

WRIT PETITION NO. 6743 OF 2007

The Central Hindu Military Social Education Society, A Society duly registered under the Societies Registration Act & also under the Public Trust Act, 1950, having office at Rambhoomi, Bhosla Military School Compound, Anandvalli, Nashik, through its Secretary- Shri Divakar K. Kulkarni.

... Petitioner.

Vs.

1. The Joint Charity Commissioner Nashik Region, Nashik.
2. The Chairman/Manager, Janlaxmi Co-operative Bank Ltd. Samruddhi Gadkari Chowk, Agra Road, Nashik.

... Respondents.

P.N.Joshi for the petitioner.

S.D.Rayrikar, A.G.P. for respondent No.1.

A.S.Desai for the Respondent No.2.

Umesh Mankapure, Amicus Curiae is present.

WITH
WRIT PETITION NO. 5861 OF 2008.

Maharashtra Rashtrabhasha Sabha, Rashtrabhasha Bhavan, 387, Narayan Peth, Pune Through it's authorised Representative Satish Sampathlal Surana, Age 45 years, Occupation Service, R/o 24, Nutan Housing Society, Nutan Colony, Aurangabad.

... Petitioner

Vs.

1. The State of Maharashtra, Through:Charity Commissioner, Maharashtra State, Mumbai.
2. The Joint Charity Commissioner, Pune Region,Pune.
3. Shantaram Ramchandra Patil, Age 65 years, Occ: Retired, R/o 1327/A, Sadashiv Peth, Pune-30.

... Respondents.

P.B.Shirsath with V.N.Tayade
for the Petitioner.

V.A.Sonpal, A.G.P. for Respondent Nos

N.P.Deshpande for Respondent No.3.

CORAM : V.C.DAGA, J.

DATED : 22nd October 2008.

JUDGMENT :

. Rule in both petitions returnable forthwith.
Heard finally by consent of the parties.

2. These petitions, filed under Article 227 of the Constitution of India, are directed against the orders passed by the Joint Charity Commissioner, Nashik and Pune rejecting applications filed under section 36(1)(a) of the Bombay Public Trust Act, 1950 ('B.P.T.Act' for short). In both petitions parties are different but the legal contentions raised are common based on more or less similar basic facts, so this common judgment shall dispose of both

these petitions.

Facts in W.P.No.6743/2007 :

3. The petitioner- Central Hindu Military Social Education Society is a Trust duly registered under the provisions of the B.P.T.Act owning properties one of which bearing Plot No.11, Survey Nos. 710, 711, 714, Hissa No.12, admeasuring 517.50 sq.mtrs. situate within the limits of the Nashik Municipal Corporation, Nashik ("said property" for short).

4. The petitioner trust is running a Bhosala Military School and other allied institutions. The petitioner trust finding it difficult to develop the said property for want of financial resources, adopted a resolution in its General Body Meeting held on 30th November, 1997 to enter into an agreement of development with one Janlaxmi Co-operative Bank Ltd., ("Bank" for short). Accordingly, the petitioner-Trust executed development agreement in favour of the said Bank and handed over possession of the said property in the year 1977 itself and got it developed.

5. The petitioner- Trust faced legal problems in executing the registered documents in favour of the Bank so as to transfer part of the interest in the

said property in favour of the Bank for want of permission of the Charity Commissioner under section 36(1)(a) of the B.P.T. Act. Consequently, the petitioner- Trust moved an application before the Joint Charity Commissioner, Nashik some time in the month of July, 1999, to seek permission under section 36(1)(a) of the B.P.T. Act so as to transfer part of the property in favour of the Bank in terms of the development agreement.

6. The Charity Commissioner after hearing parties to the application, by a reasoned order, refused to grant *post facto* sanction finding that no tenders were invited by the Trust before sealing the agreement and handing over possession of the subject property in favour of the Bank and that as per clause (iv) of the development agreement dated 30th September, 1998, the obligation to obtain permission from the Charity Commissioner under B.P.T. Act was thrown on the Bank, especially, when the trustees were supposed to have obtained such sanction. This order is under challenge in this petition at the instance of the petitioner in W.P.No.6743/2007.

Facts in W.P.No.5861/2008 :



7. In this petition also, petitioner is a public trust registered under the provisions of the B.P.T. Act established and controlled by the Central Government for promotion of Hindi language owning a property bearing Survey No.44, Sheet No. 73 admeasuring 1077 sq. meters situated at Aurangabad.

8. The said trustees considering prime location of the Trust property resolved to develop the said property and assigned the rights of development in favour of one "M/s. Yogiraj Builders" in the year 1977.

