

Haji Ismail Haji Habib ... vs State Of Maharashtra Thru Gp High Court ... on 11 December, 2019

Equivalent citations: AIRONLINE 2019 BOM 2741

Author: S.C.Dharmadhikari

Bench: S. C. Dharmadhikari, R.I.Chagla

Judgment.WP-743-19+1.doc

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.743 OF 2019
WITH
INTERIM APPLICATION NO.01 OF 2019

Haji Ismail Haji Habib Musafirkhana-	}	
Shop Tenant Forum (Proposed)	}	
Represented by Mr.Fazal Mehmood,	}	
Add : 33, Husainiya Marg (Pakmodiya	}	
Street), Mumbai - 400 003	}	Petitioners

versus

1] State of Maharashtra	}	
Through Government Pleader,	}	
Bombay High Court, Mumbai.	}	
	}	
2] The Charity Commissioner (M.S.)	}	
Off : 3rd Floor, Dharamday Ayukata Bhavan,	}	
Worli, Mumbai : 400 016	}	
	}	
3] Haji Ismail Haji Habib Musafirkhana	}	
Trust,	}	
Off Add : Ashoka Shopping Centre,	}	
Ground Floor, Shop No.54,	}	
Opp L.T.Marg Police Station,	}	
Near G.T.Hospital, Mumbai : 400 001	}	
	}	
4] Shoeb Zakaria Noorani,	}	
(Trustee of Respondent No.3 Trust),	}	
	}	
5] Mrs.Sameera Shoeb Noorani,	}	
(Trustee of Respondent No.3 Trust),	}	
Both 4 & 5 R/at : 602, Sunshine CHS,	}	
Building No.-4, New Link Road,	}	

Oshiwara, Andheri (W), }
Mumbai - 400 053 }
 }
6. Mrs.Nafisa Shakir Noorani, }
(Trustee of Respondent No.3 Trust), }
R/at: 603, Tulip Co-operative Housing }
Society, Building No.-4, }

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New Link Road, Oshiwara, Andheri (W), }
Mumbai - 400 053. }
 }
7] Shakeel Zakaria Noorani }
(Trustee of Respondent No.3 Trust) }
Add : Ashoka Shopping Centre, }
Ground Floor, Shop No.54, }
Opp. L.T.Marg Police Station }
Near G.T.Hospital, Mumbai : 400 001 }
 }
8] Saifee Burhani Upliftment Trust, }
Off Add: Ezzy Hall, Ground Floor, }
47/49 Raudat Tahera Street, }
Bhendi Bazar, Mumbai -400 003 }
 }
9] Maharashtra State Board of Wakfs }
Through its C.E.O., Panchakki, Aurangabad }

Respondents

Mr.S.M.Gorwadkar-Senior Counsel a/w
Mrs.Sana Y. Baugwala, Mr.Ritwik Joshi
i/b Baugwala Yusuf Suleman for the
Petitioners.

Mr.B.V.Samant-AGP for Respondent Nos.1
and 2 (State).

Mr.Anirban Tripathy for Respondent
Nos.3 to 6.

Mr.Raman Paranjape for Respondent
No.7.

Mr.Virag Tulzapurkar-Senior Counsel a/w
Soumya Shrikrishna-Counsel, Chirag
Kamdar-Counsel, Denzil, Nanki, Apeksha,

Paridhi i/b Wadia Ghandy & Co. for
Respondent No.8.

Ms.Divya Parab i/b Mr.R.Momin for
Respondent No.9.

CORAM :- S. C. DHARMADHIKARI &
R.I.CHAGLA, JJ.

DATE :- DECEMBER 11, 2019
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ORAL JUDGMENT:- (Per S.C.Dharmadhikari, J.)

1. By the earlier orders, this writ petition was placed before this Division Bench.
2. After the earlier orders were brought to the notice of both sides, we indicated to them that this writ petition will be disposed of by this Bench. On their agreement, recorded on 19 th November, 2019, this writ petition was placed alongwith other matters and after the other matters were disposed of, we placed this matter before us.
3. Since all pleadings are complete and detailed arguments have been canvassed, this writ petition is disposed of by this judgment and order.
4. Rule. Respondents waive service. By consent, Rule is made returnable forthwith.
5. In this writ petition under Article 226 of the Constitution of India, the petitioners challenge the order dated 26 th November, 2015, copy of which is at Exhibit 'B' to the petition. That order is passed by the Charity Commissioner, Maharashtra State in Application No.48 of 2012.

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6. The application was moved seeking sanction of the Charity Commissioner under Section 36(1)(a) of the Maharashtra Public Trust Act, 1950 (for short, "the MPT Act"). The Trust in question is, "Haji Ismail Haji Habib Musafirkhana Trust", P.T.R.No.B/140 (Mumbai). The order impugned in this petition allows this application and directs as under:

"1) Application is allowed.

2) Sanction is hereby accorded under Section 36(1)

(a) of the Maharashtra Public Trusts Act, 1950 to the trustees of Haji Ismail Haji Habib Musafirkhana Trust, P.T.R.No.B/140 (Mumbai) to sell the property i.e. Sanadi land with standing structure thereon situated at the junction of Yacub Street, Sheikh Abdulla Pakmodia Street and Edulji Cooper 2nd Street, Mumbai admeasuring 842.82 sq.mtrs. equivalent to 961 square yards or thereabouts bearing Cadastral Survey No.4315 of Bhuleshwar Division, Mumbai on 'as is where is' basis to Saifee Burhani Upliftment Trust, P.T.R.No.E/25619/Mumbai for a consideration of Rs.1,10,00,000/- (Rupees One Crore Ten Lakhs only) on the following terms and conditions :-

i) The purchaser shall pay amount of Rs.1,10,00,000/-

(Rupees One Crore Ten Lakhs only) by crossed cheque/demand draft to the Trust.

ii) The sale deed shall be executed within a period of six months form the date of this order.

iii) All expenses including stamp duty, registration charges, etc. shall be borne by the purchaser.

iv) The entire amount of sale proceeds shall be held as trust corpus and kept intact for ever in the form of investment in fixed deposits yielding monthly interest or otherwise in any Nationalized Bank and should not be withdrawn without prior permission of this Authority. Interest amount may be withdrawn.

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v) The interest accrued on the fixed deposits shall be utilized only for the purpose and objects of the trust.

vi) This permission shall be subject to all the relevant laws and rules applicable to the transaction and the property as well.

Vii) The trustees are directed to file necessary change report after completion of the sale transaction."

7. The facts necessary to appreciate the arguments of both sides, are briefly set out herein below.

8. Respondent No.3 before us is a Trust and we say this because the record indicates that it has been assigned a registration number. It has been assigned the number B- 140(Mumbai) by the office of the Charity Commissioner, Maharashtra State, Mumbai exercising powers under the then Bombay Public Trusts Act, 1950, now the MPT Act. The Trust is known as "Haji Ismail Haji Habib Musafirkhana Trust". Annexure 'A' to the application preferred before the Charity Commissioner, Maharashtra State on which the impugned order has been passed is a copy of this Registration

Certificate. Annexure A-1 is the certified true copy of one Register of Public Trust, namely, Schedule 1 as prescribed under Rule 5 of Bombay/Maharashtra Public Trusts Rules, 1951.

9. Respondent No.1 is the State of Maharashtra, whereas, respondent No.2 is the Charity Commissioner, Maharashtra State. M.M.Salgaonkar Judgment.WP-743-19+1.doc Respondent Nos. 4 to 7 are the trustees of the Trust (respondent No.3) and respondent No.8 is another Trust governed by the MPT Act and having its office at the address mentioned in the cause title. The newly added respondent No.9 is the Maharashtra State Board of Wakfs through its Chief Executive Officer.

10. Application No.48 of 2012 was filed invoking the powers of the Charity Commissioner under Section 36(1)(a) of the MPT Act. Section 36 reads as under :-

"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 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.

Provided that, the Charity Commissioner may, before the transaction for which previous sanction is given under clause (a), (b) or (c) is completed, modify the conditions imposed thereunder, as he deems fit; M.M.Salgaonkar Judgment.WP-743-19+1.doc Provided further that, if such condition is of time-limit for execution of any contract or conveyance, then application for modification of such condition shall be made before the expiry of such stipulated time. (1A) The Charity Commissioner shall not sanction any lease for a period exceeding thirty years under this Act. (2) The Charity Commissioner may revoke the sanction given under clause (a) or clause (b) of sub-section (1) on the ground that such sanction was obtained by fraud or mis-representation made to him or by concealing from the Charity Commissioner, facts material for the purpose of giving sanction; and direct the trustee to take such steps within a period of one hundred and eighty days from the date of revocation (or such further period not exceeding in the aggregate one year as the Charity Commissioner may from time to time determine) as may be specified in the direction for the recovery of the property.

Provided that, no sanction shall be revoked under this section after the execution of the conveyance except on the ground that such sanction was obtained by fraud practiced upon the Charity

Commissioner before the grant of such sanction.

(3) No sanction shall be revoked under this section unless the person in whose favour such sanction has been made has been given a reasonable opportunity to show-cause why the sanction should not be revoked. (4) If, in the opinion of the Charity Commissioner, the trustee has failed to take effective steps within the period specified in sub-section (2), or it is not possible to recover the property with reasonable effort or expense, the Charity Commissioner may assess any advantage received by the trustee and direct him to pay compensation to the trust equivalent to the advantage so assessed.

(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 M.M.Salgaonkar Judgment.WP-743-19+1.doc 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 bonafide and they have not derived any benefit, either pecuniary or otherwise, out of the said transaction, and

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

Explanation.- For the purposes of sub-section (5), the term "the Charity Commissioner" shall mean only the Charity Commissioner appointed under section 3."

11. A perusal of this provision reveals that alienation of immovable property of a Public Trust is permissible, but for that a previous sanction of the Charity Commissioner has to be obtained. The legislature has deliberately inserted the words "previous sanction of the Charity Commissioner". Therefore, notwithstanding anything contained in the instrument of Trust, no sale, exchange or gift of any immovable property and 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 M.M.Salgaonkar Judgment.WP-743-19+1.doc land or a building belonging to a Public Trust, shall be valid without the previous sanction of the Charity Commissioner. The section was amended by addition of the

words "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". Clause (c) sub-section (1) of Section 36 enable the Charity Commissioner to record a satisfaction in terms thereof. Then this Section was amended by inserting provisos below clause (c) of sub-section (1) and addition of sub- section (1A). Sub-section (5) was also added and by which, 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, can be obtained provided that the Charity Commissioner is satisfied in terms of clauses (a) to (g) of sub-section (5) to Section 36.

12. Having thus noted the scheme of the Section, we proceed to refer to the contents of the application made by the third respondent-Trust through its trustees to the Charity Commissioner.

13. In para 1 of this application, there is introduction of the Trust. In para 2, it is categorically stated that the Trust is governed by a Scheme framed by this Court in Suit No.741 of M.M.Salgaonkar Judgment.WP-743-19+1.doc 1944. A certified copy of the said Scheme, which governs the administration and management of the Trust is annexed and marked as Annexure-B to the application.

14. Then, it is stated in para 3 that the Board of Trustees of the Trust are managing and administering the Trust in accordance with the terms, conditions and provisions contained in this Scheme. In para 4, it is stated that the main object of the Trust is to maintain Musafirkhana known as "Haji Ismail Haji Musafirkhana' situate at Pakmodia Street, Mumbai.

15. Paras 5 to 9 of this application read as under:-

"5. The applicants say that the trust holds the property consists of land with building thereon shown in the plan. A copy of the plan is annexed hereto and marked as ANNEXURE C. The original area of the land as shown in the Schedule of the property incorporated in the Scheme was 961 sq.yards or there about and same is the area shown in the record of the public trusts registration as evidenced in Schedule I. However, from the property card obtained from the Superintendent, Mumbai City Survey and Land Records, the property is now shown as Sq.Yards (1008.00) sq.meters 842.82. A certified Xerox copy of the said property card is annexed hereto and marked as ANNEXURE-D.

6. It is submitted that the property in question is in dilapidated condition and trustees found it extremely difficult to manage, administer and run the trust and to maintain or even repair the building for extreme shortage of funds. In the meeting of the trustees held on 13-12-2011 the resolution was passed to sell the trust property, as the property in question is in dilapidated condition and could not be repaired. A copy of the said Resolution dt.13-12-2011 is annexed hereto and marked as ANNEXURE-D1. The property was declared to be a dangerous condition by the MCGM who had issued M.M.Salgaonkar Judgment.WP-743-19+1.doc notice dated 17-5-2007 to vacate the said building. Hereto annexed and marked ANNEXURE-E is

the copy of notice dt.17-5-2007. The said property, which is a building of ground plus one and storeys, is and has been fully occupied and encroached upon by half several tenants and trespassers. There is a suit bearing suit no.3299/03 is pending in the Hon'ble High Court at Bombay against the trespassers in the said property and that there is no order passed by any Court or Authority restraining the said Trust from transferring the said properties. The income of trust by way of rent etc. comes to Rs.3,25,773/- per annum which also varies on account of the failure of the tenants to pay the rent whereas the trust has to spend on the statutory outgoings etc. to the tune of about Rs.2,89,365/- per annum. Since the property is in dilapidated condition the Trust also spends around Rs.40,000/- per annum on structural repairs therefore the Trust is incurring losses of Rs.3,592/- per annum out of the said property. Hence, the trustees decided to dispose off the property and invest the amount to be received from the purchaser in fixed deposit in Bank and accrued interest to be received from the Bank should be utilized for the objects of the Trust. The trustees learnt that another public trust known as Saifee Burhani Upliftment Trust, bearing No.E- 25619 (Mumbai) had grand plan scheme for development of a huge area at Mohamedali Road, Bhendi Bazar. The said public trust has a highly prestigious and important mosque situated on the same road namely, Pakmodia Street, Mumbai 400 003. The trustees of this trust approached another trust viz. Saifee Burhani Upliftment Trust registered the Bombay Public Trusts Act, 1950 bearing P.T.R.No.E-25619 (Mumbai), who made an offer by its letter dated 8-12-2009 for purchasing the property at a consideration of Rs.1,10,00,000/- subject to the permission of the Hon'ble Charity Commissioner, Maharashtra State, Mumbai. The offer letter dated 8-12-2009 is annexed herewith and marked ANNEXURE-F.

7. The trustees obtained valuation report from the Govt. Registered Valuer viz.H.Mehta & Associates, who have assessed the valuation of the property at Rs.34,00,000/- whereas trust is getting Rs.1,10,00,000/- from the purchaser viz. Saifee Burhani Upliftment Trust. The said Valuation Report is annexed herewith and marked ANNEXURE-G. M.M.Salgaonkar Judgment.WP-743-19+1.doc

8. On receipt of the aforesaid offer from Saifee Burhani Upliftment Trust, trustees consider the offer for purchase of the property, which is from another public trust that there is no need whatsoever to issue any public notice or to invite tenders. Since the offer is from another public trust, a trust property would be utilized from the benefit and achievement of the objects of the another public trust. The transaction is not of a commercial nature and therefore commercial rates simply cannot be the criteria or the consideration. The applicants/trustees have therefore, unanimously resolved to accept the offer of Saifee Burhani Upliftment Trust for Rs.1,10,00,000/- on 'as is where is' basis by passing a resolution to that effect in the meeting of the trustees held on 24-12-2011. True copy of the said resolution dated 24-12-2011 is annexed herewith at ANNEXURE-H. Further in the said meeting of the trustees held on 24-12-2011 Trustees authorized Shoeb Zakaria Noorani, one of the trustees of the above trust to enter into MOU and file an application for getting the sanction of the

Charity Commissioner, Maharashtra State, Mumbai for sale of the property under Section 36(1)(a) of the Bombay Public Trusts Act, 1950. Therefore, it will be fit and proper and in the interest of justice that the applicants/trustees be permitted to alienate the trust property to Saifee Burhani Upliftment Trust, without insisting publication for sale of the property by giving public notice in the newspapers.

9. An MOU dt.26-12-2011 has been entered into between the applicants/trustees of "Haji Ismail Haji Habib Musafirkhana Trust" and the said Saifee Burhani Upliftment Trust. A true copy of the said MOU dt.26-12- 2011 is annexed herewith and marked ANNEXURE-I."

