

(2016) 09 BOM CK 0078

In the Bombay High Court

Case No : Notice of Motion (L) No. 1073 of 2015 In Suit (L) No. 352 of 2015

J.V. Gokal Charity Trust, Mumbai

APPELLANT

Vs

Contrex Pvt. Ltd., Mumbai

RESPONDENT

Date of Decision : 19-09-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Maharashtra Public Trusts Act, 1950 — Section 50, Section 79, Section 80

Citation : (2016) 6 AIRBomR 787

Hon'ble Judges : G.S. Patel, J.

Bench : Single Bench

Advocate : Mr. J. P. Sen, Senior Advocate, a/w Aditya Mehta, i/b Kalpesh Doshi, Advocates, for the Plaintiffs; Mr. Rajesh Talekar, Advocate, for the Defendant No. 10; Mr. F. E. DeVitre, Senior Advocate, i/b M/s. Dastur Dadhich and Kalambi, Advocates, for the Defenda

Final Decision : Dismissed

Judgement

G.S. Patel, J. - A. Introduction

The facts of the case are straightforward. The issues they raise, though narrow, are not. A very great deal of learning has been cited on both sides of the debate: some of the precedents are very old indeed. Counsel have argued that later decisions effectively upturn the older ones, even if they do not say so in so many words. There are two principal issues of law: first, limitation; and, second, whether the jurisdiction of a civil court is ousted in claim such as this because of the statutory provisions of the Maharashtra Public Trusts Act, 1950 ("MPTA").(1) Mr. Seervai and Mr. Andhyarujina for Defendants Nos. 2 and 3 urge me to hold that the Plaintiffs' claim, as canvassed by Mr. Sen, supported by Mr. DeVitre for Defendants Nos. 6, 7 and 11, is hopelessly time-barred; and that, in any case, the suit is not maintainable, as the claim lies exclusively within the jurisdictional domain of the Commissioner of Charities ("Charity Commissioner"). I have considered the arguments on both sides, and the material placed before me. This

has not been easy and I have found myself returning to the material repeatedly after arguments closed. Finally, I have been unable to find for the contesting Defendants. Their submissions seem to me to be not only inequitable, but the reading of the law those Defendants commend seems to me to be one that is unintended by the statute and more than likely to result in the gravest of imbalances. As we shall see, had the parties' positions been reversed, the interpretation canvassed by Mr. Seervai and Mr. Andhyarujina would have worked against them - a civil court's jurisdiction would not then have been ousted. I believe it is unreasonable to interpret a jurisdiction-ousting statute in so selective a manner.

(1) Earlier the Bombay Public Trusts Act, 1950 (Act 29 of 1950). The Act's title was changed by Mah. 29 of 2012, Schedule, entry 43, retrospectively with effect from 1st May 1960.

B. Facts

2. Plaintiffs Nos. 1 and 2 (the "Gokal Trust" and the "SK Foundation" respectively; together, "the two Plaintiff Trusts") are both public charitable trusts registered under the MPTA. The Gokal Trust was set up in 1967 and the SK Foundation in 1982. The 3rd Plaintiff is a trustee of both Trusts. The other Trustees are Defendants Nos. 6 to 11. Defendant No.10, Shishir Diwanji, is a solicitor of this Court and a partner at M/s Desai & Diwanji.

3. The 1st Defendant ("Contrex") is a private limited company. Defendants Nos. 6 to 9 are its directors. The dispute is about the ownership of and title to 100 shares of Contrex held by one Ramanlal Gokal ("Ramanlal"), who died on 22nd March 2007.

4. Ramanlal had four brothers: Arun, since deceased; Defendant No. 6 ("Ravindra"), Defendant No.8 ("Ashok") and Defendant No.9 ("Kishore"), all sons of one Jagjivan Gokal. Defendants Nos. 7 and 11 ("Nakul" and "Nayan") are Arun Gokal's sons. Defendants Nos. 2 and 3 ("Mukesh" and "Bharat" respectively) are Ramanlal's sons.

