

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13384 OF 2022

Shree Khambhati Modh Vanik Samaj
vs.
The State of Maharashtra and Others

...Petitioner
...Respondents

Mr. Vishal Kanade a/w. Mr. Shashikant Chaudhari, Ms. Tanaya Patankar, Ms. Varsha Mishra, Ms. Snehal Chaudhari, Ms. Pranot Pawar and Ms. Preshita Parab i/b. Maharashtra Law Associates, for the Petitioner.

Mr. C.D. Mali, AGP for the State.

Ms. Charmie Gandhi a/w. Mr. Chirag Unadkat, for Respondent Nos. 4 and 5.

Mr. Shravan Giri, for Respondent No. 2.

Ms. P.M. Bhansali a/w. Ms. Dharini Jain, for Respondent Nos. 6 & 7.

Mr. Aditya Pimple and Mr. Sangharsh Jadhav i/b. Mr. Naresh Pai, for Respondent No. 8.

Mr. Aseem Naphade a/w. Mr. Sulaiman Bhimani i/b. The Law Suits, for Respondent No. 9.

CORAM : N. J. JAMADAR, J.
RESERVED ON : AUGUST 3, 2023
PRONOUNCED ON : DECEMBER 20, 2023

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally at the stage of admission.

2. The challenge in this petition is to an order dated 6th September, 2022 passed by the learned Charity Commissioner on Applications (Exhibits 7, 10, 14, 17, 24 and 29) in Application No.

CC/16/2021/Misc filed by respondent Nos. 2 to 9 seeking intervention in the said applications preferred by the petitioner/trust for grant of permission under section 36(1)(a) of the Maharashtra Public Trust Act, 1951 (the Trust Act, 1951), whereby the learned Charity Commissioner was persuaded to allow the intervention applications and direct the petitioner to add the interveners as respondents to the said application.

3. The background facts leading to this petition which assails seemingly an innocuous order of intervention deserves to be noted in a little detail to appreciate the legality, appropriate and correctness thereof, in a proper perspective.

a) The petitioner is a public charitable trust registered under the Public Trust Act, 1950. The petitioner/trust owns a property “Samaj Darshan” situated at CTS No. 84B and 84C at Kandivali(w), Mumbai (the subject property). The petitioner/trust had resolved to redevelop the subject property.

b) An application No. 115 of 2014 was filed before the Charity Commissioner under section 36 of the Trust Act, 1950 seeking permission to redevelop the property and enter into a Development cum Sale Agreement with M/s. Bhakti Enterprises, the respondent No. 2. By an order dated 8th June, 2015, the learned Charity

Commissioner was persuaded to accord sanction under section 36(1)(a) of the Act, 1950 to the trustees of the petitioner-trust to redevelop the trust property. It was, inter alia, noted that the decision of the trust to redevelop the trust property was justifiable. Pursuant thereto, the petitioner/trust and respondent No. 2 entered into a Development Agreement on 7th December, 2015.

c} Asserting that the respondent No. 2 committed breach of terms and conditions of the Development Agreement, the petitioner terminated the Development Agreement vide notice dated 15th July, 2017.

d} In the wake of the dispute, the petitioner instituted Commercial Arbitration Petition No. 147 of 2018. In the said petition by moving Commercial Arbitration Application No. 54 of 2018 the petitioner sought interim relief. In the said proceeding on 21st February, 2019 the consent terms were executed between the petitioner and respondent No. 2. Pursuant thereto, by an order dated 3rd April, 2019 Commercial Arbitration Petition No. 147 of 2018 came to be disposed, inter alia, on the following terms :-

I. The Court Receiver, High Court, Bombay as appointed as receiver of the suit project by an order dated 28 August 2018 stands discharged, subject to payment of cost as set out by the Court Receiver which shall be paid by the respondent within a period of two weeks of such intimation.

II. The Court Receiver shall accordingly hand over the suit project to the respondent within one week

from today and place a report to that effect on the proceedings of this petition.

III. The discharge of the Court Receiver, however, is subject to the compliance of the other terms and conditions as agreed between the parties in the consent terms.

e} Asserting that the respondent No. 2 committed breach of the consent terms, the petitioner took out a Notice of Motion (L) No. 1824 of 2019 seeking to restore the Petition No. 147 of 2018 and a host of reliefs including appointment of a new developer in the place of respondent No.2 and appointment of Court Receiver.

f} Initially on 27th June, 2020 ad-interim relief was granted in the said Notice of Motion. By an order dated 26th November, 2020, this Court was persuaded to allow the petitioner to appoint a new developer for the development of the trust property. The Notice of Motion was thus made absolute in terms of prayer clause (a) to (d). Prayer clause (c) with which we are primarily concerned reads as under :-

(c) That this Court be pleased to grant permission to the Applicants to appoint a new Developer for development of the suit property in view of breach of the undertakings given to this Court by the Respondent under the Consent Terms dated 21.02.2019 (Exh. A hereto).

g} Pursuant to aforesaid order, the petitioner trust appointed a new developer M/s. H. Rishabraj Developers to redevelop the trust

property. Proceedings were initiated before MahaRera seeking permission to change the promoter. The petitioner also moved the application seeking permission of the Charity Commissioner to appoint M/s. H. Rishabraj Developers for the redevelopment of the trust property.

h} Respondent No. 2, the erstwhile developer, filed an application seeking to intervene in the said application. The respondent No. 2, inter alia, contended that respondent No. 2 was a necessary and proper party to the said application and there was a reasonable apprehension that material facts, which bear upon the determination of the application under section 36 of the Act, 1950, would be concealed by the petitioner.

i} The respondent No. 8, which is association of the allottees of the flats allotted by respondent No. 2/the erstwhile developer, also claimed to be a necessary and proper party. Non-impleadment of respondent No. 8 would cause irreparable loss to respondent No. 8 as material facts would be concealed from Charity Commissioner by the petitioner, contended respondent No. 8.

j} Respondent Nos. 3 to 7 and 9 who are individual allottees of the flats allotted by the developer have preferred applications for intervention on more or less identical grounds.

k} The petitioner/trust resisted the intervention and

impleadment of respondent Nos. 2 to 9 by filing affidavits in reply.