16. A perusal of these paragraphs shows that the Trust property is a building on a land belonging to it. That building is in dilapidated condition and trustees found it extremely difficult to manage, administer and run the Trust and to maintain or even repair the building on account of extreme shortage of funds. That is how, they convened a meeting and passed a Resolution. Further, there are encroachments in this building and property. M.M.Salgaonkar Judgment.WP-743-19+1.doc The trespassers could not be evicted as litigation involves huge expenditure. Further, a valuation report was obtained by the trustees and which valuation report says that on account of encroachments and encumbrances, the value of the Trust property has diminished to great extent. Then it is stated that an offer was received from respondent No.8, after which, the negotiations were held culminating into execution of Memorandum of Understanding dated 26 th December, 2011, copy of which is annexed to the application. Thus, the annexures to the application, include, inter alia, the letters and communications received from the Municipal Corporation of Greater Mumbai declaring the building to be dilapidated and requiring immediate eviction of the occupants, the valuation report, the copy of Resolution passed by the trustees and the copy of the Memorandum of Understanding. Thereafter, the necessary details are filled in the format prescribed by the Rules. Ultimately, the applicants pray that the third respondent-Trust be granted permission/sanction under clause (a) of sub-section (1) of Section 36 of the MPT Act to dispose off the Trust property, on 'as is where is' basis subject to 48 tenants/occupants and the intending purchaser to be saddled with all the obligations as are set out in the Memorandum of Understanding.

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17. This application was filed on 13th March, 2012. After all the procedural formalities were completed, this application was considered by the Charity Commissioner and after referring to the contents of this application, the Charity Commissioner, in a reasoned order, held that the applicants before him are trustees as per the records maintained in relation to this Trust. The Trust property is in a dilapidated condition and needs redevelopment. The Trust will not be able to fund the redevelopment and that is why the trustees have sought permission to dispose of the property. The Charity Commissioner noted that another important factor is that the purchaser (respondent No.8 before us) is also a Trust headed by respectable persons from Bohra Community. The object of this respondent No.8-Public Trust is to uplift the condition of the city and make available residential as well as the commercial premises to the occupants and residents of this old building, particularly in the locality in which the subject Trust property is situate. That is why, the Charity Commissioner

holds that the decision of the trustees to sell the property for redevelopment is justified. A case of legal necessity to sell the Trust property is made out. He then concluded, by applying the principles laid down in several decisions of this Court and the Hon'ble Supreme Court, that the transaction and deal with this respondent No.8-Trust is in the interest of the Trust, also in M.M.Salgaonkar Judgment.WP-743-19+1.doc interest of the people in the locality and would make the city well developed. The contents of the valuation report are referred to and the Charity Commissioner concludes that he finds no reason to refuse the permission to sell the Trust property to another Trust. Holding thus, he allows the application.

18. From the record it appears that on 25th June, 2018, the advocate appearing on behalf of the petitioners-Mrs.Sana Yusuf Baugwala, gave a notice on behalf of the "Shop Tenants Forum". In fact, the Forum is a proposed entity, but never registered nor has any legal status. It is a group of individuals. There were about 26 individuals forming this Forum and represented by one Mr.Abdul Hamid S. Arbi and Mr.Fazal Mehmood. The notice says that the group of persons has received from respondent No.8-Trust communications as also notices which have been issued by the statutory authorities and in reply to which, the group of persons says that respondent No.8 is claiming to be the landlord/owner of the property. Respondent No.8 relies upon the order of sanction passed by the Charity Commissioner. However, it is stated in paras 5 and 6 of this notice as under:

"5] That since you claim to be the new Landlord/Owner of the said property, the said property in question being a Religious Charitable organization cannot be bought without prior sanction of the Ld.Charity Commissioner (M.S.) or the Maharashtra State Board of Wakf. Moreover, it is a matter of record that the Hon'ble Supreme Court of India vide its order dated 11.05.2012, M.M.Salgaonkar Judgment.WP-743-19+1.doc have issued status quo and have restrained all those in management of the Wakf properties/Muslim Trust, from alienating and/or encumbering the such properties during the pendency of the proceedings. The Hon'ble Supreme Court also has restrained the Charity Commissioner, Mumbai to either encumber or alienate any of the properties under the management, till pendency of the SPLs. The Copy of the said order dated 11-05-2012 passed by Hon'ble Supreme Court is enclosed herewith for your kind perusal and record.

6] That it would be appropriate that you kindly forward to my clients the Copies of the necessary permissions obtained by you from the Charity Commissioner (M.S.) office under section 36 for purchasing/alienating the said Trust property in question and/or the Copy of NOC from the Maharashtra State Board of Wakf for alienating the said "Masjid"

property. That if at all the sale/transfer/alienation of the said Trust has taken during the pendency of the said SPLs i.e. from 11.05.2012 till this date, then the sale itself become null and void."

19. Then, the notice alleges that there is a cluster Redevelopment Scheme. However, Haji Ismail Haji Habib Musafirkhana Trust has not communicated any such change of landlord/ownership nor there is anything informed to this group to establish that the eighth respondent before us is new

landlord/ owner of the property. Therefore, it is alleged that there is no landlord-tenant relationship. Then it is stated that this eighth respondent is a Trust, but it is a scam in itself as there is no charitable purpose involved in the redevelopment scheme. The advocate for this group alleged that they are not aware of any redevelopment proposal pertaining to the Haji Ismail Haji Habib Musafirkhana Trust. No proposal has been forwarded to them. M.M.Salgaonkar Judgment.WP-743-19+1.doc Then it is alleged that a copy of the redevelopment agreement pertaining to the premises of the group, mentioning the benefits has not been provided nor the features of this redevelopment scheme are to their knowledge. At the same time, in para 10 of this notice, the group alleges that respondent No.8 intends to redevelop the property in question under "Saifee Burhani Upliftment Trust under a composite scheme invoking Development Control Regulations for Greater Mumbai and, particularly, DCR 33(9) as the properties are purchased and shown as the property of the eighth respondent-Trust. However, the redevelopment is hit by a mandatory clause, which requires a transfer of the tenanted premises into ownership. Once the property is shown as a Trust property and the subject DCR being invoked, there cannot be conversion for conversion from tenancy to ownership will require sanction under Section 36 of the MPT Act. That sanction or permission is mandatory. Thus, it is claimed that the senders of this notice are not aware of any valid and legal sanction obtained by respondent No.8 from the Charity Commissioner. The other paragraphs of the notice call upon respondent No.8 to provide the documents set out in para 12 and then in para 13 it is said that the persons whose names are mentioned in this notice and stated to be a forum of shopkeepers is ready and willing to repair the property under the Mumbai M.M.Salgaonkar Judgment.WP-743-19+1.doc Building Repairs and Reconstruction Board and also willing to pay their contribution, if any, to the concerned authority to get the concerned Musafirkhana building repaired immediately. It is said that the transaction with respondent No.8 is illegal and violates the directions of the order dated 11 th May, 2012 of the Hon'ble Supreme Court of India.

20. After this notice was sent and the reference is made to the order of the Hon'ble Supreme Court of India, the present writ petition came to be filed. To be precise, it was filed in this Court on 3rd November, 2018. thereafter it was to appear as per the computerised dating system on 30th January, 2019. However, it appeared before the learned Single Judge of this Court on 19 th March, 2019 and was adjourned to 20th March, 2019. On 20th March, 2019, none appeared for the petitioners and, therefore, the matter was adjourned to 29th March, 2019. On 29th March, 2019, by consent, it was adjourned to 3rd April, 2019. After that the matter appeared before the learned Single Judge on 3 rd April, 2019 and he directed issuance of notice after permitting the petitioners to carry out the amendment to implead the Waqf Board. The order of 3rd April, 2019, directs the parties to file affidavit-in-reply. The matter was then adjourned to 16th April, 2019. Thereafter it could not be taken up and was adjourned to M.M.Salgaonkar Judgment.WP-743-19+1.doc 16th July, 2019. Prior thereto, from the record, it appears that on 10th June, 2019, the matter was taken up before a learned Single Judge of this Court and he took affidavit of respondent No.8 on record. Thereafter, matter was stood over, by consent, on 26 th July, 2019. After that date, it was placed on 24 th September, 2019, but adjourned to 3rd October, 2019. Then it was taken up on 11th October, 2019 and an order was passed by a learned Single Judge. That order, inter alia, grants interim relief. Respondent No.8 is directed not to initiate the steps for eviction of the petitioners, which would be at the risk of the petitioners. After that date, the matter appeared together with other cases of

individuals anticipating and apprehending eviction from the subject building and on 19th November, 2019, we passed the following order:-

"1. After the administrative order clubbing the matters was passed by the Hon'ble Chief Justice, the present petition has been listed before this Bench.

2. This was listed along with couple of other petitions which are disposed of.

3. We have heard both sides on the point of continuation of an interim order dated 11.10.2019 in the above matter.

4. That order reads as under:

"P.C. Not on Board. Taken on Board.

Heard Mr.Gorwadkar, learned Senior Counsel assisted by Ms. Baugwala, learned counsel for the Petitioner and Mr. Babar, learned AGP for M.M.Salgaonkar Judgment.WP-743-19+1.doc respondent- State. Also heard Mr. Tripathy, learned Counsel for Respondent Nos. 3 to 6, Mr.Paranjpe, learned counsel for Respondent No.7 and Ms. Shrikrishnan, learned Counsel for theRespondent No.8.

2 After hearing learned counsel for the parties at some length, Court is of the view that an interim order is called for.

3 Accordingly, Respondent No.8 is directed not to initiate steps for eviction of the Petitioner which would be at the risk of the Petitioner.

4 Stand over to 15.11.2019."

5. Mr. Tulzapurkar, learned Senior Counsel appearing on behalf of the contesting Respondent No.8 says that this order is blanket in nature. This protects the so called forum members, who are shopkeepers, from eviction.

6. Mr. Tulzapurkar submits that the challenge in this petition is to an order of sanction dated 26.11.2015 passed by the Charity Commissioner, Maharashtra State in Application No. J-4/48/2012.

7. Mr. Tulzapurkar submits that by itself this order does not bring about eviction of the members of the Petitioner forum, if at all, there is such legal entity. The order of eviction has been passed because there is a complete rehabilitation scheme carved out in terms of distinct statutes and legislations. After those schemes are in place, the parties like Respondent No.8 can take assistance of the powers which have been conferred by another law, in the authority established under that law. In that regard, our attention is invited to Section 95-A of the Maharashtra Housing and Area Development Act,1976. That confers the power of summary eviction. That Section reads as under:

"95A. Summary eviction of occupiers in certain cases.- (1) Where the owner of a building or the members of the proposed co-operative housing society of the occupiers of the said building, submits a proposal to the Board for reconstruction of the building, after obtaining the written consent of not less than 70 per cent of the total occupiers of that building and a No Objection Certificate for such reconstruction of the building is issued by the Board to the owner or to the proposed co-operative housing society of the occupier, as the case may be, then it shall be binding on all the occupiers to vacate the premises.

Provided that, it shall be incumbent upon the builder of such No Objection Certificate to make available to all the occupants of such building alternate temporary accommodation.

(2) On refusal by any of the occupant to vacate the premises as provided in sub-section (1), on being approached by the holder of such, No Objection Certificate for eviction of such occupiers, it would be competent for the Board, notwithstanding anything contained in chapter VI and VII of this Act, to effect summary eviction of such occupiers.

(3) Any person occupying any premises, land, building or structure of the Board unauthorisedly or without specific written permission of the Board in this behalf shall, notwithstanding anything contained in Chapters VI and VII of this Act, be liable for summary eviction.

(4) Any person who refuses to vacate such premises or obstructs such eviction shall, on conviction, be punishable with imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees, or with both."

8. Mr. Tulzapurkar would submit that the scheme is carved out pursuant to the benefit that is available for redevelopment of old and dilapidated buildings in the city of Mumbai. That benefit is conferred by the Development Control Regulations for Greater Bombay, 1991. Once such a redevelopment scheme is in place, then, the non cooperating occupiers can be summarily evicted and in that regard, the above provisions are material.

9. The order of eviction is a summary one and passed under Section 95-A of this Statute. In the Writ Petition, there is neither any averment, nor any challenge to the summary eviction order. Hence, the blanket interim order passed by the learned Single Judge poses a M.M.Salgaonkar Judgment.WP-743-19+1.doc obstacle and hindrance in the sense that this summary eviction order cannot be enforced and implemented. This will stall the redevelopment scheme itself.

10. Mr. Gorwadkar, learned Senior Counsel appearing on behalf of Petitioner would submit that the challenge in this Writ Petition is to the order of sanction. If the sale of the property belonging to the Respondent No.3 Trust is challenged, then once the sanction accorded by the Charity Commissioner

falls to the ground, the conveyance in favour of Respondent No.8 would not survive. If all this does not survive, then there is no redevelopment scheme, nor any eviction. Hence, the order be continued for a reasonable period so as to enable the Petitioner to argue the petition.

11. While we note the anxiety of Mr. Gorwadkar to have a continuation of the interim order until the Writ Petition is heard for admission or for a reasonable period, yet, we are of the view that there is substance in the objections raised by Mr. Tulzapurkar. In the petition i.e. fled and brought before us, there is indeed no challenge to the order under Section 95-A of the Maharashtra Housing and Area Development Act, 1976. That order is passed against the individual occupiers be they commercial or residential. Ultimately, individuals are aggrieved and dissatisfied by the order, they may be members of a forum, but their individual tenements would be demolished and brought down and they would be summarily evicted. They cannot get the benefit of a blanket interim order passed by the learned Single Judge in a Writ Petition not fled by the tenement holder or occupier individually. The forum cannot seek any protection for such occupiers against the eviction orders.

12. In this view of the matter, we leave it to the individual members of this forum and if they are aggrieved and dissatisfied with the order of their summary eviction, they can bring a independent challenge to the same. To enable them to bring such challenge by fling individual cases or petitions, we continue the order passed on 11.10.2019 for a period of two weeks. The benefit of this order will not be available to those, who do not file individual petitions within a period of two weeks and move them before the competent Court. The shopkeepers/occupiers be they members of the Petitioner forum, can be evicted in exercise of the summary powers of eviction should they M.M.Salgaonkar Judgment.WP-743-19+1.doc not file any individual cases within the period stipulated above. Thus, beyond two weeks, this order will not continue and enure for the benefit of the shopkeepers/occupiers against whom order under Section 95A of the MHADA Act, 1976, is passed.

13. We post this matter on 05.12.2019."

21. We have several affidavits on record and the contents of which are material.

22. An affidavit-in-reply is filed by respondent No.8, which is at pages 87 to 97 of the paper-book. In this affidavit it is stated that the property is not a Waqf property. It is stated that respondent No.3-Trust is a Public Trust registered under the MPT Act. It is governed by a scheme dated 9th March, 1945 framed by this Court in Suit No.741 of 1944. Then it is stated that the land and building are situate, lying and being at the junction of Yakub Street, Shaikh Abdulla Pakmodia Street and Edulji Cooper 2nd street within the Registration District and Sub-District of Mumbai. This property vests in the trustees of the Trust. It is not a waqf property. It is specifically stated in this affidavit that for a property to be a waqf property, it has to be dedicated to or vested in 'Allah' that is God Almighty and in the absence of such vesting or dedication, the property in question will not be a waqf property. In the present case, the said property has been vested in the trustees of respondent No.3 and there is no vesting or dedication in favour of 'Allah' or God Almighty. That being the M.M.Salgaonkar Judgment.WP-743-19+1.doc case, the said property is not a waqf property. The further assertion in this affidavit is that there is no 'mosque' or 'masjid' in the said property. Then it is stated that an attempt is made to distort the facts without demonstrating and proving that how

the property is a waqf property. It is then stated that the order of the Hon'ble Supreme Court of India dated 11 th May, 2012 passed in Special Leave Petition (Civil) No.31288-31290 of 2011 is clear. It does not say that the Charity Commissioner lacks jurisdiction to pass an order under the provisions of the MPT Act by invoking Section 36(1)(a) thereof, in relation to the properties belonging to a Muslim Trust. Thus, the MPT Act applies to the Trusts formed by Muslims and it is not contemplated by law that all such Trusts are waqfs. There is a distinction between 'a Waqf' and 'a Trust' and merely because a Trust carries on religious and charitable activities that does not make a Muslim Trust 'a Waqf'. On such assertions and on merits as well, the allegations in the petition are denied.