5. On 26th June 2006, Ashok Gokal and his wife Sudha transferred 50 shares they then held in Contrex to Ramanlal and Mukesh. Ramanlal's name was first; Mukesh's second. On the same day, Kishore Gokal and his wife Panna transferred another 50 shares to Ramanlal and Bharat, again held so that Ramanlal's was the first name and Bharat's the second. Ramanlal paid the entire consideration (Rs.5,000 per transaction).

6. Ramanlal died on 22nd March 2007. He left a Will dated 25th January 2005 (2) and a Codicil dated 28th June 2006.(3) He appointed Defendant Nos. 4 ("Hemraj Asher"), Defendant No. 5 ("Prashant Asher" together, "the Ashers"), Ashok (Defendant No.8) and Kishore (Defendant No.9) as his Executors. Ashok sought probate in Testamentary Petition No. 733 of 2007. Mukesh and Bharat consented; they filed consent Affidavits dated 7th September 2007 and 6th

September 2007 respectively.(4) Probate was granted on 13th December 2007. This included a Schedule of Ramanlal's assets that was annexed to the probate petition.(5) The 100 shares in question were listed at item 26 in this Schedule.

(2) Plaintiff, Ex. "H", pp. 118 - 143.

(3) Plaintiff, Ex. "I", pp. 144 - 152.

(4) Plaintiff, Ex. "J", pp. 153 - 154, and Ex. "K", pp. 155 - 156.

(5) Plaintiff, part of Ex. "I", pp. 147 - 152.

7. On 12th March 2010, the executors of Ramanlal's estate filed in Court an estate administration report dated 8th March 2010 and made by Ashok (Defendant No.8). Accounts for the estate for the years ending 31st March 2008 and 31st March 2009 were part of this report.(6) The report also mentions the 100 Contrex shares.

Notice of Motion, Defendant No. 6 Affidavit in Reply, Report by Ashok Gokal,

(6) Defendant No. 8, pp. 71 - 98.

8. Mukesh and Bharat brought proceedings to remove Ashok and Kishore (Defendants Nos. 8 and 9) as executors. Various orders were passed by the trial court and in appeal. Ultimately, both Ashok and Kishore were removed as executors. Only the two Ashers continued; they are today the only two executors of Ramanlal's estate.

9. Ramanlal made no specific bequest of these 100 Contrex shares in either his Will or his Codicil. The Will contains a residuary clause 16 in favour of the two Plaintiff Trusts:

"16. I direct that all of my property of whatsoever kind and wheresoever situate and not disposed of by this my Will or any Codicil thereto otherwise not effectively (including those which cannot take effect because the legatee to whom any property is bequeathed under this Will predeceasing me except as otherwise provided herein) disposed of (hereinafter called "my residuary estate") shall be distributed equally between the J.V. Gokal Charity Trust and Shree Krishna Foundation, which are the two charitable Trusts created as per my direction, absolutely for their respective use and benefit."

10. The immediately next Clause 17 contains a widely worded prohibition against challenging any part of the Will or its dispositions. Any legatee who does so forfeits his bequest. This also extends to anyone who intermeddles with administration or management of the estate.(7)

(7) Plaintiff, Ex. "H", pp. 118 - 141, at p. 139.

11. Ashok's estate administration report of 8th March 2010 says, in the context of Clause 16 of the Will, that the "residue of the property is being ascertained pending determination of claims made by the claimant." This is a reference to

Mukesh and Bharat.

12. On 21st August 2013, M/s Jhangiani, Narula & Associates acting for Mukesh and Bharat wrote to Contrex and its directors (Ravindra, Nakul, Ashok and Kishore; Defendants Nos. 6 to 9) and demanded that they remove Ramanlal's name as the first name on these 100 Contrex shares and to record those shares as being held only by Mukesh and Bharat (50 shares each).(8) This was, Mr. Sen says, the first time that Mukesh and Bharat made a claim "hostile" to the 1st and 2nd Plaintiff trusts as residuary legatees.