1} The learned Charity Commissioner, after appraisal of the pleadings, perusal of the documents and consideration of the submissions canvassed on behalf of the parties, allowed the applications holding inter alia that the respondents/ interveners had interest in the property of the trust which is the subject matter of application No. 16 of 2021. The objections raised on behalf of the petitioner that the contract of respondent No. 2 has been terminated under the orders of this Court and that the trust does not owe any liability to the allottees of the erstwhile developer, were repelled by observing that all those aspects can be delved into at the time of final decision of main application i.e. Application No. 16 of 2021.

4. Being aggrieved and dissatisfied with the impugned order, the petitioner/trust has preferred this petition.

5. I have heard Mr. Vishal Kanade, learned counsel for the petitioner, Mr. C.D. Mali, learned AGP for the State, Ms. Charmie Gandhi, learned counsel for respondent Nos. 4 and 5, Mr. Shravan Giri, learned counsel for respondent No. 2, Ms. Bhansali, learned counsel for respondent Nos. 6 & 7, Mr. Aditya Pimple, learned

counsel for respondent No. 8 and Mr. Aseem Naphade, learned counsel for Respondent No. 9. The counsels for the parties took the Court through the orders passed by this Court and Charity Commissioner and the material on record.

6. Mr. Vishal Kanade, learned counsel for the petitioner submitted that respondent Nos. 2 to 9 have made an endeavour to agitate the contractual dispute inter se and with the petitioner before a wrong forum. Mr. Kanade would urge that the scope of inquiry under section 36 of the Act, 1950 is, in a sense, limited. The said proceeding, according to Mr. Kanade, cannot be converted into a proceeding to establish contested rights and liabilities of the petitioner and respondent Nos. 2 to 9. The learned Charity Commissioner committed an error in allowing the intervention on the premise that respondent Nos. 2 to 9 have an interest in the trust property. Correctly appreciated in the facts of the case, according to Mr. Kanade, respondent Nos. 2 to 9 cannot be said to be the persons having interest in the trust. In fact, respondent Nos. 2 to 9 have an adverse interest. It was urged that respondent Nos. 2 to 9 do not fall within the ambit of phrase “person having interest” under section 2(10) of the Trust Act, 1950.

7. Mr. Kanade submitted that the very premise of the submissions on behalf of the allottees that the order passed by MahaRera on 21st January, 2022 fastens responsibility on the trust to discharge the liabilities created by the erstwhile developer/respondent No. 2 is untenable as by a further order dated 19th December, 2022 in Rectification Application, MahaRera deleted the operative direction that the trust shall be held liable to take on all the responsibilities arising of the liabilities created by erstwhile developer.

8. Mr. Kanade further submitted that the real objection of respondent No. 2, or for that matter respondent Nos. 2 to 9, is to the appointment of the new developer. However, since the petitioner trust has appointed the new developer pursuant to the order passed by this Court in Commercial Division Notice of Motion No. 99 of 2020 in Commercial Arbitration Petition No. 147 of 2018, which has not been assailed, the respondent Nos. 2 to 9 cannot be permitted to agitate the said grievance indirectly before the Charity Commissioner.

9. Mr. Aditya Pimple, learned counsel for respondent No. 8 – Association, countered the submissions on behalf of the petitioner.

Mr. Pimple would urge that the definition of “person having interest” under section 2(10) of the Act, 1950 is an inclusive definition. Taking the Court through the definition of “person having interest” in the light of the definition of ‘beneficiary’, Mr. Pimple submitted the legislative intent of substantially relaxing the rule of *locus standi* becomes abundantly clear.

10. Mr. Pimple would further submit that the petitioner trust is a co-promoter. The petitioner-trust has resorted to commercial exploitation of the trust property. From the stand point of the conditions, which the Charity Commissioner may be persuaded to impose while granting permission under section 36 of the Act, 1950, the presence of the Association of the allottees before the Charity Commissioner is indispensable to safeguard the interest of the allottees and, eventually, the trust. All the objections which are sought to be raised by the petitioner can be delved into at the time of adjudication of the application under section 36 of the Act, 1950. Therefore, the impugned order does not warrant any interference.

11. Mr. Giri, learned counsel for respondent No. 2, would submit that the petitioner trust has executed an undertaking to indemnify the new developer M/s. H. Rishabraj Developers and bear all the

legal expenses which may arise from the transaction with the erstwhile developer/ respondent No. 2, and to be a co-promoter of the project. It was further submitted that the petitioner trust and the new developer have made false claim that the flats which have already been sold by respondent No. 2 are yet not sold. All these facts deserve to be placed before the Charity Commissioner and for that purpose the presence of respondent No. 2 before the Charity Commissioner is necessary. Attention of the Court was invited to terms of MOU dated 13th March, 2021 between the petitioner trust and the new developer.