9. The petitioners claim to have moved an application under section 36 of the B.P.T. Act sometime in the year 1977. However, according to the office of the Charity Commissioner, no such application was filed by the Trust. No evidence was produced on record to show that such an application was moved at any time muchless on 23rd October, 1997. The present proceedings under section 36 (1)(a) of the B.P.T. Act were initiated by filing an application dated dated 9th August, 2001.

10. According to the petitioners, the tenders were floated in the local newspapers on 13th February,

1998. In response thereto, four persons submitted their tenders on 25th February, 1998. According to the petitioners, one M/s.Yogiraj Builders offered to give highest percentage of constructed portion in the building to the Trust to be constructed on the subject plot of the Trust within a period of 20 months from the date of development agreement.

11. The agreement for development was executed on 16th March, 1998. The total built up area was 2,154 sq.meters. Out of this 1,217 sq.mtrs. area was agreed to be given to the Trust. As against this, 17 shops in the basement plus 17 shops on the ground floor were to be retained by the builder and developer on lease for a period of 99 years. The Trust was to execute lease deed in favour of the builder and developer.

12. The application dated 9th August, 2001 moved under section 36 (1)(a) was treated as application for *ex post facto* sanction by the Charity Commissioner. The said application, after hearing the trustees, was rejected by the Charity Commissioner for want of power to grant *ex post facto* sanction to the arrangement arrived at between the trust and the developer. Consequently, application came to be rejected.



Submissions :

13. Mr.P.N.Joshi, learned counsel appearing for the petitioner in W.P.No.6743/2007 raised solitary contention that the Joint Charity Commissioner was not precluded from considering the grant of *ex post facto* approval or sanction to the development agreement. He thus, submits that matter be remitted back to the Joint Charity Commissioner for consideration afresh.

14. Mr.Shirsath, learned counsel appearing for the petitioners in W.P.No.5861/2008 urged that the Joint Charity Commissioner without ascertaining the fact of filing earlier two applications dated 23rd October, 1997 and 24th October, 1998 filed by the petitioners erroneously held that no such applications were received by its office.

15. He further submits that the impugned order dated 16th May, 2008 is passed without hearing the Advocate for the petitioner as such impugned order is in breach of the principles of natural justice.

16. According to Mr.Shirsath, the agreement for development is not within the sweep of section 36 of

the B.P.T.Act, 1950. The lease is to be created after the terms of development agreement are fulfilled. Therefore, it was well within the rights of the trustees to apply for sanction before execution of the long term agreement of lease.

17. In the submission of the learned counsel, the Charity Commissioner while granting sanction under section 36 is required to bear in mind the interest, benefit and protection of the trust. He has power to refuse permission for sale of the trust property on the ground of inadequacy of consideration and he may reject the agreement on that ground. The Joint Charity Commissioner has committed error in relying upon the Division Bench judgment of this Court in the case of **Madhukar Sundarlal Seth v. S.K.Laul**, 1993 Mh.L.J. 1107. According to him, power under section 36 of the B.P.T.Act, which vests with the Charity Commissioner, is very limited. He has to consider genuine need to sell immovable property of the Trust. Secondly, he has also to consider whether or not the said property is being sold in the interest of Trust and its beneficiaries. He cannot substitute his own ideas and views vis-a-vis functioning of trust as held by the Division Bench of this Court in **Suburban**

Education Society v. Charity Commissioner of Maharashtra State, 2004 (2) All.M.R. 575.

18. According to the learned counsel, in the present case, the learned Joint Charity Commissioner has erroneously held that the construction will be unauthorised and the same will not come in the aid of Trust or the builder to regularise the transaction without any sound reason. In his submission, various reasons mentioned by the Trust for developing its property have not been considered by the learned Joint Charity Commissioner.

19. Mr. Shirsath submits that if the Trust has taken a decision that the Trust wants to dispose of the property to fulfil its objects, then it is not within the jurisdiction of the Charity Commissioner to go behind this decision in exercise of powers under section 36 of the B.P.T. Act. Reliance is placed on the judgment of this Court in the case of **Bara Imam Masjid Trust v. Charity Commissioner, Maharashtra State, 2006 (1) Mh.L.J. 809**. In his submission, the power conferred on the Charity Commissioner under section 36(1) is to ascertain whether or not the property is being sold in the interest of the Trust and that at the best available price.



20. It is further submitted that since the petitioner Trust had no finance to construct and develop the old building, it had no option but to invite tenders and enter into an agreement of development with M/s.Yogiraj Builders as it had offered to give maximum constructed area to the Trust as compared to other offerers. The learned Joint Charity Commissioner failed to take into consideration the legal and factual aspects and thereby erred in rejecting the application.