(8) *Plaint, Ex. "Q"*, pp. 254 - 259.

13. On 7th August 2014, Hemraj Asher, for himself and on behalf of his fellow executor, Prashant Asher, wrote to the Gokal Trust forwarding a copy of the Audited Accounts of the estate for the year ending 31st March 2014. The notes to these accounts, in relation to the 100 Contrex shares, say that following the probate issued, the executors attempted to get the share certificates; these were not, however, made available.(9)

(9) *Plaint, Ex. "V"*, pp. 279 - 298 at p. 286.

14. On 11th March 2015, Mukesh and Bharat filed Company Petition No. 20 of 2015 before the Company Law Board (NOW National Company Law Tribunal) seeking reliefs under Sections 397 and 398 of the Companies Act, 1956 inter alia alleging oppression and mismanagement of Contrex.

15. The Plaintiffs brought suit on 11th April 2015. They seek a declaration that the two lots of 50 Contrex shares vest, respectively, in the Gokal Trust and the SK Foundation; for orders directing Contrex and the Ashers to delete the names of Ramanlal on all 100 shares and also the names of Mukesh and Bharat on the two lots of 50 shares, and to insert the names of the Gokal Trust and the SK Foundation instead; and for consequential directions for rectification of Contrex's register of members. In the alternative, the Plaintiffs seek declarations that the two lots of 50 Contrex shares vest in, respectively, the Gokal Trust and the SK Foundation, and then there follow prayers for transmission of those shares to the two Plaintiff Trusts, rectification of the register and so on. The Motion seeks to restrain Contrex's directors from transmitting those shares to Mukesh and Bharat, and to restrain Mukesh and Bharat from exercising rights in respect of those shares. A Court Receiver is also sought of the shares, as is an order to deposit those shares in Court.

16. In response, Mukesh filed two affidavits dated 16th April 2015(10) and 23rd April 2015.(11) In the first affidavit, Mukesh raises the plea of limitation, contending that the "right to sue first accrued" to the Plaintiffs on 27th March 2007, when Ramanlal died.(12) He then says that these shares never formed part of Ramanlal's estate.(13) In the second affidavit, Mukesh takes the plea of maintainability, contending that without the Charity Commissioner's prior sanction, the suit is not maintainable.(14) There are also averments that some of

the reliefs (in the suit) are within the exclusive purview of the Company Law Board, and there is a traverse of the Plaint as well. I am not concerned with these. For the present purpose, the two pleas of limitation and maintainability were the only ones on which both sides made their submissions, and these are the only issues that I address in this judgment.

(10) Notice of Motion, 2nd Defendant Affidavit in Reply, pp. 12 - 22.

(11) Notice of Motion, 2nd Defendant Additional Affidavit, pp. 23 - 56.

(12) Notice of Motion, 2nd Defendant Affidavit in Reply, paragraph 4, pp. 13 - 14.

(13) Notice of Motion, 2nd Defendant Affidavit in Reply, paragraph 4, p. 18. I will not be considering the other allegations of mismanagement of Contrex, collusion, etc., since none of this was ever addressed.

(14) Notice of Motion, 2nd Defendant Additional Affidavit, paragraph 3, p. 24.

17. In particular, I am not addressing the other question that probably arises, viz., when two persons' names are shown as holders of shares of a company, whether they hold these shares as joint holders or as joint owners. I will proceed for now on the basis that a joint holder is not necessarily a joint owner. It is accepted that neither Mukesh nor Bharat paid any consideration for the acquisition of the Contrex shares, and that the entirety of the purchase price was paid by Ramanlal alone. Neither Mukesh nor Bharat had a fractional interest at any time in either of the two 50- share lots (i.e., an exclusive entitlement to 50% or 25 shares each). Their names simply appeared second on the two sets of holdings. I will take it, too, that there may be incongruities in the law governing companies and securities, perhaps exacerbated by apparently conflicting provisions regarding nominees, for these seem to provide that a nomination, if validly made, would defeat any right of survivorship of a joint owner. Given the consent Affidavits filed in the Probate Proceedings - and these affidavits have not been impeached at any time, nor those consents withdrawn - Mukesh and Bharat must be deemed to have accepted that all 100 Contrex shares were part of Ramanlal's estate. The subsequent assertion to the contrary seems to me to be a worthless latter-day epiphany.