23. There is an affidavit then filed by the trustees of respondent No.3 and this affidavit says in clearest terms that the third respondent is a Trust incorporated in the year 1944. It is governed by a scheme framed by this Court. The object of respondent No.3-Trust is to provide accommodation to pilgrims. M.M.Salgaonkar Judgment.WP-743-19+1.doc It is stated that clause (6) of the scheme provides that at all time, a member of the Testator's family shall be a trustee of the Trust. The Trust is not a waqf. Then all aspects of the transaction with respondent No.8 are highlighted. In addition to that, it is stated that the building has been taken over by encroachers. They refused to vacate the building. The Trust had to file a suit being Suit No.3299 of 2003 in this Court. Then reliance is placed upon the Maharashtra State Board of Waqf as set out in the Maharashtra Government Gazette. It is also said that respondent No.3 was aggrieved and dissatisfied with the inclusion of the third respondent's name in this Government Gazette and applied for deletion. Thereafter a corrigendum of 26 th April, 2005 was issued deleting the name of the third respondent-Trust. It is stated that as there was no progress in the legal proceedings and encroachers continued to occupy the building, a meeting was convened and thereafter, offer of respondent No.8 was considered. Respondent No.8 was redeveloping the entire Bhendi Bazar area. Since the building in question is falling in Bhendi Bazar area, the trustees of respondent No.8 approached the trustees of respondent No.3 and conveyed their interest to purchase the building in question. Thereafter, Memorandum of Understanding was executed. The amounts have been paid. Then, an application was made to the Charity Commissioner and M.M.Salgaonkar Judgment.WP-743-19+1.doc the Charity Commissioner considered all the relevant factors and passed the order of sanction. Thus, the permission or sanction received by respondent No.3 is in accordance with law. It is also brought to the notice of the Charity Commissioner and now in this litigation before this Court that the building in question is dilapidated and in a ruinous and dangerous condition. It poses a threat to the life of the residents of the building, neighbours and passers-by. That is why this Court was of the view that the building should be demolished. A copy of the order dated 14 th June, 2018 in a Civil Suit has been referred to. For all these reasons, it is mentioned that the order of sanction should not be interfered with. It is also denied in this affidavit that the petitioners are the beneficiaries and the tenants/occupants of the respondent No.3-Trust and are the persons interested. They cannot bring any challenge to the order of sanction. The material contentions having been dealt with, this affidavit contains denials. It is said specifically in this affidavit that it is not correct to allege that a 'Sunni' Muslim property has been alienated in favour of the 'Shias'. Merely because the Trust is created for the benefit of 'Kachi Memon' does not mean that it cannot do business or transact with Shia Muslims. It is in these circumstances and asserting the position in law that the property of a Trust vests in the trustees and the trustees have right to alienate the same that M.M.Salgaonkar Judgment.WP-743-19+1.doc the

affidavit proceeds to pray for the dismissal of the writ petition.

24. It is, inter alia, pointed out that the order of the Hon'ble Supreme Court is with regard to only waqf property. Once the property in question is not a waqf property, then, the Charity Commissioner has powers to pass the order of sanction. The affidavit also refers to a litigation commenced by one Mohammad Shafi Abdul Shakoor Arbiwala, who is one of the persons in the group/Forum and he filed Waqf Suit No.75 of 2019 before the Maharashtra State Waqf Board at Aurangabad. Thereafter, the order in that suit is also referred in the affidavit filed subsequently. Thus to the affidavit of the third respondent-Trust, we find that there are several annexures. One of the annexures is a copy of the Memorandum of Understanding and together with that, there is a Memorandum of Understanding of 12 th March, 2015 entered into between a Trust (respondent No.8) and respondent No.3. In this Memorandum of Understanding, it is stated as under:-

"The Memorandum of Understanding dated 12th day of March, 2015 entered into between Saifee Burhani Upliftment Trust hereinafter referred to as the 1st Party and Haji Ismail Haji Habib Musafirkhana Trust, a Public Charitable Trust registered under the Bombay Public Trust Act of 1950, hereinafter referred to as the 2 nd Party.

M.M.Salgaonkar Judgment.WP-743-19+1.doc WHEREAS the 2nd Party is the absolute Owner of a building known as Haji Ismail Haji Habib Musafirkhana Trust, located and situated at Junction of Yakub Street, Sheikh Abdulla Pakmodia Street and Edulji Cooper 2nd Street at the Registration Sub-Division of Bombay and registered in the Books of Collector of Land Revenue under No.9341 New Survey No.4315 of Bhuleshwar Division. The said Musafirkhana was a Dharamshala having 36 rooms used for the lodging of pilgrims travelling to Saudi Arabia on Haj. The said building is a s such infested with trespassers who have been squatting over the same since past 40 years and the 2 nd Party has filed Suit No.3299 of 2003 in the Bombay High Court for evicting these trespassers.

WHEREAS the entire second floor of the aforesaid building admeasuring about 568.87 sq.feet was occupied by Mr.Dawood Ibrahim, a fugitive from law and the 2nd Party through Mr.Shoeb Z. Noorani had filed an undertaking in Misc. Application No.188 of 2007 in Bombay Blast Case No.1 of 1993 (Misc.Application No.376 of 1994) before the Designated Court under the TADA (P), at Mumbai Central Prison, Mumbai wherein he has undertaken to construct and handover 568.87 sq.feet to the State of Maharashtra till the disposal of M.A.No.314/94, 326/94, 376/94 in BBC No.1 of 93, in order to safeguard the interest of the prosecution/Government.

WHEREAS, the 1st Party is engaged in the development of Bhendi Bazar area as per the Cluster Development Scheme announced by Saifee Burhani Upliftment Trust, is undertaking the redevelopment of Bhendi Bazaar area admeasuring approximately 16.5 acres as an urban renewal scheme in terms of Regulation 33(9) read with Appendix IIIA (Hereinafter collectively referred to as Regulation 33(9) of the Development Control Regulations for Greater Mumbai, 1991 ("The project"). The

Government of Maharashtra has granted in- principle approval and the High Power Committee constituted under Regulation 33(9) has granted its letter of intent for the project. The Municipal Corporation of Greater Mumbai has granted IOD (Intimation of Disapproval) for one of the sub-clusters of the Project. The Project involves the rehabilitation of around 3,200 residential families and 1250 commercial/ retail business/tenants, Saifee Burhani Upliftment Trust is therefore keen to acquire the building referred to hereinafter as Haji Ismail Haji Habib Musafirkhana Trust Building.

M.M.Salgaonkar Judgment.WP-743-19+1.doc WHEREAS the 1st Party had entered into a Memorandum of Understanding with the 2nd Party on 17th February, 2010 pursuant to which the 2 nd Party had filed Application No.48 of 2012 before the Charity Commissioner u/s 36(1)(a) of the Bombay Public Trust Act 1950 seeking permission to sell the above building known as Haji Ismail Haji Habib Musafirkhana Trust Building."

25. In this Memorandum of Understanding it is stated that despite best efforts, respondent No.3-Trust has not been able to evict the trespassers. The Memorandum of Understanding records that a payment of Rs.1,10,00,000/- would be made after deducting therefrom a sum of Rs.11,00,000/-, which has already been paid to respondent No.3 by cheque on 12 th February, 2010. This amount will be paid after the third respondent is able to obtain the sanction of the Charity Commissioner in Application No.48 of 2012. After the necessary compliance, the eighth respondent has undertaken to become a party to the pending suit, namely, Suit No.3299 of 2003. It has taken over the obligation and responsibility to deal with all the trespassers. It will settle their claims and file Consent Terms. The trespassers would vacate the respective rooms and hand over possession thereof to the eighth respondent. Thereafter a sum of Rs.35,00,000/- would be paid to each of the trespassers, who are in occupation of various rooms, by way of cheques as and when the trespassers vacate the respective rooms and hand over possession thereof. Thus, the responsibility of vacating all the trespassers was taken M.M.Salgaonkar Judgment.WP-743-19+1.doc over. In addition, a sum of Rs.5,00,000/- would be paid to respondent No.3. Thus, respondent No.8 says that on obtaining permission from the Charity Commissioner by the third respondent, the eighth respondent would take over the building and thereafter also comply with the requirements under the order of the Designated Court under the Terrorist and Disruptive Activities (Prevention) Act (for short, "TADA"). With reference to 568.87 sq.ft. on the second floor which is at present in the ownership of the Designated Court, it is agreed that it will be cleared by the third respondent and will be handed over to the eighth respondent. The annexures to this affidavit include a copy of an order of the learned Single Judge passed in Suit No.3299 of 2003. That, according to the deponent, refers to all the problems faced by the trustees.

26. Pertinently, the seventh respondent to this petition, who was once a party to the application filed before the Charity Commissioner, has filed an affidavit. In this affidavit, he purports to support the petitioners. However, in the first affidavit filed by this seventh respondent in this Court on 24 th June, 2019, he says that he is not aware of any matter concerning the Waqf Act, 1995 nor he is aware about the writ petitions concerning the Muslim Properties filed in this Court and its outcome or any

order passed M.M.Salgaonkar Judgment.WP-743-19+1.doc by the Hon'ble Supreme Court relating to these writ petitions. The seventh respondent says that at the time of passing the Resolution dated 24th December, 2011, the authority for pursuing the case on behalf of the Trust (Respondent No.3) and the remaining trustees was given to respondent No.4. Respondent No.4 is well conversant with the MPT Act as well as the Waqf Act, 1995 as he is member of various Trusts and Auqafs run by the Muslim Community. He was authorised to pursue the application seeking sanction. The seventh respondent says that he will not be able to say whether the order passed by the Charity Commissioner is in accordance with law or not. The seventh respondent says that he was party applicant in the application filed before the Charity Commissioner, but his name was deliberately deleted at the behest of respondent Nos.4, 5, 6 and 8 in this petition. It is alleged that the second respondent is hand in glove with respondent Nos.4, 5, 6 and 8 so that a valuable Trust property can be sold at a meager price of Rs.1,10,00,000/-. In fact, its actual price is more than Rs.7,00,00,000/- and respondent No.8 paid the stamp duty on the said amount. If that is the position, then, the seventh respondent says that the sale at such a meager price would not be in the interest of the Trust. Pertinently, he admits that on the basis of the order passed by the Charity Commissioner (impugned order), a Conveyance Deed has M.M.Salgaonkar Judgment.WP-743-19+1.doc been executed, but even that does not have the signature of respondent No.7. For all these reasons, he would submit that this Court should pass appropriate order.

27. Respondent No.8 filed a further affidavit-in-reply to deal with the allegations in the affidavit of respondent No.7. In this affidavit-in-reply, it is said that respondent No.7 was a party to the Resolution passed by the third respondent-Trust on 24 th December, 2011. Respondent No.7 accepted the valuation of Rs.1,10,00,000/-. He gave his no-objection to the sale as well. It is clear that once the Resolution was passed by all the trustees and the seventh respondent is a party thereto, there is no necessity of obtaining the signature of respondent No.7. Pertinently, respondent No.7 says in his affidavit, according to respondent No.8, that the fourth respondent was authorised to present the application and finalise the transaction. It is said that the Memorandum of Understanding dated 26th December, 2011 has also been signed by respondent No.7, who agreed to all the terms and conditions thereof. There is also an affidavit dated 17 th November, 2011 executed by respondent No.7 consenting to the sale of property to respondent No.8. A copy of this affidavit is also enclosed as Exhibit 'B' to the affidavit filed on 8th November, 2019. In this affidavit, respondent No.8 says that the seventh M.M.Salgaonkar Judgment.WP-743-19+1.doc respondent to this petition has filed a suit in this Court bearing Suit No.1231 of 2018, wherein, he has prayed for setting aside and cancelling the Conveyance Deed dated 19th May, 2016 executed in favour of respondent No.8 in respect of the Trust property.

28. After this affidavit was served on all the parties, an additional affidavit has been filed by respondent No.8 to point out that Waqf Suit No.75 of 2019 filed before the Maharashtra State Waqf Tribunal at Aurangabad specifically says that the Trust property as defined in this petition is, Godown Nos.1 and 2 admeasuring 636 square feet. That is part and parcel of the subject building. It is alleged in this affidavit that the application before the Waqf Tribunal was the most appropriate remedy to resolve the issue as to whether the property is a 'Waqf Property' or not. Pertinently, one of the petitioners/members of this "Shop Tenants Forum" has approached this Tribunal at Aurangabad. The Tribunal has rejected his application. Aggrieved by that, a Civil Revision

Application has been filed before this Court's Bench at Aurangabad in which an order was passed on 30 th April, 2019 not to demolish the godown. Thus, the application in that application says that the waqf property is godown Nos.1 and 2 and that is in his possession. It is these circumstances that the M.M.Salgaonkar Judgment.WP-743-19+1.doc eighth respondent says that if the Waqf Board is the proper forum to resolve this issue, then, after the eighth respondent has come on the scene, became the owner of the property, no proceedings before that Tribunal could have also been proceeded with unless the eight respondent was impleaded as a party thereto. With regard to the fulfillment of the terms and conditions under the Conveyance Deed, in this affidavit the following paragraphs are material:-

"8. I state that Respondent No.8 has till date paid Rs.5,25,00,000/- (Rupees Five Crore Twenty Five Lakh Only) to Respondent No.3 over and above Rs.1,10,00,000/- (Rupees One Crore Ten Lakh Only) paid under the Deed of Conveyance in order to comply with the obligations under the Memorandum of Understanding dated 12th March 2015 (Exhibit E in the Affidavit in Reply dated 12th April, 2019 filed by Respondent No.4). Respondent No.8 under the Memorandum of Understanding dated 12th March, 2015 has also agreed to construct and hand over premises admeasuring 568.87 square feet in terms of the order dated 31st December 2007 passed in Miscellaneous Application No.188 of 2007 in Bomb Blast Case No.1 of 1993 by the Hon'ble Designated Court for Bomb Blast Cases, at Greater Bombay under Terrorist and Disruptive Activities (Prevention) Act, 1987. A copy of the receipt issued by Respondent No.3 evidencing the payment of Rs.5,25,00,000/- (Rupees Five Crore Twenty Five Lakh Only) is annexed hereto and marked as Exhibit "C".

9. I therefore, submit that Respondent No.8 has paid a total sum of Rs.6,35,00,000/- (Rupees Six Crore Thirty Five Lakh Only) to Respondent No.3 in respect of the said Property.

10. Further I state that since Respondent No.8 has undertaken the responsibility of redeveloping the Bhendi Bazaar Area under Regulation 33(9) read with Appendix IIIA of the Development Control Regulation of Greater Bombay, 1991 as an urban renewal/cluster M.M.Salgaonkar Judgment.WP-743-19+1.doc scheme, Respondent No.8 is obligated to rehabilitate the eligible tenants/occupants of the said Building in new premises on ownership basis at its own costs. I submit that Respondent No.8 over and above the transitory benefit, will be giving the eligible tenants/occupants of the said Building an total carpet area of approximately 4,900 square feet to the commercial tenants/occupants & a total carpet area of approximately 7,500 square feet to the residential tenants/occupants, on ownership basis, which has to also be factored into the price of the said Property.

11. I further state that all the aforesaid very material and relevant facts relating to the redevelopment scheme and the rehabilitation of the eligible tenants/occupants as a part of a cluster redevelopment scheme along with the surrounding buildings in the Bhendi Bazar Area undertaken by Respondent No.8, were placed before the Hon'ble Charity Commissioner and were present to his mind while passing the Impugned order."

This affidavit was filed on 29th November, 2019.

29. There is an additional affidavit filed by respondent No.7 and in which, respondent No.7 says that he is dealing with the affidavit-in-reply of respondent No.8. He once again admits that there was a transaction for sale of the Trust property. The transaction and the agreement in relation thereto with the eighth respondent is to the knowledge of this seventh respondent. However, he says that the Sale Deed does not bear his signature and he has already issued a legal notice. He is not accepting the sale. He has also stated in this affidavit that there was a Resolution of the Trust. That the affidavit of 17 th November, 2011 preceding this Resolution bears his signature. Further, even the Memorandum of Understanding bears his signature. Then, he M.M.Salgaonkar Judgment.WP-743-19+1.doc says that the Conveyance Deed was not signed by him. If the Conveyance Deed has not been signed by him, then, the subject transaction, according to him, is illegal. This affidavit is filed on 3rd December, 2019.

30. To this affidavit, there is an annexure. The same is a copy of the communication dated 26th March, 2013 between the Chairman/Trustee of the third respondent-Trust and one Shaikh Abdealibhai Bhanpurawala of the eighth respondent-Trust. After a copy of the Sale Deed has been annexed, reliance is placed on a challan, which was executed evidencing payment of stamp duty.

31. The affidavit-in-rejoinder of the petitioners needs to be referred to because it sets out a case some what distinct from what is set out in the memo of the petition. It is stated that respondent No.8 is in no way connected to the challenge to the registration of a Sunni Trust/Waqf (Respondent No.3). That is a Waqf and the certification is done by the competent authority under the Waqf Act, 1995 in Application No.40 of 2009. It is stated that the certificate would enable the petitioners to contend together with the assertions in the petition that a Gazette Notification of Bombay Government of the year 1944 notifies the said respondent No.3-Trust in question as Waqf at page No.34 of the said Gazette at serial No.3/1931. Now the reference thereto is M.M.Salgaonkar Judgment.WP-743-19+1.doc a Waqf institution "Seth Haji Ismail Haji Habib Musafirkhana Trust". Even the address is that of the third respondent. Thus, the third respondent is created as a Waqf and there are names of Mutawallis mentioned at serial No.163 in the List of Mutawallis of Waqfs of Bombay registered under the MUSALLAM Waqf Act No.XLII of 1923 as amended by Bombay Act No.XVIII of 1935. This substantiates the case that the third respondent is created as Waqf even prior to 1935.