12. Ms. Charmie Gandhi, the learned counsel for respondent Nos. 4 and 5 submitted that respondent Nos. 4 and 5 have purchased flat No. 4 and 5 under registered agreement. The petitioner and the new developer are falsely denying the sale. Thus, elements of fraud on the part of the petitioner are required to be placed before the Charity Commissioner. As the respondent Nos. 4 and 5 have purchased the flat from the erstwhile developer for a valuable consideration, it can not be said that they are not interested persons.

13. Ms. Bhansali, learned counsel for respondent Nos. 6 and 7

submitted that the powers of the Charity Commissioner under section 36 of the Act are wide. The inquiry under section 36 is not restricted to the grant or refusal of permission to enter into the transaction with the prospective transferee. Mr. Bhansali would urge that the definition of “beneficiary” under section 2 of the Act is of wide amplitude. The purchasers of the flats derive interest under the instruments executed by the promoters of the project of which the petitioner is a co-promoter. To ensure that the rights of the purchasers are not prejudiced, their impleadment is necessary for a just, complete and effective adjudication of the application under section 36 of the Act, submitted Ms. Bhansali.

14. Mr. Naphade, learned counsel for respondent No. 9, submitted that respondent No. 9 has purchased flats No. P-905 and P-972 for a valuable consideration of Rs. 1,19,00,000/-. Respondent No. 9 was one of the complainants before MahaRera. By an order dated 18th April, 2022 the rights of respondent No. 9 and other complainants as allottees of the said project have been protected. The owner is directed to allot other flats to complainant at serial No. 1 having similar area as booked by complainant and execute registered agreement for sale and in default refund the entire money paid by respondent No. 9 along with interest as prescribed under section 18

of RERA, 2017. Mr. Naphade would further submit that real question for consideration is as to whether the respondent/allottees of the flats have right to be heard under section 36(5) of the Trust Act, 1950, as the petitioner in effect seeks *ex facto* sanction to the appointment of M/s. H. Rishabraj Developers.

15. Mr. Kanade joined the issue by canvassing a submission that a person who has an interest adverse to the trust cannot be said to have an interest in the trust and the aforesaid contentions of all the private respondents would indicate that they pursue an interest adverse to that of the trust. Therefore, the learned Charity Commissioner was not at all justified in permitting the intervention.

16. To start with, it is necessary to appreciate the nature of power conferred upon the Charity Commissioner under section 36 of the Trust Act, 1950 under which the petitioner has preferred Misc. Application No. 16 of 2021 and in which the respondent Nos. 2 to 9 seek to intervene. The relevant part of section 36 reads as under:-

36. Alienation of immovable property of public trust

(1) [Notwithstanding anything contained in the instrument of trust]

(a) no sale, (***) exchange or gift of any immovable property, and

(b) no lease for a period exceeding ten years in the

case of agricultural land or for a period exceeding three years in the case of non-agricultural land or a building belonging to a public trust, shall be valid without the previous sanction of the Charity Commissioner, (Sanction may be accorded subject to such condition as the Charity Commissioner may think fit to impose, regard being had to the interest benefit or protection of the trust;

(c) if the Charity Commissioner is satisfied that in the interest of any public trust any immovable property thereof should be disposed of, he may, on application authorise any trustee to dispose of such property subject to such conditions as he may think fit to impose, regard being had to the interest or benefit or protection of the trust.

.....

36(5) Notwithstanding anything contained in sub-section (1) in exceptional and extraordinary situations where the absence of previous sanction contemplated under sub-section (1) results in hardship to the trust, a large body of persons or a bona fide purchaser for value, the Charity Commissioner may grant ex-post facto sanction to the (transfer of the trust property, effected by the trustees prior to the date of commencement of the Maharashtra Public Trusts (Second Amendment) Act, 2017], if he is satisfied that-

(a) there was an emergent situation which warranted such transfer,

(b) there was compelling necessity for the said transfer,

(c) the transfer was necessary in the interest of trust,

(d) the property was transferred for consideration which was not less than prevalent market value of the property so transferred, to be certified by the expert,

(e) there was reasonable effort on the part of trustees to secure the best price

(f) the trustees actions, during the course of the entire transaction, were bona fide and they have not derived any benefit either pecuniary or otherwise, out the said transaction, and

(g) the transfer was effected by executing a registered instrument if a document is required to be registered under the law for the time being in force].

17. Section 36 of the Act confers the Charity Commissioner with the power to accord sanction for alienation of the property of a public trust. Though the property of a public trust vests in the trustees, yet they are not the owners of the trust property. The property vests in them for the purpose of the discharge of the objects of the trust or for the benefit of the beneficiaries. It is, therefore, imperative that the trustees of a public trust do not have unbridled power to alienate the property of the trust as if they are the owners thereof. The legislature has therefore vested authority in the Charity Commissioner to accord sanction for alienation of the property of the trust as the Charity Commissioner exercises *parens patriae* jurisdiction. A plain reading of section 36(1) would indicate that the exercise of power by the Charity Commissioner is governed by the paramount consideration of interest, benefit, and protection of the trust. Power conferred on the Charity Commissioner is thus not un-chanelised. Charity Commissioner has to pose unto himself the question as to whether the proposed alienation is in the interest or benefit of the trust or for the protection of the trust. Two fold consideration is warranted. One, whether the alienation as proposed is necessary from the perspective of the interest and benefit of the trust. Whether the alienation sub-serves the best interest of the trust. Two, once the Charity Commissioner holds

that alienation of the property of the trust is warranted then, how to secure the best possible advantage to the trust by authorizing alienation to a particular party and/or in a particular manner.