21. He further submits that the Trust has entered into an agreement for development of its plot with the builder and, immediately, applied for sanction as contemplated under section 36 of the B.P.T. Act to the Joint Charity Commissioner. No *ex post facto* sanction was asked for by the petitioners because the lease was to be created only after the terms of agreement for development are fulfilled as per condition No.4 in the agreement. Reliance is placed on the judgment of the division bench of this Court in the case of **A.R.Khan Construwell & Co. v. Youth Education and Welfare Society, Nasik**, 2006(2) Mh.L.J. 595.

22. Per contra, Mr.Deshpande, learned counsel appearing for respondent No.3 urged that this is not a fit case for entertaining petition under Article 227 of the Constitution of India. He further submits that it is absolutely false on the part of the petitioners to contend that they had filed application on 23rd October, 1997 and another application on 14th October, 1997. According to him, had these applications been filed, the petitioners would have certainly pressed those applications rather than entering into transactions with the builder. He further submits that no evidence in this behalf is produced on record to support filing of two applications on earlier occasions.

23. Mr.Deshpande further submits that under section 36 of the B.P.T.Act previous sanction is contemplated. Therefore, the Trust should not have finalised the transaction. He submits that one cannot finalise the deal and then approach for permission or sanction. In his submission, the Charity Commissioner by the impugned order has rightly held that application is not maintainable. He further submits that the petitioners had engaged as many as three advocates. All of them chose to remain absent when the matter was heard by the Joint Charity



Commissioner. If that be so, he submits that no grievance in this behalf can be allowed to be made or entertained at the instance of the petitioners.

24. Mr.Deshpande further submits that the trustees of the Trust have executed an agreement to purchase built-up area of 1,197 sq.ft. in the same building for Rs.13,00,000/-. The amount has been paid. According to him, the builder has earned profit running into crores, as against which the Trust has suffered loss of about Rs.64,00,000/-. He, thus, prayed for dismissal of the petition.

Consideration :

25. At the outset, having seen the pleadings in the petition being Writ Petition No.6743/2007 and the prayers made, the facts of the case do not justify invocation of Article 226 of the Constitution of India. Hence petition as filed under Article 226 is liable to be rejected. Order accordingly.

26. Let me first consider the submission of Mr.Shirsath (in W.P.No.5861/2008) that the application moved by the Trust under section 36(1) of the B.P.T. Act was not for *post facto* sanction. The submission

made is misplaced. In this case, property has already been developed. Construction is complete in toto. Funds are spent by the developer. Third party rights are already created. Now, no other person can compete. The fate of the property is already sealed. Under these circumstances, by no stretch of imagination it can be said to be an application for prior sanction. The condition to execute lease deed is a part of composite transaction. It is one of the conditions of the development agreement.

27. Now, let me examine, the submission made as to whether or not an application for *post facto* sanction can be considered on the text of section 36(1) of B.P.T. Act. The relevant part of the section 36 reads as under :

S.36 (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 building; belonging to a public trust shall be valid without the previous sanction of the Charity Commissioner. Sanction may be accorded subject to such conditions 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 protection of the trust." (Emphasis supplied)

28. The question posed is no more *res integra* in view of earlier judgements of this Court on the issue.

29. In the case of **Chandrabhan Chunnilal Gour v. Shraavan Kumar Khunnolal Gour**, 1980 Mh.L.J. 690; the learned single Judge has held as under :

"The use of the word "previous" before the word "sanction" in section 36(1), Bombay Public Trusts Act clearly means that sanction contemplated by subsection (1) has to be obtained before the transaction is completed and not thereafter. Ex-post -facto sanction cannot validate the transaction. The second sentence added by the Amending Act of 1971 merely authorises the Charity Commissioner to impose conditions as he may think fit while granting sanction. Once having said that sanction has to be previous, it was not necessary to repeat the same word again while empowering the Charity Commissioner to impose conditions. Hence, merely because the word "sanction" in the second sentence is not preceded by word "previous" it cannot be said that Legislature had empowered the Charity Commissioner to accord sanction after the transaction. Clause (g) of section 69 refers to sanction under section 36 and cannot be taken to enlarge the scope of section 36. It the Charity Commissioner has to exercise power under section 69, he can exercise it only in the manner provided in section 36(1). Hence, if section 36 requires sanction to be previous, there is no power in the Charity

Commissioner to accord sanction after the transaction and validate it by the so called ex-post-facto sanction. Section 36(1) is not merely procedural or technical. Section 41-E cannot be said to empower the Charity Commissioner to grant an ex-post -facto sanction." (Emphasis supplied)

The above judgment is approved by the Division Bench of this court in the case of **Charity Commissioner v. Shantidevi L. Chhaganlal Foundation Trust**, 1989 Mh.L.J. 1048 in the following words :

"16. In Chandrabhan vs. Shrawan Kumar (supra), a single Judge of this Court held that sanction contemplated by section 36(1) has to be obtained from the Charity Commissioner before the transaction is completed and there is no power in the Charity Commissioner to accord sanction after the transaction is completed and validate it by ex post facto sanction."