C. Maintainability

18. The objection on this ground is founded principally on Sections 50(15) and 51 of the MPTA:

(15) The whole of Section 50 was substituted by Mah. 20 of 1971, Section 34.

SECTION 50: SUIT BY OR AGAINST OR RELATING TO PUBLIC TRUSTS OR TRUSTEES OR OTHERS.

In any case, -

(i) where it is alleged that there is a breach of a public trust, negligence, mis-application or misconduct on the part of a trustee or trustees,

(ii) where a direction or decree is required to recover the possession of or to follow a property belonging or alleged to be belonging to a public trust or the proceeds thereof or for an account of such property or proceeds from a trustee, ex-trustee, alienee, trespasser or any other person including a person holding adversely to the public trust but not a tenant or licensee,

(iii) where the direction of the Court is deemed necessary for the administration of any public trust, or

(iv) for any declaration or injunction in favour of or against a public trust or trustee or trustees or beneficiary thereof,

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

(a) an order for the recovery of the possession of such property or proceeds thereof;

(b) the removal of any trustee or manager;

(c) the appointment of a new trustee or manager;

(d) vesting any property in a trustee;

(e) a direction for taking accounts and making certain enquiries;

(f) an order directing the trustees or others to pay to the trust the loss caused to the same by their breach of trust, negligence, misapplication, misconduct or wilful default;

(g) a declaration as to what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(h) a direction to apply the trust property or its income cy-pres on the lines of section 56 if this relief is claimed along with any other relief mentioned in this section;

(i) a direction authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged or in any manner alienated on such terms and conditions as the court may deem necessary;

(j) the settlement of a scheme, or variations or alterations in a scheme already settled;

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

- (l) an order for winding up of any trust and applying the funds for other charitable purposes;
- (m) an order for handing over of one trust to the trustees of some other trust and deregistering such trust;
- (n) an order exonerating the trustees from technical breaches, etc;
- (o) an order varying, altering, amending or superseding any instrument of trust;
- (p) declaring or denying any right in favour of or against a public trust or trustee or trustees.
- (q) granting any other relief as the nature of the case may require which would be a condition precedent to or consequential to any of the aforesaid relief or is necessary in the interest of the trust:

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

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

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

SECTION 51: CONSENT OF CHARITY COMMISSIONER FOR INSTITUTION OF SUIT.

- (1) If the persons having an interest in any public trust intend to file a suit of the nature specified in section 50, they shall apply to the Charity Commissioner in writing for his consent. If the Charity Commissioner after hearing the parties and making such enquiries (if any) as he thinks fit is satisfied that there is a prima facie case, he may within a period of six months from the date on which the application is made, grant or refuse his consent to the institution of such suit. The order of the Charity Commissioner refusing his consent shall be in writing and shall state the reasons for the refusal.
- (2) If the Charity Commissioner refuses his consent to the institution of the suit under sub-section (1) the persons applying for such consent may file an appeal to the Divisional Commissioner in the manner provided by this Act.
- (3) In every suit filed by persons having interest in any trust under section 50, the Charity Commissioner shall be a necessary party.
- (4) Subject to the decision of the Divisional Commissioner in appeal under section 71, the decision of the Charity Commissioner under sub-section (1) shall be final and conclusive.