18. Evidently, the power of the Charity Commissioner under section 36(1) is of wide amplitude. It is not restricted to grant or refusal of permission for alienation to the proposed transferee. A vast canvass ranging from the choice of transferee, consideration, terms of transfer, and mode of transfer can be traversed by the Charity Commissioner regard being had to the interest, benefit and protection of the trust.

19. A profitable reference in this context can be made to a Full Bench judgment of this Court in the case of **Shailesh Developers and Anr. vs. Joint Charity Commissioner, Maharashtra and Others**¹ wherein in the light of the conflict between Division Bench judgments of this Court as to the scope of the power of the Charity Commissioner under section 36, the Full Bench considered, inter alia, the following question :-

i) Whether the power vesting in the Charity Commissioner under Section 36 of the Bombay Public Trusts Act, 1950 is confined to grant or refusal of sanction to a particular sale transaction which the trustees propose to make or it extends to compelling

1 2007 (3) Mh.L.J. 717.

trustees to sell or transfer the property to another party who participates in the proceedings under Section 36 and gives his offer ?

20. After an elaborate analysis of the governing provisions and previous precedents and upholding the view in the case of **A.R. Khan Construwell and Co. vs. Yough Education and Welfare Socceity and Others Society and Others**² the Full Bench answered the aforesaid question in the case of **Shailesh Developers** (supra), as under:-

28. While exercising power either under Clause (b) or Clause (c), the Charity Commissioner can impose conditions having regard to the interest, benefit or protection of the trust. Before passing an order of sanction or authorisation, the Charity Commissioner has to be satisfied that the trust property is required to be alienated. Once the Charity Commissioner is satisfied that the alienation of the trust property is necessary in the interest of the trust or for the benefit of the trust or for the protection of the trust, it is very difficult to accept the submission that the power of the Charity Commissioner is restricted either to grant sanction to a particular proposal of the trustees or to reject it. It is the duty of the Charity Commissioner to ensure that the transaction of alienation is beneficial to the trust and its beneficiaries. He has to ensure that the property is alienated to a purchaser or buyer whose offer is the best in all respects. It is not necessary in every case that the Charity Commissioner has to ensure that property is sold by the trustees to the person offering highest price or consideration. What is the best offer in the interest of the trust will again depend on facts and circumstances of each case. In a given case, while alienating the trust property, the trustees may provide that as a part of consideration for alienation, the purchaser should construct a building on a part of the trust property for the use by the trustees for the objects of the trust. In such a case, it may be necessary to

2 2006(2) Mh.L.J. 595.

ascertain the reputation and capacity of the purchaser apart from the consideration offered. When the Charity Commissioner is satisfied that trust property needs to be alienated and when he finds that the offer received by the trustees may not be the best offer, he can always direct that bids be invited by a public notice. When a better offer is received in public bidding or auction, it is very difficult to say that the power of the Charity Commissioner is restricted and he cannot enjoin the trustees to sell or transfer the trust property to a third party who has given an offer which is the best in the interest of the trust. The Trustees approach the Charity Commissioner only when they are satisfied that there is a necessity to alienate the trust property. The trustees hold the property for the benefit of the beneficiaries and therefore once they express desire to alienate the property, it is obvious that Charity Commissioner can always impose condition while granting sanction that the property shall be sold or transferred to a person who has come with an offer which is the best offer in the interests of the trust. The Section gives a power to the Charity Commissioner to impose conditions and the said conditions will include a requirement of selling or transferring or alienating the trust property to a purchaser who has offered the best deal having regard to the interest and benefit of the beneficiaries and the protection of the trust. The power to impose conditions cannot be a limited power when the law requires the Charity Commissioner to exercise the said power having regard to the interest, benefit and protection of the trust. Once the Charity Commissioner accepts the necessity of alienating the trust property, the trustees cannot insist that the property should be sold only to a person of their choice though the offer given by the person may not be the best offer. The property may be vesting in the trustees but the vesting is for the benefit of the beneficiaries. The Charity Commissioner has jurisdiction to ensure that the property is sold or transferred in such a manner that the maximum benefits are available to the beneficiaries of the Trust. Under Clause (b) of Section 36 of the said Act, the Charity Commissioner has jurisdiction to decide whether it is in the interest of the trust that the property of the trust be sold or transferred. Once the learned Charity Commissioner is satisfied that the property is required to be transferred or sold in the interest of the Trust, the learned Charity Commissioner cannot remain silent spectator when he finds that the

transaction proposed by the Trustees is not in the interest of the Trust or its beneficiaries. Once the necessity of sale or transfer is established, the Charity Commissioner can certainly ensure that best available offer is accepted, so that the transaction is for the benefit of the trust. If the trustees were to be the final authority to judge what is in the interest of the Trust, the legislature would not have enacted provision requiring prior sanction. While deciding which is the best offer, the learned Charity Commissioner is bound to take into consideration various factors which cannot be exhaustively listed. However, the paramount consideration is the interest, benefit and protection of the trust. It is obvious from the scheme of Section 36 that legislature never intended that trustees could sell or transfer the trust property vesting in them as if it was their personal property. It is the duty of Charity Commissioner to ensure that the property should be alienated in such a manner that maximum benefits are accrued to the trust. The Charity Commissioner while considering an application under Section 36(1) of the said Act of 1950, in a given case can opt for public auction or can invite bids.