30. Reading of the aforesaid sub-section unequivocally goes to show the permission contemplated under section 36(1) is a prior "permission" and not subsequent "permission or sanction".

31. The Supreme Court in para-63 of its judgment in the case of **Life Insurance Corporation of India v. Escorts Ltd., & Ors.**, (1986) 1 SCC 264, observed as under:



"63. We find, on a perusal of the several, different sections of the very Act, that the Parliament has not been unmindful of the need to clearly express its intention by using the expression "previous permission" whenever it was thought that "previous permission" was necessary. In Sections 27(1) and 30, we find that the expression 'permission' is qualified by the word 'previous' and in Sections 8 (1), 8(2) and 31, the expression 'general or special permission' is qualified by the word "previous", whereas in Sections 13(2), 19(1), 19(4), 20, 21(3), 24, 25, 28(1) and 29 the expressions 'permission' and 'general or special permission' remain unqualified. The distinction made by Parliament between permission simpliciter and previous permission in the several provisions of the same Act cannot be ignored or strained to be explained away by us. That is not the way to interpret statutes."

In the above view of the matter, submission made by Mr. Shirsath holds no water.

Absence of transparency :

32. So far as absence of a transparency leading to absence of public invitation of tenders is concerned, this Court as well as the Apex Court have repeatedly held that the sale of socialist/ public property must be transparent.

33. In a case of **Ram and Shyam Company v. State of Haryana**, AIR 1985 SC 1147; the Apex Court tried to



make distinction between two types of properties and disposal thereof, i.e. the use and disposal of the private property and socialist property; and went on to observe that owner of private property may deal with it in any manner he likes without causing injury to any one else. But the socialist property has to be dealt with in a public interest. The marked difference lies in this is that while the owner of private property may have a number of considerations which may permit him to dispose of his property a song. On the other hand, disposal of trust property partakes the character of a Trust in its disposal and there should be nothing hanky and panky and it must be done at the best price so that larger revenue coming into the coffers of the State.

34. While taking the above view, the Apex Court relied upon various judgments including that of **Ramana Dayaram Shetty v. The International Airport Authority of India**, (1979) 3 SCR 1014 = AIR 1979 SC 1628; wherein the property of the public sector undertaking was involved. It is, thus, clear that the socialist property or the property held in Trust is treated at par with the public property or government property for the purposes of sale or transfer. If that be so, the same consideration would hold good for disposal of



the properties of the public Trust.

35. The only question that arises in this case for consideration is: whether on the facts found, the petitioner Trust was justified in agreeing to transfer property held by it in favour of the developer or Bank by a private negotiation without inviting public offers.

36. It is needless to mention that while developing the property held in Trust by public charitable trust, the Trust is expected to make all attempts to obtain best available price while disposing of the public property or the property held in trust. This principles may be taken as well established by now.

37. In **Fertilizer Corporation Kamagar Union v. Union of India**, AIR 1981 SC 344 (at p. 350) the Apex Court speaking through Chandrachud, C.J., observed :

"We want to make it clear that we do not doubt the bona fides of the authorities, but as far as possible, sales of public property, when the intention is to get the best price, ought to take place publicly. The vendors are not necessarily bound to accept the highest or any other offer, but the public at least get the satisfaction the the Government has put all its cards on the table".

38. In **Sachidanand Pandey v. State of West Bengal**, AIR 1987 SC 1109 (at p.1133) O.Chinnappa Reddy, J. after considering almost all the decisions of the Apex Court on the subject summarised the propositions in the following terms :

"On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established : State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public INTELSTAT when it is considered necessary to dispose of a property is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism".

39. On the aforesaid touchstone, if the cases in hand are examined, the petitioner trust, neither invited tenders nor held public auction but chose to hold negotiations with private party straightway. Had they invited tenders, the possibility of the Trust getting better offers. In both petitions, transparency in the subject transactions is lacking.

40. On the above canvass, both these petitions are without any merit. In the result, both these petitions are dismissed. Rule is discharged with no order as to costs.

(V.C.DAGA, J.)