32. For these reasons, it is contended that the MPT Act governs the religious and charitable Trusts. It was enacted to regulate and to make provisions for their administration in the State of Bombay. The Muslim category Waqf/Trust was enlisted under the 'B' category of the Bombay Public Trust Act, 1959. The 'A' category is for Hindu religious and charitable institutions and 'C' category is for Christians etc. The Waqf Act was enacted in 1995. That is a Central Act. That provides for better administration of Auqaf/Waqf and for matters connected therewith or incidental thereto. Reliance is placed on Section 112 of this Waqf Act, 1995 to urge that the information, which is gathered by the petitioners would reveal that the third respondent is a Waqf. There is an old marble plate embedded in one of the wall of the Masjid in the said Musafirkhana whereon in Urdu, the details of the intention of the M.M.Salgaonkar Judgment.WP-743-19+1.doc Wakif (Donor) is mentioned. The

copies of the same are annexed to the affidavit-in-rejoinder and it is stated the premises comprise 'Masjid' and Namaz is offered regularly five times together with Friday prayers and Eid Namaz. All this would denote that the third respondent-Trust and its property is a Waqf. The existence of 'Masjid' is sought to be proved by relying upon the municipal assessment record. Thus, the attempt is to show that the order of the Hon'ble Supreme Court of India applies with full force to the third respondent. This is an affidavit-in-rejoinder filed on 4 th December, 2019. This completes the narration of the facts and their contents.

33. We have also an Interim Application filed by one Mohammed Farooq Anwar Rathod, who seeks to intervene in this writ petition by urging that Haji Ismail Haji Habib Musafirkhana Trust building is a place where this applicant/intervener has spent his childhood. He is a Muslim and belongs to 'Sunni Sect'. Pertinently, this intervener says that there is an order dated 10 th July, 1944 passed by this Court in relation to the third respondent after the third respondent came into existence. The main object of the third respondent is to rent out the place to those Haji's who wish to take pilgrimage to Haj. The Haji Ismail Haji Habib Musafirkhana Trust has a building called M.M.Salgaonkar Judgment.WP-743-19+1.doc Musafirkhana located and situate at 33, Pakmodia Street, Mumbai - 400 008. This intervener says that the building consists of ground plus two upper floors. The ground floor consists of 36 shops and a godown. These shops and godown were given on rent to various persons to carry on business therefrom. It is stated that the revenue earned from running the shops on ground floor is used for charitable purpose. The premises on the first and second floor were initially used to house Haj pilgrims. As time passed, the Musafirkhana lost its significance. The people taking pilgrimage did not require the accommodation in the Musafirkhana. The Musafirkhana came to be used less and less by the pilgrims. The premises, therefore, were given on rent and the revenue generated therefrom was used to further various charitable objects like education of boys and girls, meet medical expenses of the poor and needy etc. Thereafter, it is said that in the year 1990, the rooms on the second floor came to be given out on rent to one Dawood Ibrahim. Many of the tenants lodged in the first and second floor are part of the underworld. These individual members of the underworld fearing action against them stopped going out and began using the ground floor for reading Namaz. This is how the prayer room on the ground floor came into existence. The applicant/intervener further states that this prayer room is being wrongly depicted as 'Masjid'. Being a M.M.Salgaonkar Judgment.WP-743-19+1.doc Muslim, the applicant offered Namaz in the prayer room. Then he says that there is a flurry of activities in the Musafirkhana. On few occasions, even police visited the site. Then the applicant learnt that the building has been sold by the third respondent to the eighth respondent. This is how from the documents, this applicant gathered information and says that the sale is illegal. The illegality is sought to be demonstrated by urging that respondent No.3 should have given a public notice before the sale. The public notice ought to have been given in a prominent daily English newspaper and a language newspaper published from Mumbai, having wide circulation in the area. The object of the public notice is to attract best possible price. In the absence of a public notice, the real price of the property cannot be determined. There was no public notice and, therefore, duty of the Charity Commissioner was to protect the interest of the beneficiaries. Having failed to do so, the applicant is also one of the persons aggrieved by the order of the Charity Commissioner. He realised about all the developments set out in this application in the month of October 2019. This intervener/applicant, therefore, says that the order of the Charity Commissioner be set aside and the

petitioners in the writ petition be directed to implead him as a party respondent.

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34. We have referred to the averments in this Interim Application for a specific reason, which we will set out in our discussion. The discussion would commence after we summarise the oral arguments of the learned counsel appearing for the parties.

35. Mr.Gorwadkar, learned senior counsel appearing for the petitioners submitted before us that the impugned order is bad in law and deserves to be quashed and set aside. The counsel would submit that the order of the Charity Commissioner can be faulted in law as also on facts. He would submit that the first objection to the order is that it has been passed by an authority, who lacks inherent jurisdiction to pass the same.

36. Mr.Gorwadkar would submit that once the order of sanction impugned in the petition is without jurisdiction and ex facie illegal, then by virtue of the same, no title passes in favour of the eighth respondent. If the order of sanction falls, then, even the sale must perish. In other words, no separate proceedings are then required to quash and set aside the Sale Deed in favour of the eighth respondent.

37. Mr.Gorwadkar, in support of his first contention, would invite our attention to the statements in the affidavit-in-rejoinder. M.M.Salgaonkar Judgment.WP-743-19+1.doc He took us through that rejoinder affidavit, and, particularly, pages 315, 316 and 317 thereof to urge that the property in question belongs to a Waqf. It partakes the character of Waqf property by virtue of these annexures. Once it is a Waqf property, then, it is the authority set up by the Waqf Act, 1995, which would have to deal with the same. Thus, the Waqf Act, 1995 is the governing law and not the MPT Act. Mr.Gorwadkar would submit that there is a definition of the term "Waqf". According to Mr.Gorwadkar, that expression is defined in law to mean the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes what is set out in the definition of the term "Waqf" appearing in Section 2(r) of the Waqf Act, 1995. Mr.Gorwadkar was emphatic in his submission. He would urge that even if "Waqf" means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable, still that is an inclusive expression. It includes, a Waqf by user, but such Waqf shall not cease to be a Waqf by reason only of the user having ceased irrespective of the period of such user. Thus, Mr.Gorwadkar would submit that assuming without admitting that there is no dedication, the user from times immemorial would enable him to urge that this is a Waqf, as M.M.Salgaonkar Judgment.WP-743-19+1.doc defined in Section 2(r). Mr.Gorwadkar submits that the sect of Muslims, which is administering and managing the affairs of respondent No.8 are 'Sunnis'. They could not have struck a deal or entered into any transaction in relation to the property belonging to a Waqf managed and administered by 'Shia' sect. From the very inception, therefore, this deal and transaction is vitiated.

38. By relying upon the judgment of the Hon'ble Supreme Court of India in the case of Mohammad Shah vs. Fasihuddin Ansari and others¹, Mr.Gorwadkar would submit that actual proof of dedication is not necessary. There is no divestment required. He would submit that once this legal position becomes clear, then, we should not hesitate to accept the arguments of the petitioners based as they are on documentary evidence.

39. In answer to certain arguments canvassed in reply, Mr.Gorwadkar would rely upon further notification issued by the State Government to cancel the corrigendum. He would, thus, submit that we should place no reliance on the two Government notifications referred by respondent Nos.3 and 8.

40. Mr.Gorwadkar further, alternatively, submitted that assuming that the immovable property in question is not a Waqf, 1 1956 SC 713 M.M.Salgaonkar Judgment.WP-743-19+1.doc still the same cannot be disposed of by a private treaty. Mr.Gorwadkar would submit that the property is disposed of virtually by a private treaty. There is a clear indication in the documents that respondent Nos.3 and 8 dealt with a property belonging to a Public Trust governed by the MPT Act. It is a Trust property. The Trust is a Public Charitable Trust. Therefore, it is a public property. It could not have been disposed of in a non-transparent and secret manner. Now, the impugned order, though passed in the year 2015, can be assailed in the petition filed in November, 2018. It can be so assailed because there is no knowledge of the sale nor is there any information available in public domain with regard to the discussions, negotiations preceding the same. The Charity Commissioner also did not adhere to the norms and standards prescribed in law. Once the Charity Commissioner is chosen by the MPT Act and he is endowed with the duty to accord sanction to alienation of a Trust property or property belonging to a Public Trust, then, the Charity Commissioner is obliged to follow the mandate of Article 14 of the Constitution of India or the principles analogues thereto. In other words, the Charity Commissioner could not have allowed disposal of the property without the proposed sale being notified to the public. The Charity Commissioner should have directed the trustees to invite bids and offers from the public after publishing M.M.Salgaonkar Judgment.WP-743-19+1.doc a public notice. He should have allowed other bidders to bid or make an offer to purchase the property. The Charity Commissioner having not adopted this course mandated by law, his order deserves to be quashed and set aside.

41. Additionally, Mr.Gorwadkar would submit that there is an obligation in law on the Charity Commissioner and he must satisfy himself that the sale is in the interest, for benefit or for the protection of the Trust. Thus, he has to be satisfied that the sale is necessary and that the sale or disposal of the property is, in the interest for benefit or protection of the trust. So long as this satisfaction is not specifically recorded in the order of sanction, that must fail. In other words, such a satisfaction must be patent or discernible from the order itself. In the instant case, the Charity Commissioner has not applied his mind to this aspect at all. His order is virtually unreasoned and cryptic. He has allowed a private deal or transaction to be finalised in a non-transparent and secret manner. The order of the Charity Commissioner, therefore, does not accord with the principles set out in the judgments of this Court and, particularly, a Full Bench judgment rendered in the case of Sailesh Developers and others vs. Joint Charity Commissioner Maharashtra and others². The order does not take note of the parliamentary legislation, particularly, the 2 2007(3)Bom.C.R.7

M.M.Salgaonkar Judgment.WP-743-19+1.doc Places of Worship (Special Provisions) Act, 1991. Mr.Gorwadkar relies upon this legislation to contend that the Trust property in this case specifically refers to a 'Masjid'. There is a 'Masjid' in the property. If that is so situate and where the prayers/Namaz are offered regularly by the members of the community, then, this law protects such place of worship. Mr.Gorwadkar also invited our attention to the Government Resolution dated 7 th October, 2008 to urge that the property in question is a Waqf property. For all these reasons, he would submit that the impugned order be set aside and petition be allowed.

42. In support of his arguments, Mr.Gorwadkar relied upon the following judgments.

(i) Mohammad Shah vs. Fasihuddin Ansari and Ors., [AIR 1956 SC 713(S)]

(ii) U.P.Sunni Central Board of Wakfs vs. Mazhar Hasan and Ors., [(2001) 6 SCC 289]

(iii) Cyrus Rustom Patel vs. Charity Commissioner, Maharashtra State and Ors., [(2018) 14 SCC 761]

(iv) Sailesh Developers and Ors. vs. Joint Charity Commissioner Maharashtra and Ors., [2007(3) Bom.C.R.7]

(v) Ritesh Tiwari and Anr. vs. State of Uttar Pradesh and Ors., [(2010) 10 SCC 677]

(vi) Sayyed Ali and Ors. vs. A.P.Wakf Board, Hyderabad and Ors., [(1998) 2 SCC 642]
M.M.Salgaonkar Judgment.WP-743-19+1.doc

43. Mr.Gorwadkar is partly supported in his arguments by the learned counsel appearing for respondent No.7. He would submit that the seventh respondent signed the documents in the belief that the Charity Commissioner is empowered by law and could have protected the interest of the Trust. Now, that everything is revealed to him, he does not support the order of the Charity Commissioner. He joins the petitioners in the challenge. Additionally, learned counsel would submit that the documents have been signed by respondent No.7, but it is pertinent to note that the primary document, namely, the application made before the Charity Commissioner, though contains the name of respondent No.7, later on, it was deleted at the behest of the trustees of respondent No.3. Thus, other trustees of respondent No.3-Trust have colluded with each other in disposing of the Trust property. He, therefore, would submit that the petition must succeed.

44. The writ petition is contested by respondent Nos.3 to 6 and

8. Mr.Tripathi, learned counsel appearing for respondent Nos.3 to 6, invited our attention to pages 183 and 187 to submit that respondent No.3 is a Trust. That it is a Public Trust is clear and apparent from the fact that there was a scheme prepared in relation to the administration and management of the affairs of M.M.Salgaonkar Judgment.WP-743-19+1.doc this Trust. The trustees are named. The scheme does not say that the property is dedicated to the Almighty. Rather, it vests in the trustees. On the ground floor of the building belonging to the Musafirkhana-Trust, there is a godown. It may have been used as a prayer-room or prayer-hall, but that by itself or without anything more does not

mean that there is dedication of the property and for the purposes set out in the definition of the term "Waqf". Thus, there is no substance in the contentions of Mr.Gorwadkar that there is a Waqf and the property in question is governed by the Waqf Act, 1995. Our attention has been invited to the two affidavits filed in reply. For the above reasons, the counsel would submit that this petition be dismissed.

45. The writ petition was argued extensively by Mr.Tulzapurkar, learned senior counsel appearing for respondent No.8. He has invited our attention to the scheme to urge that respondent No.3 can never be termed as Waqf. He would submit that the building comprises of ground plus two upper floors. There may be a prayer-hall on the ground floor, however, the first and second floor of the building are occupied by trespassers, encroachers and also members of the underworld. Mr.Tulzaourkar relied upon the proceedings before the Designated Court under the TADA to urge that the Court has M.M.Salgaonkar Judgment.WP-743-19+1.doc passed the order referring specifically to the second floor of this property and the entire floor is, therefore, sought to be brought under the control of this Designated Court.

46. Mr.Tulzapurkar would submit that the Waqf Act, 1995 sets out a complete procedure if there is a dispute as to whether a Waqf exists and a property is belonging to a Waqf or not. In relation thereto, he invites our attention to the provisions of the Act. He would submit that the Act contains elaborate provisions. The counsel would invite our attention to the sections appearing in Chapter II titled as "Survey of Auqafs".

47. Mr.Tulzapurkar would submit that Section 4 of this Chapter is titled as "Preliminary survey of Auqafs". Then Section 5 provides for a "Publication of list of Auqafs" and Section 6 provides for "Disputes regarding Auqafs". Then material section is Section 7, which empowers the Tribunal to decide a question of the nature referred in sub-section (1) thereof. Thus, when any question arises as to whether a particular property specified as Waqf property in a list of Auqafs is Waqf property or not or whether a Waqf specified in such list is a Shia Waqf or Sunni Waqf, the Board or the mutawalli of the Waqf or any person aggrieved by the publication of the list of Auqaf under Section 5 therein, may institute a suit in the Tribunal for a decision on the question M.M.Salgaonkar Judgment.WP-743-19+1.doc and the decision in respect thereof shall be final. Our attention has been invited to the two provisos below sub-section (1) and sub-section (2) to urge that notwithstanding anything contained in sub-section (1), no proceedings under the Waqf Act, 1995 in respect of any Waqf shall be stayed by any Court, Tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding. Mr.Tulzapurkar then relied upon sub-section (5) of Section 6 and Section 7 to urge that these two sections set out a complete Scheme and is a Code by itself. If any question arises of the nature raised in this petition, then, the petitioners' remedy was to approach the Tribunal. This writ petition under Article 226 of the Constitution of India cannot be the remedy to decide a disputed question of fact. Therefore, according to Mr.Tulzapurkar, the petition deserves to be dismissed on this ground. However, Mr.Tulzapurkar submits that he would satisfy this Court even on merits that there is no substance in the arguments of Mr.Gorwadkar.