(emphasis supplied)

21. In the case of **Cyrus Rustom Patel vs. Charity Commissioner, Maharashtra State and Others**³, on which reliance was placed by Ms. Bhansali, Supreme Court approved the aforesaid enunciation. It was, inter alia, observed that the power to grant sanction has to be exercised by taking into consideration three classic requirements i.e. the interest, benefit, and protection of the Trust. The Charity Commissioner has to be objectively satisfied that the property should be disposed of in the interest of the public trust and in doing so, he has right to impose such conditions as he may think fit, taking into account the aforesaid triple classic requirements.

3 (2018) 14 Supreme Court Cases 761.

22. The case **Cyrus Patel** (supra) was followed by the Supreme Court in the case of **Shri Ambadevi Sanstha vs. Charity Commissioner**⁴. The Supreme Court enunciated that in case the Charity Commissioner accepts the necessity of alienating the trust property, the trustees can not insist that the property should be sold only to a person of their choice, though the offer given by the person may not be the best offer. The property may be vested in the trustees, but the vesting is for the benefit of the beneficiaries. Best available offer should be accepted in the case of sale.

23. The aforesaid enunciation of law makes it abundantly clear that the power exercised by the Charity Commissioner under section 36(1) is of wide amplitude. It is not restricted to determine the justness of the wish of the trustees, and the manner of alienation proposed by the trustees can not be the governing considerations but the interest and benefit of the trust. The Charity Commissioner has not only an authority but a duty to secure the best interest of the trust. Therefore, the submission on behalf of the respondents about the wide amplitude of the power of the Charity Commissioner under section 36 appears to be impeachable.

24. The question that wrenches to the fore is whether the

4 (2019) 17 Supreme Court Cases 419.

respondent Nos. 2 to 9 have interest in the trust which entitles them to participate in the proceeding under section 36(1) so as to influence the exercise of the power by the Charity Commissioner.

25. The relevant provisions of the Trust Act, 1950 which bear upon the answer to the aforesaid question need to be noted. Section 73A, which was inserted by Maharashtra 20 of 1971, reads as under:-

“Sec. 73A - Power of Power of inquiry officer to join persons as party to proceedings-

In any proceedings under this Act, any person having interest in the public trust may be joined as a party to such proceedings on an application made by such person on such terms and conditions as the officer holding the inquiry may order.

26. Section 2(10) of the Act, 1950 defines, “person having interest” as under:-

Sec.2(10) - “person having interest” includes

(a) in the case of a temple, person who is entitled to attend at or is in the habit of attending the performance of worship or service in the temple, or who is entitled to partake or is in that habit of partaking in the distribution of gifts thereof,

(b) in the case of a math, a disciple of the math or a person of the religious persuasion to which the math belongs,

(c) in the case of a Waqf, a person who is entitled to receive any pecuniary or other benefit from the Waqf and includes a person who has right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah, maqbara or other religious institution connected with the Waqf or to participate

in any religious or charitable institution under the Waqf,
 (d) in the case of a society registered under the Societies Registration Act, 1860, any member of such society, and
 (e) in the case of any other public trust, any trustee or beneficiary.

27. Sub section (2A) of section 2, which was inserted by Maharashtra Act No. 55 of 2017 with effect from 10th October, 2017, defines “beneficiary” as under:-

“Sec.2(2A) - “beneficiary” means any person entitled to any of the benefit as per the objects of the trust explained in the trust deed or the scheme made as per this Act and constitution of the trust and no other person”.

28. At the threshold, it may be necessary to note that Mr. Kanade, the learned counsel for the petitioner made an endeavour to urge that section 73A of the Act, 1950 does not govern an application under section 36 of the Trust Act, 1950. It was urged that section 73A regulates the power of inquiry officer to join persons as a party to the proceeding. Since the Charity Commissioner exercises substantive power under section 36 it does not amount to an inquiry envisaged by section 73A.

29. I am afraid to accede to this submission. Section 73A begins with the expression, “In any proceedings under this Act”. Merely because the marginal note of section speaks about the power of

inquiry officer, the scope of section 73A cannot be restricted to an inquiry conducted by the inquiry officer. The expression, “officer holding the inquiry” is elastic enough to include the Charity Commissioner when he exercises the powers under section 36 of the Act, 1950.

30. Evidently, the qualification to join in any proceeding under the Act is, interest in the public trust, in question. It would be contextually relevant to note that the expression person having interest in the public trust has been used by the legislature in other provisions of the Act. For instance, under section 50 which envisages the consent of the Charity Commissioner to two or more persons having interest, to institute the suit for or against the public trust and section 50A, under which two or more persons having interest in a public trust, may make an application to Charity Commissioner to modify or amalgamate the scheme.

31. The object of conferment of locus on “person having interest” becomes clear if the nature of the authority of the trustees is appreciated. As noted above, the property of the trust vests in the trustees for the benefit of beneficiary or for the discharge of the object of the trust. It is quite conceivable that the trustees may

discharge their duties in furtherance of the object of the trust or in derogation thereof. In a given case, the trustees may not be available or may have become defunct or rendered themselves disabled or even might be acting against the interest of the trust. Therefore, the persons who have an abiding interest in the affairs of the trust have been conferred the locus to seek remedies and participate in the proceeding, so that the object of the trust and, ultimately, public interest are not defeated.

