking glass: the curious tale only gets curiouiser. There is the entry at some point in this dizzying narrative of 'Peter the Waiter', serving staff at the bar. He seems to have played something of a pivotal role in getting Agrawal's form filled. There are so many issues and problems with Agrawal's membership application. None are satisfactorily explained. But then, it all happened at a bar.

86. Gupte J returned a finding in paragraph 35 that neither Mehta nor Agrawal were Trust members. That is totally correct. He also said that consequently they are wholly ineligible to be Ordinary Trustees or to serve on the committee. That is also correct. He seriously doubted their Ordinary Membership of the Club. So do we. On the questions of balance of convenience and irretrievable prejudice, therefore, Gupte J found for the Plaintiffs. So do we.

87. If we carry this to its logical conclusion, the result is startling. If Mehta and Agrawal can show how they validly acquired membership *under the constitution as it stands*, then there is no question of their claiming appointment to the Committee. Even if they are able to show that they were properly admitted to membership, that could only have been as Ordinary Members, and neither could ever have been validly appointed as an Ordinary Trustee. If this be so, then there was really no need for an EGM to remove them — viewed either way, they simply could never be Ordinary Trustees. There is, therefore, nothing on which the Charity Commissioner needs to return a ‘finding’. If anything, the Charity Commissioner would need to invalidate any earlier change report by which Mehta and Agrawal purportedly took office as Ordinary Trustees, something entirely forbidden by the constitution.

88. From paragraph 37 of the impugned order by Gupte J, there is a discussion on the emergence of the new constitution. Gupte J looked at this for a limited purpose — only to support the finding of irretrievable prejudice and balance of convenience. Certainly, these

are prima facie views. They cannot be otherwise. But it is equally certain that no explanation was offered to Mr Justice Gupte and none is offered to us now about the inconsistencies and the very many oddities in the second version of the constitution.

89. To Mr Mirza's and Mr Mody's submission that the 'fact' of this second-version constitution must be considered, the answer is simplicity itself: at whose instance? None of the Trust Members would have anything to do with it. Nor do any of the other Ordinary Members. Only Mehta and Agrawal play this card — but they cannot, for they cannot be dealt a hand in the first place. They are yet to show that they are validly 'in the game'. Their very memberships are in doubt, and prima facie have been held to be dubious. If their membership in any category is doubted, leave alone their appointment to the Committee, what locus have they to advocate this second-version Constitution? The entire edifice of the defence by Mehta and Agrawal is that their Ordinary Membership cannot be doubted. It can. It is. It has been. And until they overcome that, there is no question of looking to the second-version constitution at their instance.

90. Neither Mehta nor Agrawal have filed any proceeding assailing the first-version (and only) constitution. It is extremely doubtful if they could even do so. A civil suit would, by their own reasoning, be barred and Mr Mirza's arguments before us would be turned on them. Second, their locus as members is itself not established.

91. There is an emphatic finding in paragraph 44 of Gupte J's order that the affairs of the Trust are unsafe in the hands of the Defendants. In light of subsequent events, this means Mehta and Agrawal. We sustain that finding.

92. Consequently, the order of Mr Justice Gupte of 29th October 2015 is upheld. Appeal No. 158 of 2017 and Appeal No. 347 of 2016 are dismissed.

F. SUMMARY AND FINAL DIRECTIONS

93. Our conclusions are these:

- (a) This Court has jurisdiction to try both suits.
- (b) A 'finding' by the Charity Commissioner on the Change Report filed pursuant to the EGM in question is not a pre-condition for the resolutions at that EGM to operate.
- (c) Prima facie, neither Mehta nor Agrawal have shown that they were properly admitted to Ordinary Membership of the Club.
- (d) Neither Mehta nor Agrawal were ever entitled, even assuming they were Ordinary Members, to be appointed as Ordinary Trustees of the Club.
- (e) The appeals against Ms Justice Dalvi's order are allowed in part. The finding that the trial of the EGM suit cannot proceed until the Charity Commissioner

returns a finding on the change report filed pursuant to the EGM cannot be sustained in law. It is contrary to settled law. It is quashed and set aside.

- (f) The appeals against Gupte J's order fail the *Wander v Antox* test. It is not demonstrated that any part of Gupte J's order was not reasonably possible, or was arbitrary, perverse or capricious.
- (g) The appeals against Gupte J's order are dismissed.

94. Gupte J stayed his order conditionally. Paragraph 46 reads:

46. Learned Counsel for the Defendants seeks stay of this order. I am not inclined to consider any stay of the order, which has the result of allowing Defendant Nos.1 and 3 in the management of the trust in any way. Learned Counsel for the Defendants submits that in that case, at least Defendant Nos.2, 4 and 5 along with Mr. Sandeep Mehta, who has been appointed as a member of the Managing Committee in the interregnum, should be allowed to operate as the Managing Committee for a limited period and that he would accept this as a condition of the stay order. I am inclined to consider stay of this order for a limited period on this footing. However, in the facts and circumstances, which I have discussed in this order, I can only permit such stay even for a limited period subject to conditions. Hence, the operative part of this order is stayed for a limited period of six weeks from today, subject to the following conditions:

- (i) Defendant Nos.1 and 3 shall not be allowed to participate in any of the meetings of the Managing Committee or hold themselves out as members of the Managing Committee;

(ii) Defendant Nos.2, 4, 5 and Mr.Sandeep Mehta shall merely look after the day to day management of the trust and its premises and shall not take any policy decision or admit any new members, ordinary or trust members. They shall not admit any new member on the Managing Committee. They shall give full, free and complete access to the records of the Trust including all cupboards, computers, registers, data, books of accounts, lists, forms, contracts, documents of the trust to Plaintiff Nos.2 to 5 for the purposes of inspection.

(iii) Defendant Nos.2, 4, 5 and Mr. Sandeep Mehta shall not initiate any disciplinary action against Plaintiff Nos.2 to 5;

(iv) It is made clear that no record of the trust shall be removed from the office of the trust;

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

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

95. This stay cannot continue in this form. Defendants Nos. 2, 4, 5 and Mr Sandeep Mehta were, obviously, some interim or pro-tem committee. They will now have to step down. Those elected to the Committee at the EGM in question will continue. We continue clauses (i) and (iv) of Gupte J's order. Mehta and Agrawal are not to participate in any of the meetings of the Managing Committee nor to hold themselves out as members of the Managing Committee. No records of the Trust are to removed from the office of the trust, but this must be read sensibly: it does not extend to routine items such

as Kitchen Order Tickets, or KOTs, records of annual event tickets or passes, etc. The Club's properly appointed advisors and tax consultants will guide the managing committee on what must be preserved and what need not be retained. However, this is subject to our direction that no records of membership, managing committee meetings, balloting, admission to membership, and no financial records (except as approved by the tax consultants) are to be destroyed. These may be digitized for safe-keeping, but these records will be needed at the trial.

96. All Interim Applications and Notices of Motion are infructuous in light of this order and are disposed of accordingly.

97. Mr Mirza seeks a stay. We do not know the basis of this since Mehta is not on the committee. His claim to being on the committee has been emphatically rejected and his claim to membership has also been doubted. The other previous Appellants namely, Malik, Anand and Panjwani, were also removed by Gupte J's order. They have accepted Gupte J's order and seek no stay. In fact, they will now have to step down. As Gupte J noted, the affairs of this Trust are unsafe in the hands of Mehta and Agrawal, a finding that we have readily upheld. The application for stay is rejected.

(Gauri Godse, J)

(G. S. Patel, J)