48. Mr.Tulzapurkar would submit that the application was made to the Charity Commissioner with specific averments. These averments are based on the legal proceedings in relation to M.M.Salgaonkar Judgment.WP-743-19+1.doc respondent No.3 and its property. Mr.Tulzapurkar submits that way back in the year 1944, the suit was filed in this Court and in which a scheme for administration and management of the third respondent was settled. There are specific clauses in the scheme by which certain persons named therein are styled as trustees and the property in question has been included therein to be vesting in these trustees. After that, Mr.Tulzapurkar relies upon the registration, which has been obtained by the third respondent under the MPT Act. Mr.Tulzapurkar would submit that none of these documents or their contents are disproved till date. There was never any dispute raised with regard to the status of the third respondent as Trust and governed by the MPT Act. For the first time, in a writ petition to challenge the order of sanction of the Charity Commissioner that some frustrated and disgruntled persons occupying ground floor shop premises styling themselves as "Forum", have sought to question this status. Whether they are beneficiaries or otherwise, they could not raise this issue for they are aware of the execution of these documents, including the scheme of the Trust, its registration as Public Charitable Trust and its property being included in the Property Register maintained under the MPT Act and the Rules framed thereunder. For decades together, these documents have not been questioned by anybody. Further, the petitioners seek to rely upon M.M.Salgaonkar Judgment.WP-743-19+1.doc a stray sentence or paragraph in the order of the Hon'ble Supreme Court of India. That judgment should be read in its entirety. That judgment was rendered in an appeal to challenge a judgment of the Division Bench of this Court. The Division Bench of this Court was seized of certain writ petitions, during the course of which, it proceeded to quash and set aside the entire list of the properties. This list of the properties being struck down, the persons aggrieved by that direction, approached the Hon'ble Supreme Court. They would urge that the order of this Court would not enable the Charity Commissioner, exercising powers under the MPT Act, to deal with Waqf property. He is not empowered to deal with them. There is a distinction between a Trust governed by the MPT Act and a Waqf governed by the Waqf Act, 1995. The Hon'ble Supreme Court, bearing in mind this fundamental underlining distinction, proceeded to issue the sweeping directions. Mr.Tulzapurkar would submit that the judgment of the Hon'ble Supreme Court itself clarifies that members of the Muslim community or Muslim region can form a Trust. A Trust, formed and established by Muslims, is not necessarily a Waqf. For it to be a Waqf, it has to satisfy the requirements set out in section 2(r) of the Waqf Act, 1995. In other words, a Muslim Trust can also be governed by the MPT Act, 1950. There is nothing illegal about such governance and the M.M.Salgaonkar Judgment.WP-743-19+1.doc Hon'ble Supreme Court's judgment expressly clarifies this aspect. Once the burden is entirely on the petitioners to establish and prove that the third respondent is a Waqf and the property of the third respondent is a Waqf property, then, they have miserably failed to discharge that burden. No amount of reliance on the judgment of the Hon'ble Supreme Court would therefore be of any assistance to the petitioners, according to Mr.Tulzapurkar.

49. Mr.Tulzapurkar would submit that the affidavit-in-rejoinder also does not carry the case of the petitioners any further. The documents referred to in the affidavit-in-rejoinder and the copies of which are annexed to the same would not by themselves establish and prove the case of the petitioners that the third respondent is a Waqf. For these documents to be relied upon, the petitioners would have to file appropriate proceedings and in which the contents of these documents

can be verified and scrutinised. The burden is on the applicants/petitioners and they cannot, by relying on the annexures to the affidavit-in-rejoinder, urge that all the documents of 1945 onwards and particularly, the registration of respondent No.3 as a Public Trust is ipso facto wiped out. The documents annexed to the affidavit-in-rejoinder are doubtful and suspicious in character. There is a reference to certain Trust and Mutawallis, but the address of the Mutawalli is M.M.Salgaonkar Judgment.WP-743-19+1.doc stated to be Kambekar Street and not of Junction of Yacoob Street and Pakmodia Street Bhuleshwar. Therefore, there is no reference to the specific entity as a Waqf. For these reasons, he would submit that some of the old documents would not belie the contents of the legal proceedings, particularly the suit instituted in this Court and the order setting out a scheme passed in that suit. Mr.Tulzapurkar would submit that the Advocate General had appeared in the proceedings way back in the year 1944. For all these reasons, he would submit that we must reject the arguments of Mr.Gorwadkar on the point of jurisdiction and competence of the Charity Commissioner.

50. Then, Mr.Tulzapurkar attempted to support the order of the Charity Commissioner by urging that the law is not as propounded by Mr.Gorwadkar. The law does not oblige the Charity Commissioner to issue a public notice. The moment he is seized of an application in the nature made by respondent No.3, the law does not lay down any absolute principle by which such application and its filing has to be publicised and public at large has to be informed about the pendency of the same. The satisfaction of the Charity Commissioner in terms of Section 36 of the MPT Act is the predominant requirement. That satisfaction can be based on the Charity Commissioner perusing the record in M.M.Salgaonkar Judgment.WP-743-19+1.doc relation to the application brought before him. The record would indicate that the details therein set out the Trust in question, its object and purpose, the nature of the property belonging to it, its location and present status and position. Mr.Tulzapurkar submits that the trustees brought before the Charity Commissioner an application with specific assertions, including the averments in relation to the notice from a public body like the Municipal Corporation of Greater Mumbai. That notice calls upon the trustees to pull down or demolish the building belonging to the third respondent. That was stated to be dangerous and in a dilapidated condition. It is so ruinous or likely to fall that if it indeed collapses, that would endanger the life of the occupants and residents in the building. Not only they would be affected, but equally those residing in the neighbourhood and passing by this building would suffer. Their life is in danger. This is the first factual assertion in relation to the condition of the building. The second factual assertion in relation to the building is that the building is occupied by the persons who are not the original tenants or occupants. Now, the trespassers have taken over the building. The trespassers and encroachers could not be evicted by the trustees for they have no financial means to evict them. In other words, though legal proceedings have been initiated against these trespassers and encroachers, today, despite pendency of the M.M.Salgaonkar Judgment.WP-743-19+1.doc legal proceedings for over a decade, the trustees could not secure an order of eviction. The trustees are receiving meager income from which it is impossible for them to maintain and preserve the structure and to prosecute the litigation. More particularly, on the second floor of the building, there is occupancy by the members of the underworld. These members are accused of belonging to the gang of a dreaded Gangster Dawood Ibrahim. In relation to the acts committed by him and his gang, criminal prosecution was launched and that was subject matter of the proceedings before the Designated Court. There is specific reference to the second floor of the

building and the nature of its occupancy. That second floor cannot be dealt with except in terms of the order and direction of the Designated Court.

51. The trustees, therefore, obtained a valuation of such an encumbered and unsafe property. The valuer opined that such a property will not fetch the price prevailing in the market, which is ordinarily fetched by a unencumbered vacant property in that locality. The old dilapidated building, occupied by trespassers and encroachers, therefore, will not command a price in the market as projected by the petitioners. The meager price that it commands was not enough for the trustees to maintain the property in future. They, therefore, took a pragmatic and practical call to M.M.Salgaonkar Judgment.WP-743-19+1.doc dispose of the property. Thus, the sale was a necessity. That was also because of the pending demolition threat from the Mumbai Municipal Corporation and public bodies. In such circumstances, the Charity Commissioner was rightly satisfied that there was a legal necessity and that the sale was in the interest and for the benefit and protection of the Trust. This satisfaction is specifically recorded and by applying correct legal parameters.

52. Mr.Tulzapurkar emphasised that there is nothing in the judgments of this Court and the Hon'ble Supreme Court that in every case, whenever an application of the nature referred in the present proceeding is made or pending before him, the Charity Commissioner must issue a public notice and invite offers from the public at large to dispose of the Trust property. The Charity Commissioner in this case was satisfied that there was no requirement of directing the trustees to publish the sale in the newspapers and invite offers from the public. This could have caused considerable delay as well. For all these reasons, Mr.Tulzapurkar would submit that the impugned order deserves to be upheld and the petition be dismissed.

53. Mr.Tulzapurkar would rely upon the following judgments in support of his contention:-

M.M.Salgaonkar Judgment.WP-743-19+1.doc

(i) Haryana Wakf Board vs. Mahesh Kumar, [(2014) 16 SCC 45]

(ii) Sailesh Developers and Anr. vs. Joint Charity Commissioner, Maharashtra and Ors., [2007(3) Mh.

L.J.]

(iii) Dattatraya baburao Walawalkar and Ors. vs. Siddhivinayak Construction Private Limited and Ors., [(2016) 12 SCC 163]

54. For properly appreciating the rival contentions, we must make a reference to the provisions of the MPT Act and the Waqf Act, 1995. The Waqf Act, 1995 has been enacted in order to provide for the better administration of Auqaf and for matters connected therewith or incidental thereto. In the Statement of Objects and Reasons preceding this law/legislation, the Parliament found that only two provisions of the prior enactment could be enforced because of strong opposition from the Muslim

community. Thus, the two provisions related to increasing the period of limitation for filing suits in respect of Wakf properties in adverse possession from 12 to 30 years and application of the provisions of the Wakf Act, 1954, to the evacuee properties. Therefore, the new Waqf Act with the features set out in this Statement of Objects and Reasons was proposed to be enacted. The further amendment also subserves that purpose. Therefore, this Act of 1995 applies save as otherwise expressly provided under the Waqf Act to all Auqaf, whether created before, or after M.M.Salgaonkar Judgment.WP-743-19+1.doc the commencement of this Act. The proviso to Section 2 clarifies that nothing in this Act shall apply to Durgah Khawaja Saheb, Ajmer to which the Durgah Khawaja Saheb Act, 1955 (36 of 1955) applies. Definitions are to be found in Section 3. The word "beneficiary" is defined in clause (a) to mean a person or object for whose benefit a Waqf is created and includes religious, pious and charitable objects and any other objects of public utility sanctioned by the Muslim law. Thus, the beneficiary means a person or object. However, the term "benefit" defined in clause

(b) does not include any benefit which a mutawalli is entitled to claim solely by reason of his being such mutawalli. The term "Board" is defined in clause (c), whereas, the "Chief Executive Officer" is defined in clause (d). The term "encroacher" is also defined in clause (ee). The "List of Auqaf" means the list of auqaf published under sub-section (2) of Section 5 or contained in the register of auqaf maintained under Section 37. The term "mutawalli" is also defined in clause (i). The term "person interested in a waqf" is defined in clause (k) to mean any person who is entitled to receive any pecuniary or other benefits from the Waqf and includes those set out in sub-clauses (i) and (ii) of clause (k). We have also the definition of the term "Shia Waqf" and "Sunni Waqf". The term "Tribunal" is defined in clause (q) and the word "Waqf" in clause (r). Chapter II is titled as "Survey of M.M.Salgaonkar Judgment.WP-743-19+1.doc Auqafs" and contains Sections 4 to 7. Section 6 has been relied upon heavily before us. This Section enables holding of an inquiry to decide a question expressly referred in sub-section (1). If any question arises whether a particular property specified as Waqf property in the list of Auqafs is waqf property or not or whether a Waqf specified in such list is Shia Waqf or Sunni Waqf, then, the Board or the mutawalli of the Waqf or any person aggrieved, may institute a suit in a Tribunal for a decision on the questions referred above.

55. Therefore, as rightly relied upon by Mr.Tulzapurkar, the question that the petitioners seek to raise could have been raised by them by approaching the Tribunal. They could have approached the Tribunal and prayed for a decision on the question whether the property which is the subject matter of the present petition is a Waqf property and because that is specified in the list allegedly, by itself would it become a Waqf property or not. Pertinently, one of the members of the petitioners' Forum approached the Waqf Tribunal by filing a suit and unfortunately, that was dismissed.

56. The petitioners before us do not rest their case only on the assertion that the property in question is a Waqf property and that there was a Waqf existing and governed by the Waqf Act, M.M.Salgaonkar Judgment.WP-743-19+1.doc 1995. They raise the question of legality and validity of the order of sanction of the Charity Commissioner on several grounds.

57. The petitioners are aware that they do not have cogent and reliable material to establish and prove their case, which is vaguely set up by them.

58. In the writ petition, the petitioners say that Haji Ismail Haji Habib Musafirkhana Trust is a Public Charitable Trust registered with the Charity Commissioner's Office bearing registration P.T.R. B-140(BOM) and they say in the petition itself that they are Indian Muslims. They are members of the "Haji Ismail Haji Habib Musafirkhana-Shop Tenant Forum". Now, the petitioners say that 26 tenants having commercial properties have come together and formed this proposed Forum. They have authorised Mr.Fazal Mehmood to represent them and file proceedings. In the writ petition, there is a clear reference to the MPT Act. In fact, the petitioners say that they are beneficiaries and tenants/occupants of the third respondent-Trust and are interested persons as defined in Section 2(13) and Section 73A of the MPT Act.

59. The petitioners do not assert their status as "tenants", but term themselves as "occupants". They are not referring to any Waqf, but say that they are beneficiaries of a Public Charitable M.M.Salgaonkar Judgment.WP-743-19+1.doc Trust and that they are persons interested in the affairs of the Public Trust governed by the MPT Act.

60. In para 3 clause (a), it is said that the property bearing City Survey No.4315 situate at 23-43 Pakmodia Street, 16-30, 2 nd Cooper Street and 27-41 Yacoob Street, Bhendi Bazar, Mumbai 400 003 belongs to Haji Ismail Haji Habib Musafirkhana Trust. This is the third respondent, which is a Public Charitable Trust bearing registration No.P.T.R.140(BOM) and the petitioners claim to be the lawful tenants of the Trust. The petitioners say that on 11th September, 2017 and 3rd October, 2017, the members of the petitioners' Forum received two letters from respondent No.8. Respondent No.8 claimed that it is the landlord and owner of the property described hereinabove. Respondent No.8 claims to be the new owner of the Trust. The petitioners claim that they have not received any communication of change of landlord from the original trustees nor they were aware about the alienation of the Trust property by respondent No.3. The petitioners state and submit that they inquired about the claim of the eighth respondent during June-July 2018 and got knowledge that respondent No.3-Trust made an application under Section 36(1)

(a) of the MPT Act in regard to alienation and sale of the property in question. The description of the property is as above. The M.M.Salgaonkar Judgment.WP-743-19+1.doc petitioners then say that from the certified copies received from the office of the third respondent, it was discovered by them that Application No.J-4/48/2012 was filed before the Charity Commissioner by respondent Nos.3 to 7. That application contained averments to which we have already made a reference in the foregoing paragraphs. Then, in para 3(e) of this petition, the petitioners say that the scheme of the Trust was framed by this Court in Suit No.741 of 1944 and the main object of the Trust was to provide rooms to the needy people by taking rent for the same. There is a vague assertion in this sub-paragraph and to the effect that the property also consists of a "Masjid" which is used for performing five time prayers by the petitioners as well as public at large. The petitioners say in this sub-paragraph that even though this "Masjid" exists in the Trust property, the same was not included in the list of the Trusts transferred to Waqf Board in view of the notification of the State Government dated 5th November, 2005.

61. With regard to this notification as well, we find that on 5 th November, 2005, a notification was issued by the State Government. The notification dated 30th December, 2004 was published in the

Maharashtra Government Gazette. That notification says that the Government of Maharashtra under M.M.Salgaonkar Judgment.WP-743-19+1.doc Section 5(1) and sub-section (3) of Section 3 of Central Waqf Act, 1995 has forwarded a list of Waqfs properties to the Maharashtra State Board of Waqfs, Aurangabad for publication after scrutiny. The Maharashtra State Board of Waqf, Aurangabad, after scrutiny, resolved in the Board meeting held on 27 th September, 2003 to publish the lists of Waqfs under Section 5(2) of the said Act. The Maharashtra Sate Board of Waqf has published the lists of Waqfs under Section 5(2) of the said Act, forwarded by the Government of Maharashtra. It says that if a dispute arises whether a particular property is specified as a Waqf property in the lists is a Shia Waqf or Sunni Waqf, the Board or Mutawalli of the Waqf or any persons interested therein may institute a suit in the Waqf Tribunal, Aurangabad for a decision on the question within the period specified in this notification. While Sr.No.WB- 140 refers to "Haji Ismail Haji Habib Muzzaffarkhan Trust, 131 Paidhuni Road, Mumbai 400 003, it says that it is a Sunni Religious Waqf. It has immovable property at Pakmodia Street. What has then been brought to our notice by the parties before us is that on 26th April, 2005, the Government published a Corrigendum in the Government Gazette dated 5th May, 2005. It says that list No.3 dated 9th March, 2005 of Maharashtra State Board of Waqf and the Government of Maharashtra letter dated 8th February, 2005, as per the order of this Court in Writ Petition M.M.Salgaonkar Judgment.WP-743-19+1.doc No.2127, requires a amendment to the earlier notification being published. The amendment is relied upon to urge that the same expressly deletes the Trust-Respondent No.3 in question. Now, Mr.Gorwadkar hands over another notification published in the Government Gazette dated 23rd October, 2008. That says that the corrigendum to the Government Gazette notification of 13 th November, 2003 was issued on 5th May, 2005 and that was issued with reference to the Maharashtra State Board of Waqfs Resolution No.3 dated 9th March, 2005 and the same was published on 5th May, 2005. However, the Resolution No.3 dated 9th March, 2005 was cancelled and deleted by the Board in its meeting vide Resolution No.17 of 2008 dated 3 rd April, 2008 and confirmed that by Resolution on 27th May, 2008. Hence, the corrigendum published in the Maharashtra Government Gazette of 5th March, 2005 automatically stands cancelled. The result is that the original notification of List of Waqf properties published on 13th November, 2003 remains as it is.