32. Evidently, under sub section 2(10) of the Act, the definition, “the person having interest” is inclusive. It would be contextually relevant to note that the word, “includes” in section 2(10) came to be substituted for the word, “means” by Bombay 28 of 1953. It is trite, the use of the word, “includes” in a definition gives the term an expansive meaning. In contrast the legislature uses the word, “means” to give a precise and definite meaning. In substituting the word, “includes” for “means”, the legislative intention of expanding the scope of the term, “person having interest” becomes explicitly clear. An inclusive definition, as is trite, covers in its fold the matters which are not specifically enumerated in the said definition.

33. A profitable reference in this context can be made to a

Division Bench judgment in the case of **Digambar Pralhad Jot and Others vs. Satyanarayan Biharilal Zunzumwala and Others**⁵. The Division Bench adverted to the legislative change brought by substituting the word, “includes” for the word “means” and emphasized that the definition of the phrase, “the person having interest” is not exhaustive. The observations of the Division Bench read as under:-

7] Initially in this definition clause in place of the word 'includes' the word 'means' was used by the Legislature. The word 'includes' was substituted by Bombay Act No. 28 of 1953. It is well settled that the word 'include' in the interpretation clause is intended to be enumerative and not exhaustive. It has an extending force and it does not limit the meaning of the term to the substance of the definition. When it is intended to exhaust the signification of the words interpreted, the word 'means' is used: -- See Chandrabhagabai Ashtekar v. State oil Bombay (1958 Nag LJ J72).

(emphasis supplied)

34. The import of the phrase, “person having interest” came up for consideration before the Supreme Court in the case of **Shree Gollaleshwar Dev and Ors. vs. Gangawwa Shantayya Math and Ors.**⁶. The correctness of the view of the Full Bench decision of Karnataka High Court that, the expression “person having interest in the trust” occurring in section 2(10) and section 50 of the Trust Act, 1950 does not include the trustees when they institute the suit in their capacities as trustees for vindicating their private rights,

5 AIR 1978 Bom 196.

6 (1985) 4 SCC 393

was challenged before the Supreme Court. After adverting to the provisions of section 2(10) and 2(18), which defines “a trustee”, and section 50 of the Act, 1950, the Supreme Court did not approve the view of the Full Bench of the Karnataka High Court. It was, inter alia, observed as under :-

12] The definition of the words “person having interest” in section 2(10) of the Bombay Public Trust Act, as amended in 1953 was made inclusive to set at rest all doubts and difficulties as to the meaning of these words, which were intended and meant to be used in a generic sense so as to include not only the trustees but also the beneficiaries and other persons interested in the trust. The definition of the expression person having interest in section 2(10) is wide enough to include not merely the beneficiaries of a temple, math, Waqf etc. but also the trustees. Therefore appellants Nos. 2 and 3 who undoubtedly are members of the founder’s family i.e. beneficiaries, are entitled to attend at performance of worship or service in the Distribution of offering to the also entitled to partake in the distribution of offering to the deity and thus answer the description “person having inter” as defined in Section 2 (10) of the Act.

(emphasis supplied)

35. In the case at hand we are primarily concerned with clause (e) of section 2(10) of the Act under which “person having interest” includes, “any trustee or beneficiary”. As noted above, the definition of “beneficiary” came to be inserted by Amendment Act, 2017. Interestingly, the legislature has used the word, “means” while defining, “beneficiary”. Thus, the “beneficiary” means, any person entitled to any of the benefits as per the object of the trust explained in the trust deed or the scheme made as per the said Act

and constitution of the trust. What makes the legislative intent abundantly clear is the use of the expression, “and no other person”. This implies that the legislature made a conscious effort to exclude a person other than the one who is entitled to obtain any benefit under the objects of the trust, from the definition of “beneficiary”. There is no scope to expand the meaning of the term, “beneficiary” under section 2(2A). The legislative intent that the term “beneficiary” is restricted to that class of persons who are entitled to obtain benefit under the trust is underscored by the exclusionary clause “and no other person”. It is in the backdrop of these provisions, the import of the term, “person having interest” deserves to be construed. To qualify as “person having interest”, under clause (e) of section 2(10) in the class of beneficiary, the person must derive benefit under the trust.

36. The learned Charity Commissioner was of the view that the respondent Nos. 2 to 9/ Intervention Applicants were having interest in the property of the trust and therefore could be termed as “person having interest”. Whether this approach of the learned Charity Commissioner is justifiable ?

37. On first principles, the two terms, “person having interest in

public trust” and “person having interest in property of the public trust” are different and appear to have distinct juridical connotation. The expression, “person having interest in public trust” envisages an interest which is derived from the object of the public trust or the one which promotes the cause of the beneficiary. In contrast, “interest in the property” of the public trust may not necessarily be an interest which advances the object of the public trust. It could be an interest which is confined to the property of the trust as distinct from the public trust itself. It may also take shape of an interest which is adverse to or in conflict with the interest of the public trust. Can all these shades of interest satisfy the description of, “person having interest”, is the moot question.

38. In my considered view, the mere fact that a person has an interest in the property of the trust, can not clothe him with the character of, “person having interest in the public trust”. It is the nature of the interest in the property of the trust that assumes critical salience. If a person propounds proprietary or possessory title adverse to that of the trust; surely, such person cannot be termed as the person having interest in the trust. Technically speaking such person may claim to have an interest in the property of the trust but such interest, in effect, is adverse to, or in

derogation of, the object of the trust or the interest of the beneficiaries. This jurisdictional distinction between various facets of ‘interest’ qua the property of the trust have been expounded in precedents, reference to few of which may be necessary.