62. To our mind, the property that is described with the name of the Trust, by the petitioners themselves, is specific. The name of the Trust is Haji Ismail Haji Habib Musafirkhana Trust. The Public Charitable Trust is a nomenclature attached to this Trust. It is specifically with reference to its registration number and issued to it after the registration is sought under the MPT Act. M.M.Salgaonkar Judgment.WP-743-19+1.doc

63. The MPT Act has been enacted by the competent legislature to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Bombay. Section 2 contains definitions and the term "beneficiary" is defined in clause 2A to mean 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. This clause has been inserted by Maharashtra Act No.55 of 2017. The term "Charity Commissioner" is defined to mean the Charity Commissioner appointed under section 3 and other definitions include the definition of the term "person having interest". That appears in Section 2 clause 10. It is an inclusive definition. It includes

in sub-clause (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. The word "Waqf" is also defined in Section 2 clause 19 as under :-

"Wakf" means a permanent dedication by a person professing Islam of any moveable or immoveable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes a wakf by user and grants (including mashrut-ul-khidmat) for any purpose recognised by the Muslim law as pious, religious M.M.Salgaonkar Judgment.WP-743-19+1.doc or charitable and a wakf-alal-aulad to the extent to which the property is dedicated for any purpose so recognised; but does not include a wakf such as is described in section 3 of the Mussalman Wakf Validating Act, 1913, under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any member of his family or descendants."

64. Thus, these two definitions together with the definition of the term "Public Trust" as appearing in Section 2 clause 13 and which defines that expression to mean an express or constructive trust for either a public religious or charitable purpose or both and includes a temple, a math, a wakf, church, synagogue, agiary or other place of public religious worship, a dharmada or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860, would enable us to hold that in the instant case, when the suit was filed in the year 1944 and the scheme was settled by this Court in the year 1945 in relation to respondent No.3, it derived a nomenclature as a Trust and a Public Trust because of the policy, functioning and continuance of the scheme. Even in the MPT Act, there is a specific Chapter III titled as "Charitable Purposes and Validity of Certain Public Trusts, which contains Sections 9 to 13. One of the sections, namely, Section 19 provides for "inquiry for registration" and that provides for an inquiry, on receipt of an application under Section 18, or upon an application made by any M.M.Salgaonkar Judgment.WP-743-19+1.doc person having interest in a Public trust or on his own motion, by the Deputy or Assistant Charity Commissioner in the prescribed manner for the purpose of ascertaining, inter alia, whether a Trust exists and whether such Trust is a Public Trust.

65. To our mind, therefore, all these provisions would denote that as far as respondent No.3 is concerned, in the absence of any decision with regard to its status under the Waqf Act, 1995, it could have approached the Charity Commissioner and applied for his sanction for sale of the Trust property. The property belongs to a Public Trust. Respondent No.3 was and is a Public Trust and continues to be so until any decision in terms of the Waqf Act, 1995. In the absence of a specific decision with regard to the status, in the present proceedings, the petitioners may launch a collateral attack, but they cannot clearly, by relying upon Section 112 of the Waqf Act, 1995, say that the same repeals the earlier enactments and also repeals a law immediately before the commencement of the Waqf Act, 1995 in any State and in force in that State corresponding to Waqf Act, 1995 to urge that this respondent No.3 is a Waqf and, therefore, the Waqf Act, 1995 was the governing enactment.

66. As we have rightly held in the foregoing paragraphs, it will not be possible for us to dislodge or demolish the proceedings M.M.Salgaonkar Judgment.WP-743-19+1.doc before this Court of the year 1944, namely, Suit No.741 of 1944 and the scheme settled thereby. This scheme remains unaffected even after the enactment of the MPT Act. In fact, the MPT Act takes note of such schemes and which came into force by virtue of the orders passed by the competent court. The specific Section, namely, Section 50A by sub-section (1) opens with non obstante clause. The Charity Commissioner is empowered to frame, amalgamate or modify schemes. It is very clear that the further Sections, namely, Sections 51, 52 onwards would denote that no scheme which was in force prior to the enactment in question, namely, the MPT Act, is bereft of any legal force or sanction. In fact, all the provisions, which repealed the Religious Endowments Act, 1863 by the MPT Act, clarify that any right, title, interest, obligation or liability already acquired, accrued or incurred before the said date, any legal proceedings or remedy in respect of such right, title, interest, obligation or liability or anything duly done or suffered before the said date shall not be affected by the repeal. In the circumstances, we do not think that the scheme, which was in force, has lost its legal sanctity. There was, therefore, something more required to be done so as to dislodge the scheme of 1945.

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67. Pertinently, this scheme has been expressly referred to in the application made before the Charity Commissioner. The first response of the petitioners to the right derived by respondent No.8, commencing with their advocate notice does not say that this scheme is not in force. In fact, they are aware of the registration number. They are aware of the status that is derived by respondent No.3 and in the writ petition itself, they make a reference to the scheme of the Trust framed by this Court in Suit No.741 of 1944. If that is how they are referring to respondent No.3, now, they cannot turn around and claim that respondent No.3 is not a Public Trust governed by the MPT Act. The flip-flop on the part of these petitioners, whose status in law is also not clear, would enable us to hold that there is no substance in the arguments of Mr.Gorwadkar that the Waqf Act, 1995 applies to respondent No.3 and that the property could not have been disposed of, save and except in the manner provided in the Waqf Act, 1995.

68. In fact, to the writ petition, no documents are annexed. No documents seeking to prove the case that respondent No.3 is a Waqf are annexed. In fact, in the grounds of this writ petition, the petitioners urge that the Trust property belongs to "Sunni Religious Trust" and is having a "Masjid" inside the premises. M.M.Salgaonkar Judgment.WP-743-19+1.doc The same could not have been alienated as "Masjid" being a religious structure, cannot be sold or bought for development/redevelopment purpose. The other assertion is that the Muslim Trust has been transferred from the Charity Commissioner's office to the Maharashtra State Waqf Board. Being aggrieved by the Circular, many Muslim Trusts had approached this Court and its Benches at Aurangabad and Nagpur against the said arbitrary transfer. Then the proceedings in relation to such a transfer are referred to. The group matters were heard by this Court and an order came to be delivered on 21st September, 2011. It is that order, which was challenged by the aggrieved parties before the Hon'ble Supreme Court.

69. Thus, in the present petition, the petitioners make reference to only one paragraph and leave out rest of the paragraphs in that judgment of the Hon'ble Supreme Court. In the grounds, the only assertion is that this judgment of the Hon'ble Supreme Court would demonstrate and prove that respondent No.3 is a Waqf. Now, we do not think that even this assertion and the vague statements in the grounds are enough.

70. Pertinently, the petitioners rely upon the affidavit filed in rejoinder. The affidavit that they have filed in rejoinder says that respondent No.3 before us has referred to Government Gazette M.M.Salgaonkar Judgment.WP-743-19+1.doc notification of the year 1944. Prior thereto, they referred to a copy of the registration certificate. That copy, which is annexed to the rejoinder affidavit, is relied upon, but a close look at that would reveal that it is the Maharashtra State Board of Waqfs, which is issuing this registration certificate. It is certifying that Waqf Institution Haji Ismail Haji Habib Musafirkhana Trust, which is already registered under the Bombay Public Trusts Act, 1950 (the MPT Act) under number B-B-140 alongwith its properties have been taken down in the Waqf Register as per Section 43 of the Waqf Act, 1995 as deemed registerd. Now, Section 43 of the Waqf Act, 1995 falls under Chapter V titled as "Registration of Auqafs". That Section 43 says that notwithstanding anything contained in this Chapter (Chapter V), where any Waqf has been registered before the commencement of this Act, under any law for the time being in force, it shall not be necessary to register the Waqf under the provisions of this Act and any such registration made before such commencement shall be deemed to be a registration made under this Act. We are sorry to say that this certificate, copy of which is annexed as Exhibit 'B' (Page 351 of the paper-book) dated 29th March, 2019, cannot be said to be traceable to Section 43. Section 43 makes the registration of the Auqafs and prior to the commencement of the Waqf Act, to be a deemed registration under the Waqf Act, 1995. M.M.Salgaonkar Judgment.WP-743-19+1.doc This registration certificate, copy of which is relied upon, does not meet the requirement of Section 43 at all. In fact, a registration number is sought to be assigned by this certificate in 2019. All the more therefore, the claim of the petitioners based on this document is doubtful. Then, a reference is made to the "Seth Haji Esmail Haji Habib Musafarkhana Trust". Exhibit 'C' to the affidavit-in-rejoinder is relied upon with the assertion in the same and to the effect that the Gazette Notification of the Government of the year 1944 notifies respondent No.3 in question as a Waqf at page 34 of the said Gazette at Serial Number 163. Assuming that this is Gazette extract and it says that there is a Waqf by name "Seth Haji Esmail Haji Habib Musafarkhana Trust", yet, the petitioners in this petition have impleaded respondent No.3 as "Haji Ismail Haji Habib Musafirkhana Trust". The words "Seth" and "Ismail" are conspicuous by their absence. To the affidavit-in- reply filed by respondent No.3, and to which we do not find any assertion to the contrary, is annexed a copy of the order of the Court of Judicature at Bombay in Suit No.741 of 1944 dated 10 th July, 1944 and which says that the persons who are impleaded as plaintiffs reside at Kambekar Street without the Fort of Bombay and that the Charities, in relation to which the scheme has been declared by the Indenture of Trust dated 30 th October, 1864, is "Haji Esmail Haji Habib Musafirkhana Trust". The order says that M.M.Salgaonkar Judgment.WP-743-19+1.doc the first plaintiff died on 8th July, 1944, his name has been struck off and the plaint and proceedings were amended accordingly. After that amendment, the plaintiffs were heard and the Court found from the Originating Summons, plaint and the affidavit of the second plaintiff affirmed on that date and after hearing the advocates, that a scheme be framed for administration and management of the Trust mentioned in the plaint. That the

scheme as approved by the Advocate General of Bombay and annexed to the order is thereby sanctioned. It is in these circumstances that we do not think that we can displace this duly authenticated copy of the order of this Court only on the basis of the extract of the Bombay Government Gazette of the year 1944. Even this document therefore will not carry the case of the petitioners further.

71. Thereafter, reliance is placed on Exhibit 'D' and it is said in relation to the Exhibit 'D' in this affidavit-in-rejoinder that it has come to the knowledge of the petitioners from the material on record from Department of Archives, Mumbai that respondent No.3 was created as 'Waqf' and the names of the Mutawallis of the same is enlisted at Serial No.163 in the list of Mutawallis of Waqfs of Bombay registered under the Musallam Wakf Act No.XLII of 1923 as amended by Bombay Act No.XVIII of 1935. This is, M.M.Salgaonkar Judgment.WP-743-19+1.doc therefore, the document based on which the assertion of the petitioners is that respondent No.3 is created as a Waqf even prior to 1935.

72. A careful perusal of this document would show that it is an extract from what is referred as a proceeding before the Court of Small Causes at Bombay under the Mussalman Wakf Act No.XLII of 1923 as amended by Bombay Act No.XVIII of 1935. The subject is "Election by the Mutawallis to elect their two representatives on the Wakf Committee, Bombay". Thereafter it says that a list of Mutawallis of all Waqfs in the City of Bombay registered under the above Acts has been prepared. That is annexed to the communication/proceedings before the Court of Small Causes at Bombay. If any Mutawalli desires to object to any item or particulars therein or wishes to have any amendment made, he may apply to the Small Causes Court at Bombay in writing in person or by pleader by 2 P.M. Thereafter, it says as to how the meeting will be convened to elect the two representatives on the Waqf Committee. Now, this is stated to be an order under the signature of the Chief Judge of the Court of Small Causes, Bombay dated 1st February, 1945. The petitioners say that it is the list of Mutawallis of Waqfs in the city of Bombay registered under the Mussalman Wakf Act No.XLII of 1923 as amended by Bombay Act M.M.Salgaonkar Judgment.WP-743-19+1.doc No. XVIII of 1935. Now, based on this, it is argued that this list has, at Sr.No.163, Waqf No. 3 year of 1931 and the name of the Waqf is "Seth Haji Esmail Haji Habib Musafarkhana Trust". The name of the Mutawalli mentioned is Abulkadar Tarmahomed Noorani and he resides at Kambekar Street, Bombay -3.

73. Pertinently, we find that the affidavit, which has been filed by the third respondent says that the plaintiffs in the suit filed before this Court are, Gulam Husein Haji Hasham Noorani (deceased at the time of the order dated 10th July, 1944), Abdul Satar Mahomed Haji and Abubaker Mahomed Khamisa. Apart from the difference in the name, there is no reference to the individual- Abulkadar Tarmahomed Noorani. We are, therefore, of the opinion that even this document cannot be said to be decisive nor its contents can be accepted by us to hold that respondent No.3 was a Waqf.

74. We do not think that we should also rely upon Exhibit 'F', which is some translation from Arabic. The petitioners rely upon the municipal extract to show that there was a Masjid and in that there is an old marble plate embedded in one of the wall of the Masjid in the said Musafirkhana. We are not at all impressed by this rejoinder and we do not think that merely because the prayers were offered in this place that it could be termed as M.M.Salgaonkar Judgment.WP-743-19+1.doc "Masjid" and,

therefore, the whole premises were dedicated to the Almighty as claimed by Mr.Gorwadkar. On the other hand, respondent No.7, who is supporting the petitioners, as also other trustees of respondent No.3-Trust, have also described in their affidavits, while asserting their stand, that there were shops/godowns on the ground floor. In such circumstances, the affidavit-in-rejoinder together with its annexures, including photographs would not be of any assistance to the petitioners in contending that the third respondent is a Waqf.

75. Even the Places of Worship (Special Provisions) Act, 1991 is of no assistance. This Act is enacted to prohibit conversion of any place of worship and to provide for the maintenance of the religious character of any place of worship as it existed on the 15 th day of August, 1947 and for the matters connected therewith or incidental thereto. Mr.Gorwadkar would read one provision of this Act in isolation and without in any manner understanding the object and purpose of the same. Section 3 of this Act reads as under:-

"3. Bar of conversion of places of worship.-No person shall convert any place of worship of any religious denomination or any section thereto into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof."

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76. Before us is not a controversy whether there is a pre- existing and pre-established place of worship of any religious denomination or any section thereto, which is sought to be converted into a place of worship of different section of the same religious denomination or any section thereof. The argument before us is that the Trust (respondent No.3) belongs to one religious denomination and there is a different section of the same religious denomination (respondent No.8-Trust), which is purchasing and acquiring the property of respondent No.3 under a Deed of Conveyance. That Deed of Conveyance is executed after the sanction or permission of the Charity Commissioner was obtained by invoking Section 36(1)(a) of the MPT Act. This is, therefore, not a conversion, but an acquisition of the property. During the course of assailing that acquisition, a faint attempt is made to show that the property comprises of Masjid and that Masjid was used for offering prayers by members of Shia Community and now after acquisition of the property by Sunni Community, maybe of the same religion, this law is attracted. We do not think that this law is, therefore, applicable and can be invoked. All the more, when we have found that there is no evidence of existence of Masjid as far as the subject immovable property is concerned.

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77. Advisedly, therefore, Mr.Gorwadkar did not continue the first assertion beyond a point. He made alternate arguments. His alternate argument would require us to consider the judgment of the Hon'ble Supreme Court relied upon by him. Mr.Gorwadkar's reliance upon the judgment reported in the case of Mohammad Shah Vs. Fasihuddin Ansari and others³ is entirely misplaced. There, a section of the Mahomedan community at Jabalpur and one Gulabshah and his son were locked in litigation since the year 1980 about portions of land that adjoin a mosque in Jabalpur known as

Kotwali Masjid. There, the admitted position was that the masjid property and the ground on which it is built is Waqf property. The said Gulabshah had claimed even the masjid as his own property, but that was decided against him in the year 1881 and since then, he and after him, defendant to the suit have admitted that the masjid property is wakf, but the dispute about the rest continues and that is why the suit, which was filed in a representative capacity from which the appeal to the Hon'ble Supreme Court arose, came to be filed. The contention before the Hon'ble Supreme Court was that the masjid property is now admitted to be waqf property, that the other properties surround the mosque and adjoin it and on five specific acts of user that are set out in para 7 of the plaint and, particularly, a general 3 1956 SC 713 M.M.Salgaonkar Judgment.WP-743-19+1.doc assertion that these buildings and lands have always been used for the benefit of the community. Paragraph No.16, which is relied upon, cannot be read in isolation and equally the other paragraphs, on which heavy reliance is placed by Mr.Gorwadkar. Thus, this was a case solely resting upon the allegations in the plaint and an assertion to the contrary. We do not think that this judgment is of any assistance for deciding the issue at hand.

78. Then, Mr.Gorwadkar relies upon the judgment of the Hon'ble Supreme Court in the case of Uttar Pradesh Sunni Central Board of Wakfs vs. Mazhar Hasan and Others 4. There, the properties were registered as waqf. A reference was made under the Uttar Pradesh Muslim Waqfs Act, 1960 for cancellation of registration. The property in question was a Muslim Musafirkhana situate in Kazipura, City Baharich in the State of Uttar Pradesh, consisting of 24 rooms, one courtyard etc. The respondents' case was that the property in question was owned by a society of which the respondents have been office-bearers, that they have been in possession of the suit property and that they purchased the said land, on which the accommodation exists and, therefore, the provisions of Sections 29 to 33 of the Act did not apply. The registration of the property in dispute as waqf is illegal, null and void. That reference was resisted by the 4 (2001) 6 SCC 289 M.M.Salgaonkar Judgment.WP-743-19+1.doc appellant on the grounds that the land in question was purchased from the subscription given by the Musalman public and the building was also constructed out of such donations given by the general public. The purpose of the collection of these funds and donations made by Musalmans in general was a charitable one. That was for construction of a Muslim musafirkhana in order to relieve them from the shortage of accommodation and for religious purpose, a mosque was also constructed within the musafirkhana. Hence, the registration was in accordance with law. Once this mosque was part and parcel of the musafirkhana and that musafirkhana is meant for charitable purposes so also is of a religious character, then, the registration was defended. But, the Tribunal allowed the reference and set aside the registration. The matter was taken in revision to the High Court, which affirmed the Tribunal's view and dismissed the revision petition. The issue was absence of proof of dedication by a dedicator having Muslim faith and absent such dedication, the property could not be said to be a waqf property nor it can be deemed to be waqf property. The High Court was of the view that the dedication carries with it an idea of voluntary self-donation without any demand or appeal and that subscription or donation made on appeal being made by the people at large cannot be taken to be the donation of property of a permanent character, which is the M.M.Salgaonkar Judgment.WP-743-19+1.doc essential ingredient of the definition of Waqf under the Act. The High Court was, therefore, held not justified in cancelling the registration. Paras 3 and 4 of this judgment would denote that the controversy was peculiar. It was purely factual. If there was already a musafirkhana set up for

religious as also for charitable purposes, then the mosque is part and parcel of musafirkhana and the object for which the property in question has been set apart or dedicated, is charitable, pious or religious in nature. Since there was evidence of user, the Court held that the dedication was complete. It could not be divested for any other purpose. In such circumstances, the judgment of the High Court was reversed. We cannot read the paragraphs relied upon in isolation and totally out of context.

79. In the case of Cyrus Rustom Patel vs. Charity Commissioner, Maharashtra⁵, the Hon'ble supreme Court found that the appellant questioned the dismissal of his writ petition. The High Court refused to interfere with the order of sanction passed by the Joint Charity Commissioner granting sanction to development-cum-sale transaction. There was a Trust registered under the Bombay Public Trusts Act, 1950. The Trust agreed to enter into an agreement with M/s Astral Enterprises. The minutes of the meeting noted that the tenants in the premises 5 (2018) 14 SCC 761 M.M.Salgaonkar Judgment.WP-743-19+1.doc had, in principle, agreed to the development of the Trust property, on the condition that the interest of the tenants would be looked after and that they would be provided flats in new building on ownership basis, and that the development would be completed in a time bound manner. The partner of the Developer Firm was invited to the meeting and after the discussion and deliberations noted, an application was made to its sanction. Further, the development agreement was with respect to "Fire Temple" situate at Tardeo, Mumbai. On that property, there was a Fire Temple and certain other structures occupied by 21 occupants in the capacity of tenants. There was no further availability of FSI. Paras 5 and 6 contain the factual assertions in the application, based on which, the Charity Commissioner accorded sanction. The Charity Commissioner found that there was an explanation given by way of an affidavit and which was acceptable, that the public notice was not mandatory in all cases before a grant of sanction.

80. The arguments of the counsel before the Hon'ble Supreme Court centered and revolved around the Charity Commissioner's sanction without safeguarding the interest of the Trust. The property is a prime property in Mumbai. It is worth more than what it had been sold away. The Full Bench judgment of this M.M.Salgaonkar Judgment.WP-743-19+1.doc Court in Sailesh Developers (supra) laid down the principle that it was open to the Charity Commissioner to take care of the interest of the Trust in such transactions, and if necessary, to invite the other best offers to safeguard the interest of the Trust. It is in that context, the reliance was placed on earlier decisions of the Hon'ble Supreme Court. Then, the other argument was made by the respondents and they argued that the competent authority- the Joint Charity Commissioner had duly accorded sanction under Section 36 of the Act and at the relevant time, it was not open to the Charity Commissioner to make much interference in such a matter. It was not even open to the Hon'ble Supreme Court to interfere in such a matter, in view of the decision of this Court in Vedica Procon (P) Ltd. v. Balleishwar Greens (P) Ltd. 6. The Hon'ble Supreme Court held thus:-

"2. The B.C. Batliwala Agiary Trust is registered under the Bombay Public Trusts Act, 1950 (hereinafter referred to as 'the Act'). The Trust, in its meeting dated 20-1-2003, decided to enter into an agreement with M/s. Astral Enterprises. It was noted in the minutes of the meeting that the tenants in the premises had, in principle, agreed to the development of the Trust property at Tardeo, on the condition that the interest of

the tenants would be looked after and that the tenants would be provided flats in new buildings on ownership basis, and that the development would be completed in a time bound manner by the said developer.

3. The minutes of the trustees meeting dated 20-1-2003 states that Shri Suresh Mehta, partner of M/s. Astral Enterprises, had been invited to the meeting. It was decided that in case there was any difficulty in carrying 6 (2015) 10 SCC 94 M.M.Salgaonkar Judgment.WP-743-19+1.doc out the development agreement, it would be converted into an outright sale. The Trustee would have an exit option. It was decided that development would be on a time-bound basis. The registration charges of the deed would be borne by the developer, as well as the cost of construction. Trustees would have an exit option if trustees felt that it was not in the interest of the Trust to carry on with the joint venture development; the trustees alone shall have the option to convert the joint venture arrangement into a sale, in that event M/s. Astral Enterprises would require paying a fixed predetermined price to the Trust. The application was filed under the provisions of Section 36 of the Act, for granting sanction to enter into joint venture-cum-sale agreement between the Trust as well as the M/s. Astral Enterprises.

4. The aforesaid development agreement was with respect to "Fire Temple", bearing Cadastral Survey No.727 of Malabar Hill Division, Mumbai admeasuring about 3012 sq. m, situated at 160 Tardeo, Mumbai. On the said property stand a "Parsi Fire Temple" and certain other structures that are occupied by 21 occupants in the capacity of tenants. There was no further availability of FSI.

5. It was mentioned in the application filed under Section 36 of the Act that construction of the temple was done prior to 1940, it was old and in a dilapidated condition, and required extensive repairs. The Trust was getting a meagre income from the building. It was in need of funds to meet the objectives of the Trust; as such trustees decided to develop the property after prolonged discussions. As the Trust had no such funds as were required for carrying out the construction work, it was considered necessary to take help of the developer. M/s. Astral Enterprises was ready to provide the necessary services to the Trust, with a proposal to jointly develop the property. It transpires that agreement for joint venture development-cum-sale had been entered into and ultimately sale had been effected, for a sum of Rs.2, 95,00,000.

6. The Charity Commissioner had accorded the sanction under Section 36 of the Act. Though it was noted by the Charity Commissioner that no public notice had been published in the newspaper for inviting the offers, yet for non-publication of the same in newspapers, the applicant, gave an explanation by way of an affidavit, M.M.Salgaonkar Judgment.WP-743-19+1.doc that public notice was not mandatory in all cases, before a grant of sanction.

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10. The learned counsel appearing on behalf of the appellant urged that in the instant case, the Charity Commissioner while granting sanction has not safeguarded the interest of the Trust. The property is a prime property in Mumbai. It is worth multifold more than at what it had been sold away. The relevant aspect to grant sanction under Section 56 of the Act had been considered by a Full Bench of the High Court at Bombay in *Sailesh Developers v. Charity Commr* 2007 (4) ALL MR100: (2007) 3 Bom. CR7, in which it has been held that it was open to the Charity Commissioner to take care of the interest of the Trust in such transactions, and if necessary, to invite the other best offers to safeguard the interest of the Trust.

11. The learned counsel for the appellant has also relied upon the decisions of this Court in *Chenchu Rami Reddy and Another v. Govt. of A.P. and Others* (1986) 3 SCC 391; *R. Venugopala Naidu and Ors. v. Venkatarayulu Naidu Charities and Ors.* (1989) Supp. 2 SCC 356, *Bhaskar Laxman Jadhav v. Karamveer Kakasaheb Wagh Education Society*, (2013) 11 SCC 531.

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14. It was also submitted on behalf of the respondents that the competent authority the Joint Charity Commissioner had duly accorded sanction under the provisions contained in Section 36 of the Act, and at the relevant time, it was not open to Charity Commissioner to make much interference in such a matter. It was not open even to this Court to interfere in such a matter, in view of the decision of this Court in *Vedica Procon Private Limited v. Balleshwar Greens Private Limited and Others*; (2015) 10 SCC 94.

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18. It was also observed by this Court in *Chenchu Ram Reddy* (supra) that public officials and public-minded citizens entrusted with the care of 'public property' have to show exemplary vigilance; the property of religious and charitable institutions or endowments must be jealously protected. The sale of such a property by M.M.Salgaonkar Judgment.WP-743-19+1.doc private negotiations which will not be visible to the public eye, and may even give rise to public suspicion, should not be, therefore, made, unless there are reasons to justify the same. This Court observed:

"10. We cannot conclude without observing that property of such institutions or endowments must be jealously protected. It must be protected, for, a large segment of the community has a beneficial interest in it (that is the *raison d'être* of the Act itself). The authorities exercising the powers under the Act must not only be most alert and vigilant in such matters but also show awareness of the ways of the present day world as also the ugly realities of the world of today. They cannot afford to take

things at their face value or make a less than the closest-and-best-attention approach to guard against all pitfalls. The approving authority must be aware that in such matters the trustees, or persons authorized to sell by private negotiations, can, in a given case, enter into a secret or invisible under-hand deal or understanding with the purchasers at the cost of the concerned institution. Those who are willing to purchase by private negotiations can also bid at a public auction. Why would they feel shy or be deterred from bidding at a public auction? Why then permit sale by private negotiations, which will not be visible to the public eye and may even give rise to public suspicion unless there are special reasons to justify doing so? And care must be taken to fix a reserve price after ascertaining the market value for the sake of safeguarding the interest of the endowment. With these words of caution, we close the matter."

19. Again, in *R. Venugopala Naidu* (supra), this Court observed that fraudulent sale of the property of public charities by way of private negotiations should not be permitted. This Court further held that reserved price should be fixed after ascertaining the market value and offer of higher price by filing an affidavit. In the aforesaid case, the Subordinate Court and the High Court, instead of going into the merits of the case, non-suited the plaintiffs on the ground of locus standi. This Court had considered the fact that the value of the property which the trust got was not the market value, and quashed and set aside the sale order of the subordinate court and the consequent sale. Relying on *Chenchu Ram Reddy* (supra), this Court observed:

M.M.Salgaonkar Judgment.WP-743-19+1.doc "13. The subordinate court and the High Court did not go into the merits of the case as the appellants were non-suited on the ground of locus-standi. We would have normally remanded the case for decision on merits but in the facts and circumstances of this case, we are satisfied that the value of the property which the trust got was not the market value. Two persons namely S.M. Mohamed Yaaseen ad S.N.M. Ubayadully have filed affidavit offering Rs.9.00 lacs and Rs. 10.00 lacs respectively for these properties. In support of their bonafide, they have deposited 10% of the offer in this Court. This Court in *Chenchu Ram Reddy* and another v. Government of Andhra Pradesh and Others have held that the property of religious and charitable endowments or institutions must be jealously protected because a large segment of the community has a beneficial interest therein. Sale by private negotiations, which is not visible to the public eye and may, even give rise to public suspicion, should not, therefore, be permitted unless there are special reasons to justify the same.

It has further been held that care must be taken to fix the reserve price after ascertaining the market value for safeguarding the interest of the endowment."

.....

21. This Court in *Bhaskar Laxman Jadhav* (supra) further observed that the lack of bonafide of trustees and the petitioners could not have been overlooked by the High Court. Therefore, the safest

course was to sell off the trust land through auction. It was also observed that it was quite clear that due to the passage of time, the value of the trust land had increased considerably, and that it would be in the best interest of the Trust if the maximum price is made available for the trust land from the open market. This Court also observed that under Section 36 of the Act enjoins duties on the Charity Commissioner to consider the sale of immovable property of the trust with regard being had to the "interest, benefit or protection" of the trust. This Court considered the decision in *Chenchu Rami Reddy* case (supra) and held that the only course available to the High Court was to mould the relief and to direct the Charity Commissioner to have a relook at all the bids received pursuant to the public notice dated 19-02-2007. In *Bhaskar Laxman Jadhav* (supra), this Court observed:

M.M.Salgaonkar Judgment.WP-743-19+1.doc "30. It was also submitted that since Shri Vyankatesh Mandir Trust is a charitable trust, it was expected of the High Court (as also this Court) to subserve the larger interest of the charitable trust. In achieving this, necessary and appropriate orders can be passed for the ultimate benefit of the trust. In support of this submission learned counsel for respondent No.1 relied on *Chenchu Rami Reddy v. Government of Andhra Pradesh* (1986) 3 SCC 391, *R. Venugopala Naidu v. Venkatarayulu Naidu Charities* (1989) Supp 2 SCC 356, and *Mehrwan Homi Irani v. Charity Commissioner* (2001) 5 SCC

5. Section 36 of the Act clearly provides that the trustees may be allowed by the Charity Commissioner to dispose of immovable property of the Trust with regard being had to the "interest, benefit or protection" of the Trust. It cannot be doubted that the interest of the Trust would be in getting the maximum for its immovable property.

.....

23. Before coming to the facts and circumstances of the case, we propose to take note of the decision relied upon by the respondent- developer in *Vedica Procon Private Limited* (supra). In that case, this Court considered irregularity in the conduct of sale of the property. It was observed that duty of the Court was to satisfy itself that having regard to the market value of the property, the price offered was reasonable and when rights had been acquired as per the law, it could not be disturbed. No subsequent higher offer can be considered as a valid reason. Once the Court reaches a conclusion that adequate price was offered, a subsequent increase in the value, or any subsequent higher offer, is of no avail. In case after the auction the value of the properties had increased, it would not be a ground to recall the auction, and to interfere in the auction sale. The offer of a higher price than that of the successful bidder was made after the sale had been confirmed, and there were no allegations of fraud, irregularity, and inadequacy of price when the sale was confirmed. This Court has observed:

M.M.Salgaonkar Judgment.WP-743-19+1.doc "47.A survey of the above-mentioned judgments relied upon by the first respondent does not indicate that this Court has ever laid down a principle that whenever a higher offer is received in respect of the sale of the property of a company in liquidation, the Court would be justified in

reopening the concluded proceedings. The earliest judgment relied upon by the first respondent in Navalkha & Sons laid down the legal position very clearly that a subsequent higher offer is no valid ground for refusing confirmation of a sale or offer already made. Unfortunately, in Divya Mfg. Co. this Court departed from the principle laid down in Navalkha & Sons. We have already explained what exactly is the departure and how such a departure was not justified."

.....

27. In the instant case, the Joint Charity Commissioner was required to consider the interest and benefit of the Trust. We are compelled to observe that Joint Charity Commissioner has totally abdicated its duty, and failed to act as per the mandate of Section 36. The observations made by Joint Charity Commissioner in its Order clearly reflect that Charity Commissioner has failed to exercise the duties enjoined upon to protect trust under Section 36 of the Act. It has not considered the interest, benefit, and protection of the trust at all. The order is wholly perverse. Joint Commissioner abdicated its responsibilities, in as much as it observed that it was the outlook of the Trust as to whom it wanted to sell the property, and as certain development was to be made; as such market value of the property was not a relevant consideration. There is the sale made in the form of Joint Venture development cum sell agreement and lease was for 999 years. Right from the beginning, it was to be a joint venture agreement coupled with a sale option, as apparent from the minutes of the meeting of the trust. The trustees had been acting in collusion with developer even before resolution had been passed. Negotiations were going on with M/s. Astral Enterprises-developer.

28. It was not disputed at Bar, by the trust or the developer, that it was a case of the sale, and right from beginning an option for sale was made. No effort has been made by the Trust, in case the sale was necessary, to ascertain the real market value of the property, nor M.M.Salgaonkar Judgment.WP-743-19+1.doc has it been ascertained by the Joint Charity Commissioner. The property is located in a prime location of the city of Mumbai, at Malabar Hill Division near Central Mumbai Railway Station, and that the market value was, obviously, sky high as compared to paltry sum offered.