39. In the case of **President, Purohit Sangh vs. Prabhakar Ramchandra Gokhale and Ors.**⁷ a learned single Judge of this Court had an occasion to consider the import of, “person having interest” in the context of a temple covered by clause (a). It was enunciated that under section 2(10), the person who can be said to have interest must be a person who has got substantial or real interest in the trust property, but that does not make him person who is interested in the trust. Those persons who are hostile and their object is to see that the trust is destroyed would fall in the latter category or can be said to be having interest in conflict with the trust. It was further observed that, to put it differently, there is perceptible difference between, “person having interest in the trust” and “person having conflict of interest”. The former is the quintessence for being eligible to be considered or for being appointed as the trustee.

40. The aforesaid enunciation was approved by the Supreme

⁷ 2003(5) Mh.L.J. 73.

Court in the case of **Trambakeshwar Devasthan Trust and Anr. vs. President, Purohit Sangh and Others**⁸. The observations in paragraph 11 read as under:-

11] It will be clear from a reading of Section 2(10)(a) of the Act that in the case of a temple, person who is entitled to attend at or is in the habit of attending the performance of worship or service in the temple, or who is entitled to partake or is in the habit of partaking in the distribution of gifts of the temple is a person having interest. Section 47(3) of the Act quoted above provides that the Charity Commissioner shall have regard to the factors mentioned in clauses (a), (b), (c), (d) and (e) while appointing a trustee. The Charity Commissioner, therefore, must have regard to the question whether the appointment will promote or impede the execution of the trust as mentioned in clause (c) and to the interest of the public or section of the public who have interest in the trust as mentioned in clause (d).

41. In the case of **Ramdas Club, Akola vs. Mayur Dilip Vikhe and Others**⁹ the respondents therein had challenged the grant of permission to alienate the property of the trust by the Charity Commissioner under section 36 of the Act on the premise that they were residing adjacent to the property of the appellant- trust and were using the property of the appellant trust for various activities, including sports, and thus if the property of the trust was sold illegally, their interest would be affected. The Division Bench repelled the submission and held that the respondents cannot be said to be, “person having interest” in the appellant trust within the

⁸ (2011) 15 Supreme Court Cases 323.

⁹ (2014) 2 AIR Bom R 226.

meaning of section 2(10) as those respondents had, in fact, interest adverse to the appellant trust and, therefore, the challenge to the grant of permission for alienation of the property at the instance of such respondents was not maintainable.

42. The legal position which thus emerges is that the Section 73A of the Trust Act, 1950 allows intervention by a party who is having interest in the public trust in any proceeding under the Trust Act, 1950. In view of wide amplitude of power exercised by the Charity Commissioner under section 36 of the Trust Act, 1950, especially when the question is of alienation or otherwise disposition of the property of the public trust, a person having interest in the trust can legitimately invoke the provisions contained in section 73A of the Act, 1950. An application under section 36 of the Act, 1950 is one of the proceedings envisaged by section 73A in which intervention can be sought by a person having interest in a public trust of which the property is sought to be alienated. Undoubtedly, the definition of “person having interest” is inclusive and thus of wide import. However, where the public trust is covered by the clause (e) of section 2(10), the person who is to be included in the definition, ought to be either a trustee or beneficiary. The definition of “beneficiary”, in turn, as noted above, is precise

and confined to a person who obtains benefit under the object of the trust. Even if the expression “person having interest” is construed rather generously, there is an essential distinction between the interest in the public trust and interest in the property of the trust. In the latter case, an inquiry into the nature of the interest is warranted. If it turns out that such interest is adverse to, or in conflict with, the interest of the trust, the person propounding such interest, cannot be said to be a person having interest.

43. On the aforesaid touchstone, reverting to the facts of the case, which are noted above quite elaborately, it becomes evident that the respondent Nos. 3 to 9 derive their interest in the property of the trust (which is being developed) from respondent No. 2/ the erstwhile developer. It is not their case that they have any interest in the affairs of the trust emanating from the objects of the trust. They have a commercial interest flowing from the contractual obligations, particularly that of respondent No. 2.

44. As regards respondent No. 2, as noted above, the jural relationship with the petitioner came to be terminated by the orders of this Court passed in Commercial Arbitration Petition No. 147 of 2018. A new developer, has also been appointed under the

aegis of the order of the Court. It is the stated case of respondent No. 2 that he professed to oppose the application seeking permission for the transaction between the petitioner and the new developer and as such the application was not maintainable. In essence, the respondent No. 2 seeks to agitate the issue of legality and validity of appointment of the new developer.

45. Undoubtedly, the respondent No. 2, or for that matter, the rest of the respondents, may assail the legality and validity of the appointment of the new developer, in appropriate proceeding before the appropriate forum. But, at the heart of the matter is, can the respondent Nos. 2 to 9 agitate the said grievance before the learned Charity Commissioner in a proceeding under section 36 of the Act, 1950 ?

46. At this juncture, the nature of interest of respondent Nos. 2 to 9 assumes significance. The learned counsel for respondent Nos. 2 to 9 attempted to salvage the position by asserting that the petitioner trust is pursuing the said application mala fide. The petitioner trust, despite being a co-promoter, is denying the allotment made by respondent No. 2. The petitioner trust has undertaken the liability which may arise out of the transaction with

the erstwhile developer and, therefore, the presence of respondent Nos. 2 to 9 before the Charity Commissioner is necessary.

47. Mr. Pimple, learned counsel for respondent No. 8 placed reliance on a decision of the learned single Judge of this Court in the case of **Goregaon Pearl CHSL vs. Dr. Seema Mahadev Paryekar and Others**¹⁰ where the learned single Judge had repelled the challenge to the correctness of the view recorded in **Vaidehi Akash Housing Pvt. Ltd. vs. New D.N. Nagar Co.Op. Housing Society Union Limited**¹¹ that there was no privity of contract as between the society and third party purchasers claiming through the erstwhile developer. Since, Mr. Pimple placed reliance on the later part of the observation in paragraph 9 of the aforesaid judgment, I deem it expedient to extract paragraph 9. It reads as under:-

9] The provisions of RERA do not make any difference either. RERA has been introduced to establish a regulatory authority for regulation and promotion of the real estate sector and to ensure sales in the sector in an efficient and transparent manner and to protect consumers of the sector. The definition of 'promoter' in RERA, for our purposes, is on similar lines as MOFA. Section 18 of RERA, on which strong reliance is placed by learned Counsel for Respondent No.1, requires promoters to discharge their obligations and provides remedies for the purchasers, without prejudice to the purchasers' other rights, in the event of the promoters' failure to discharge the obligations. Section 19, which follows, entitles the allottee to obtain possession of the flat or apartment. Any grievance of

10 2019 SCC OnLine Bom 3274.

11 2015 (3) ABR 270.

the purchaser under RERA is redressed by the regulatory authority appointed under it. None of these provisions either make the owner of the freehold or leasehold interest in the land, who enters into a development agreement with a developer (who, in turn, enters into flat purchase agreements with third parties on the basis of such development agreement), liable for complying with the obligations of the developer under RERA. In fact, if at all there is any doubt in respect of the position of landowners vis-a-vis development projects registered under RERA, particularly where such landowners are entitled to a share in the total revenue generated from sale of apartments, the same has now been clarified by Maharashtra Real Estate Regulatory Authority that only such individuals/organizations would fall within the definition of 'promoter' in RERA, on account of being landowners, as would be specified as such at the time of on-line registration with the Authority. It is nobody's case that the Appellant society is such specified promoter in the on-line registration. Besides, grievance, if any, in this behalf must be addressed to the regulatory authority thereunder, and not to a civil court. There is, thus, no merit in any of the submissions of learned Counsel based on RERA.

(emphasis supplied)

48. Mr. Pimple would urge that since the petitioner trust is a co-promoter it cannot be absolved of the obligations incurred qua the allottees notwithstanding the termination of the Development Agreement with respondent No. 2.

49. I find it difficult to acceded to this submission also. At the cost of repetition, it must be recorded that all these issues can be agitated by respondent Nos. 2 to 9, if so advised, before the appropriate forum. In fact, in a suit instituted by one of the

purported allottees, a learned single Judge of this Court in Interim Application (L) No. 18626 of 2021 in Suit (L) No. 18622 of 2021 (Jayesh Mathurbhai Patel vs. M/s. Bhakti Enterprises and Ors.), following the judgment in the case of **Vaidehi Akash Housing Pvt. Ltd.** (supra), declined to grant ad-interim relief. This is only to emphasize that such action has been initiated and not to comment upon the merits of the claim of respondent Nos. 2 to 9.

50. The upshot of the aforesaid consideration is that if the respondent Nos. 2 to 9 are allowed to intervene in a proceeding under section 36 of the Public Trust Act, 1950, in the backdrop of the nature of the 'interest' they are propounding, there is a clear and present danger of the said proceeding being converted into a proceeding for adjudication of the rival and competing claims arising out of the contractual obligations between the petitioner and respondent No. 2, petitioner and respondent Nos. 3 to 9 and respondent Nos. 2 to 9 inter se, which is legally impermissible.

51. The Court cannot lose sight of the fact that the learned Charity Commissioner has already accorded permission for redevelopment. What the petitioner seeks is the approval for the change of the developer. Whether in the facts of the case, such

permission ought to be granted or not is within the province of the authority of the learned Charity Commissioner. Therefore, this order may not be construed as one influencing the exercise of the discretion by the learned Charity Commissioner one way or the other. However, the intervention of the respondent Nos. 2 to 9 in the said proceeding, is wholly unwarranted as they do not fall within the description of “person having interest in the trust”.

52. For the foregoing reasons, the petition deserves to be allowed.

Hence, the following order.

ORDER

- 1} The petition stands allowed.
- 2} The impugned order stands quashed and set aside.
- 3} The applications for intervention preferred by respondent Nos. 2 to 9 (Exhibits 7, 10, 14, 17, 24 and 29) in Application No. CC/16/2021/Misc, stand rejected.
- 4} By way of abundant caution, it is clarified that the consideration in this petition is confined to the legality and validity of order allowing intervention by respondent Nos. 2 to 9 an application under section 36 of the Act, 1950 and it may not be construed as an expression of opinion on the merits of the application and the

learned Charity Commissioner shall decide the same without being influenced by any of the observations, on its own merits and in accordance with law.

5} In the circumstances of the case, there shall be no order as to costs.

(N. J. JAMADAR, J.)

53. At this stage, the learned counsel for respondent Nos. 2 to 9 seek stay to the proceeding before the Charity Commissioner in Application No. CC/16/2021/Misc.

54. In view of the issue dealt with by this Court in this judgment and the submissions that the view of this Court may bear upon the rights of the parties in the proceedings before other forums, the learned Charity Commissioner shall not proceed with the hearing of the Application No. CC/16/2021/Misc, till 31st January, 2024.

(N. J. JAMADAR, J.)