29. This is a prestigious locality, where one would cherish to own a property, and in the true sense, it would be like a treasure house. We unhesitatingly take judicial notice of the fact, that such a huge area could not have been sold for a paltry sum of Rs.2,95,00,000/-. Trustees, as well as Joint Commissioner, have failed to act in the interest, benefit and to protect the Trust, and the same could not have been sold by such private negotiations. In our opinion, the value was many a time more at the time of entering into the agreement. The paltry sum that was reserved by the Trust could not be said to be in the interest and benefit of the trust. Merely obtaining a valuation report, from a person of choice, without making any serious effort to ascertain the market value by way of any method known to law, and fixing its reserve price, was an eye-wash; such a dubious transaction was not at all acceptable, and it shocks conscience as to how such a valuable property could have been sold at such a throw-away price. Thus, we find, on the basis of the principles laid down in aforesaid decisions, and even on the basis of the decision relied upon by the learned counsel appearing on

behalf of the developer, in Vedica Procon Private Limited (supra), that the respondents have no case at all. In the later decision, this court unequivocally held that sale should be at market price. In this case, no such effort had been made; it has not been considered as to why the trust should sell such a valuable property at all, and as to what was the compelling necessity. Ordinarily, the trust property is to be protected, such property is held in trust; in case its condition was not good, there could be several other ways to improve it; it could not have been achieved by virtually throwing away the property."

81. The Hon'ble Supreme Court made the aforesaid observations because we found that in case before it, the Charity Commissioner was required to safeguard the interest and benefit of the Trust. That is paramount and about that there never can M.M.Salgaonkar Judgment.WP-743-19+1.doc be any dispute. Secondly, the Hon'ble Supreme Court observed that the Charity Commissioner totally abdicated his duty and failed to act as per mandate of Section 36. The observations made by him in his order reflected that he failed to exercise the duty to protect the Trust. The Joint Charity Commissioner did not consider the interest, benefit and protection of the Trust at all. The order was found to be perverse. The Joint Charity Commissioner did not find it fit to probe the matter from the above angles. The Joint Charity Commissioner has observed that it was the lookout of the Trust as to whom it wanted to sell the property, and as certain development was to be made; as such market value of the property was not a relevant consideration. The case was of a sale made in the form of joint venture development-cum-sale agreement and lease was for 999 years. Right from the beginning, it was to be a joint venture agreement coupled with a sale option. The trustees acted in collusion with the developer even before the resolution had been passed and negotiations were going on with the developers. Thus, the observations in paras 27 to 29 would denote that in the factual backdrop, the Hon'ble Supreme Court came down heavily on the trustees and the Joint Charity Commissioner. M.M.Salgaonkar Judgment.WP-743-19+1.doc

82. In that process and because of the duty castes on the Charity Commissioner by law, the Hon'ble Supreme Court thought it fit to reproduce the observations made by the Full Bench of this Court in Sailesh Developers (supra). In Sailesh Developers (supra), the controversy was whether there was a conflict between the views expressed in the two Division Bench judgments of this Court, interpreting Section 36 of the MPT Act. The Full Bench found that the narrow view has rightly been criticised. The power that is conferred in the Charity Commissioner is coupled with a duty. While exercising that power, he 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 he is satisfied about this aspect and that the alienation is in the interest of Trust or for the benefit of the Trust or for the protection of the Trust, then, it cannot be said that this power 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 M.M.Salgaonkar Judgment.WP-743-19+1.doc 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. The Hon'ble Supreme Court while reproducing these paragraphs and

emphasising that the Charity Commissioner is not powerless and does not act as a rubber stamp or exercise the power only to put his stamp of approval on a particular transaction, held that the Charity Commissioner's power is not restricted. He can 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. That is when the Charity Commissioner is satisfied that the 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 the bids by public notice. Therefore, the power conferred in the Charity Commissioner is not restricted and cannot be placed in a straight jacket nor can a formula be devised, which will be applied in all cases covered by Section 36. That is why the Full Bench answered the question referred to it by holding that while the Charity Commissioner considers the application made before him to grant sanction, his power is not confined merely to grant or refuse sanction to a particular sale transaction in respect of which sanction is sought, but the power M.M.Salgaonkar Judgment.WP-743-19+1.doc extends to inviting offers from the members of the public and directing the trustees to sell or transfer the Trust property to a person whose bid or quotation is the best. Thus, the Charity Commissioner is obliged to consider the interest, benefit or protection of the Trust. In these circumstances, we do not think that the answers by the Full Bench to the questions referred to it can be read in the manner suggested by Mr.Gorwadkar. It is not an absolute proposition as is sought to be culled out by Mr.Gorwadkar. The Charity Commissioner is not expected or obliged to compel the trustees to issue a public notice and advertise the same so as to invite offers from the interested persons or bidders. It is in cases of the nature found by the Hon'ble Supreme Court and the Full Bench of this Court that sale of Trust property, which is like public property, if at all necessary, is not permissible by way of private negotiations. That could be done only in exceptional circumstances for the reasons to be recorded. In the case before the Hon'ble Supreme Court, there were no exceptional circumstances, no urgency to throw away the valuable property of the trust. That was derogatory to the interest of the Trust and would have defeated the very object of the creation of the Trust for the preservation and protection of religion and Parsi culture. To our mind, therefore, we cannot apply the judgment of the Hon'ble Supreme Court to all cases M.M.Salgaonkar Judgment.WP-743-19+1.doc unless we record our reasons either for disapproving the sanction granted by the Charity Commissioner or to overturn it.

83. Even the case of Ritesh Tewari and another vs. State of Uttar Pradesh and others⁷ relied upon by Mr.Gorwadkar considers an issue when there was a suppression of material facts. The High Court could not have been taken for a ride and rather it was its duty as custodian of the Constitution to maintain the social balance by interfering where necessary for sake of justice and refusing to interfere where it is against the social interest and public good. The order when bad from its inception cannot become legal later on and this proposition would apply to the facts and circumstances of each case. We do not think that this principle has any application to the present case.

84. The reliance on the judgment of the Hon'ble Supreme Court in the case of Sayyed Ali and others vs. A.P.Wakf Board, Hyderabad and others⁸ is once again misplaced. There, the Hon'ble Supreme Court concluded that there was a Waqf. However, it was contended that one portion or one patta of the Waqf property was granted in favour of Mokhasadars. Therefore, that patta or portion could not be taken as Waqf property. The Hon'ble Supreme Court found that once a Waqf is a permanent 7

(2010) 10 SCC 677 8 (1998) 2 SCC 642 M.M.Salgaonkar Judgment.WP-743-19+1.doc dedication of property for purposes recognized by Muslim law as pious, religious or charitable and the property having been found as Waqf, it would always retain its character as a Waqf. Merely because one patta of that property was granted in favour of Mokhasadar under the Inams Act, this character as Waqf property is not lost.

85. Even this decision, to our mind, has no application to the present case. All the more, when we have found that the property is not a Waqf property.

86. All that now remains is to consider whether the reliance placed by the petitioners on the judgment of the Hon'ble Supreme Court is well placed.

87. A copy of the judgment of the Hon'ble Supreme Court has been annexed to the petition.

88. The Hon'ble Supreme Court in the case of Maharashtra State Board of Wakfs vs. Shaikh Yusuf Bhai Chawla and others 9 considered the challenge to the judgment and final order dated 21st September, 2011 of this Court. The subject matter of all the writ petitions was the incorporation of the Maharashtra State Board of Waqfs and its impact upon the Waqfs created by persons M.M.Salgaonkar Judgment.WP-743-19+1.doc professing Islam, but belonging to different sects. After referring to the factual aspects and the ultimate directions, the Hon'ble Supreme Court found that it was necessary to trace the history of this law. The circular issued by the Charity Commissioner relinquished this authority created over the Trusts created by Muslims, although they did not attract the provisions of Waqf Act. The Hon'ble Supreme Court noted all the submissions and then passed an interim order. At the interim stage, it restricted the issue as to whether the stay granted by the Bombay High Court on 21st September, 2011 should continue in a modified form. The Hon'ble Supreme Court found that vesting of powers of management and supervision of Muslim Waqf estates in Maharashtra in the Charity Commissioner by virtue of the impugned order is improper. The Hon'ble Supreme Court held that the Waqf Board was constituted under the Waqf Act, 1995, but not at full strength as envisaged in Sections 13 and 14 of the same. On the day, when the Hon'ble Supreme Court passed the order, there was no properly constituted Board of Waqfs functioning in the State of Maharashtra. The administration of Waqfs in Maharashtra cannot be kept in vacuum. The Division Bench of this Court found that till the Board of Waqfs is properly constituted, the Charity Commissioner would continue to administer the Muslim Waqf properties, which had already been M.M.Salgaonkar Judgment.WP-743-19+1.doc registered as Trust properties with the Charity Commissioner under the Bombay Public Trusts Act. Therefore, the list of Waqfs published by the truncated Board of Waqfs was set aside by the Bombay High Court. The Hon'ble Supreme Court found that the Bombay Public Trusts Act was not a corresponding law. It, therefore, did not stand repealed. However, it cannot be also said that this law would be applicable to the Waqf properties, which are not in the nature of public charity. That is why, the Hon'ble Supreme Court made the fine, but important distinction as under:-

"28. Section 112 concerns repeal and savings. By virtue of the said provision, the 1954 Wakf Act and the 1984 Wakf (Amendment) Act were repealed. Sub-Section (3) specifically provides as follows:-

"112. Repeal and Savings.....

(1) xxx xxx xxx (2) xxx xxx xxx (3) If immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act, that corresponding law shall stand repealed."

Although, it cannot be said that the Bombay Public Trusts Act was a corresponding law and, therefore, stood repealed, it cannot also be said that the same would be applicable to Wakf properties which were not in the nature of public charities. There is a vast difference between Muslim Wakfs and Trusts created by Muslims. The basic difference is that Wakf properties are dedicated to god and the "Wakif" or dedicator, does not retain any title over the Wakf properties. As far as Trusts are concerned, the properties are not vested in God. Some of the objects of such Trusts are for running M.M.Salgaonkar Judgment.WP-743-19+1.doc charitable organisations such as hospitals, shelter homes, orphanages and charitable dispensaries, which acts, though recognized as pious, do not divest the author of the Trust from the title of the properties in the Trust, unless he relinquishes such title in favour of the Trust of the Trustees. At times, the dividing line between Public Trusts and Wakfs may be thin, but the main factor always is that while Wakf properties vest in God Almighty, the Trust properties do not vest in God and the trustees in terms of Deed of Trust are entitled to deal with the same for the benefit of the Trust and its beneficiaries.

29. In the present case, the difference between Trusts and Wakfs appear to have been overlooked and the High Court has passed orders without taking into consideration the fact that the Charity Commissioner would not ordinarily have any jurisdiction to manage the Wakf properties.

30. In these circumstances, in our view, it would be in the interest of all concerned to maintain the status quo and to restrain all those in management of the Wakf properties from alienating and/or encumbering the Wakf properties during the pendency of the proceedings before this Court. The order of the High Court staying the operation of its judgment has led to the revival of interim orders which have rendered such stay otiose. The said order of stay cannot also be continued during the pendency of these proceedings in its present form.

31. Accordingly, at this stage, we direct that in relation to Wakf properties, as distinct from Trusts created by Muslims, all concerned, including the Charity Commissioner, Mumbai, shall not permit any of the persons in management of such Wakf properties to either encumber or alienate any of the properties under their management, till a decision is rendered in the pending Special Leave Petitions."

89. The Hon'ble Supreme Court was aware of the fact that there are Muslim Waqfs and Trusts created by Muslims. The later could be brought under the purview of the MPT Act for the Charity Commissioner to exercise the powers in relation to them. M.M.Salgaonkar Judgment.WP-743-19+1.doc

90. To our mind, therefore, far from supporting the arguments of Mr.Gorwadkar, these observations would militate against them. We have applied the very principle, which has been set out in these

paragraphs of this judgment, to the facts of the present case.

91. Now, what remains for our consideration is the final argument and in the alternative canvassed by Mr.Gorwadkar. We have already dealt with and rejected his two arguments. There is no mandate to issue a public notice as was contended by Mr.Gorwadkar. The Charity Commissioner has to exercise the powers under the four corners of law and, particularly, Section

36. We find that all the assertions in the application made before him are totally uncontroverted. Based on the assertions, the Charity Commissioner found that there was a legal necessity of a compelling nature to dispose of the Trust property. The Trust property comprised of a old and dilapidated building in a very dangerous and ruinous condition and likely to fall. A notice was already issued by the Municipal Corporation of Greater Mumbai for its demolition. Secondly, the Trust found that the income generated from this property is meager. It is not enough to carry out the repairs and routine maintenance as well. The building was not only encumbered, but also encroached or trespassed M.M.Salgaonkar Judgment.WP-743-19+1.doc upon. The original occupants/tenants were nowhere on the scene, but those who have occupied for decades together were not evicted also. There was no possibility of their eviction because a suit was filed in the year 2003 and when the trustees found that it was not possible to have this suit decided despite nearly ten years of institution, it took a call and considered the offer of the another Trust, namely, respondent No.8. Respondent No.8 took over all obligations of the trustees, including rehabilitation/removal of the trespassers and encroachers. They took over the property, which was highly encumbered and encroached upon, on as is where is basis. The building was constructed in the year 1939. It was nearly 80 years old. With regard to such a property, there was no hope of any better offer being received and, therefore, the trustees passed the resolution and entered into the agreement for sale/Memorandum of Understanding. The clauses of the Memorandum of Understanding were carefully perused by the Charity Commissioner to record a satisfaction that not only there was compelling legal necessity, but the interest and benefit of the Trust is not adversely affected at all. Rather, it is for the protection of the Trust that the alienation is necessary. He found that respondent No.8 had undertaken the obligation to rehabilitate and rehouse all the occupants of nearby building in a huge area admeasuring 16.5 acres. It was implementing a cluster M.M.Salgaonkar Judgment.WP-743-19+1.doc redevelopment scheme. In fact, it has already secured the eviction of the occupants of other buildings. It had obtained necessary approvals and permissions from the Mumbai Municipal Corporation and the Planning Authority. It was a huge project and in which, respondent No.8 took over the obligation to remove each of the occupants, temporarily rehouse or if not acceptable to him, to pay a monthly compensation at the agreed rate, to bring him back in the new construction and give him rights of ownership. After all these obligations and duties of the trustees were taken over and still, price was offered to the trustees, which bearing in mind the dilapidated condition of the building and the other factors was the best in the opinion of the Charity Commissioner. He has, therefore, not placed his approval blindly, on the transaction finalised by the trustees. In fact, the order is reasoned and not cryptic. The order takes into consideration all the necessary applicable legal principles. The order records that the trustees of the purchaser Trust have decided to redevelop this property of the Trust as well as adjacent properties of other Trusts in the area. There are in all four such properties of different Trusts, which are adjacent and need redevelopment. The names of these Trusts are also stated in para 3 of the

order. The Trust did not prefer to invite offers by publication because the purchaser Trust gave a good offer and M.M.Salgaonkar Judgment.WP-743-19+1.doc undertook redevelopment of all the properties of the Trusts named in the order. It is in these circumstances, the unanimous acceptance of the offer of purchaser Trust by the trustees, which is more than the market rate of the property, influenced the decision of the Charity Commissioner. He has also found that the Trust property is in a dilapidated condition needing redevelopment, but the trustees had no funds to redevelop it. The decision of the trustees to sell the property for redevelopment was, therefore, justified and the Charity Commissioner found that bearing in mind the transaction and taken in its entirety, the interest of the Trust is also safeguarded. It is in these circumstances, he granted sanction to the transaction before before him.

92. We are of the opinion that this order of the Charity Commissioner is based on the satisfaction contemplated in law. It is a satisfaction reached in terms of the law. The view taken by the Charity Commissioner is neither perverse nor vitiated by any error of law apparent on the face of the record. The Charity Commissioner was aware of the condition of the property, the relevant factors, including how the encroachments have totally infested and affected the building in question. He was, therefore, not prevented from granting his approval or sanction to the M.M.Salgaonkar Judgment.WP-743-19+1.doc transaction and allowing the application filed by the trustees. This order, therefore, does not warrant any interference under Articles 226 and 227 of the Constitution of India.

93. As a result of the above discussion, the writ petition stands dismissed. Rule is discharged. There will be no order as to costs.

94. In view of the dismissal of the writ petition, Interim Application No.1 of 2019 does not survive and stands disposed of accordingly.

95. At this stage, Mr.Gorwadkar prays for continuation of the interim order passed by this Court on 11 th October, 2019. Mr.Kamdar, learned counsel appearing for respondent No.8 and the learned advocate appearing for respondent No.3-Trust opposes the same.

96. We have considered this aspect of the matter as well. After hearing both sides on this point, we are of the opinion that the petitioners before us are a proposed Forum of Shop Tenants on the ground floor of the building. Considering the fact that the building is dilapidated and that the petitioners are not going to be deprived of the benefits of the redevelopment scheme and rather, they are beneficiaries thereof, after proving their eligibility, they would be provided with permanent alternate accommodation on M.M.Salgaonkar Judgment.WP-743-19+1.doc ownership basis, we are not inclined to continue this interim order. The request in that behalf is rejected. (R.I.CHAGLA, J.) (S.C.DHARMADHIKARI, J.) M.M.Salgaonkar