(Emphasis added)

19. Given the frame of the prayers in the suit, the question immediately arises why sub-clauses (ii) and (iv) of Section 50, read with sub-clauses (a) and (p) should not, at a minimum, apply to the present suit. To this, Mr. Sen responds that there is a long line of authority over the last half century that consistently takes the view that any action by trustees to establish control over assets does not require the Charity Commissioner's prior permission or consent. Such an action lies de hors Sections 50 and 51. In his submission, Section 50 is not a bar per se to the legal right of a trustee to bring an action. It is an enabling section that is intended to filter out frivolous litigation and nothing more. If, he argues, the jurisdiction of a civil court is ousted, then of necessity, the reliefs sought here should be ones that can be granted by the Charity Commissioner in exercise of his powers under the MPTA. If the Charity Commissioner cannot grant these reliefs, then the civil court's jurisdiction is not ousted. The submission is this: that however broad the definition of "person having interest" may now be under Section 2(10) of the MPTA,(16) and even if this includes trustees and beneficiaries, Section 50 is not a restraint or a choke on, or in defeasance of, the powers of trustees. It is intended to control other persons interested. Trustees always have the right to bring suit to husband and protect trust property. That is, indeed, their fiduciary obligation under common law.

(16) (10) "person having interest" [includes

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

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

(16) (c) in the case of a wakf, a person who is entitled to receive any pecuniary or other benefit from the wakf 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 wakf or to participate in any religious or charitable institution under the wakf,

(16) (d) in the case of a society registered under the Societies Registration Act, 1860, any member of such society, and

(16) (e) in the case of any other public trust, [any trustee or beneficiary .

(16) The word "include" was substituted for the word "means" by Bom. 28 of 1953, section 2. The words "any trustee or beneficiary" in clause (e) were substituted for "any beneficiary" by Mah. 20 of 1971, section 3(4).

20. Before the 1971 amendment,(17) Section 50 read thus:

(17) Mah. 20 of 1971.

"50. In any case, -

- (i) where it is alleged that there is a breach of a public trust,
- (ii) where a direction is required to recover possession of a property belonging to a public trust or the proceeds thereof or for an account of such property or proceeds from any person including a person holding adversely to the public trust, or
- (iii) where the direction of the court is deemed necessary for the administration of any public trust,

the Charity Commissioner after making such enquiry as he thinks necessary, or two or more persons having an interest in the trust and having obtained the consent in writing of the Charity Commissioner as provided in Section 51 may institute a suit whether contentions or not in the court within the local limits of whose jurisdiction the whole or part of the subject-matter of the trust is situate, to obtain a decree for any of the following reliefs -

- (a) an order for the recovery of the possession of such property or proceeds thereof;
- (b) the removal of any trustee or manager;
- (c) the appointment of a new trustee or manager;
- (cc) vesting any property in a trustee;
- (d) a direction for taking accounts and making certain inquiries;
- (e) a declaration as to what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
- (f) a direction authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;
- (g) the settlement of a scheme or variations or alterations in a scheme already settled; or
- (h) granting such further or other relief as the nature of the case may require:

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

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

21. The differences between Section 50 before the 1971 amendment and the same section thereafter are obvious. Subclauses (i) and (ii) have been amended. Sub-clause (iv) has been added. There is a third proviso. Sub-clause (cc) has

been renumbered, and there are material changes to the other sub-clauses from (a) onwards, and the addition of several further sub-clauses. The before-and-after comparative chart appended to this judgment shows the differences more clearly.

22. In *Gurusiddappa Tipanna Mugeru v. Miraj Education Society*, Miraj, 1961 (63) Bom LR 312, Naik J of this Court had before him a substantially similar question, albeit under the pre-amendment version of Section 50: whether permission in writing of the Charity Commissioner was necessary to the institution of the suit. Naik J answered the issue in these words:(19)

(19) Ibid, at p. 316.

"It will thus be seen that in respect of matters covered by Clauses (i) to (iii) of Section 50, a suit has got to be instituted either by the Charity Commissioner or two or more persons interested in the trust after obtaining the consent of the Charity Commissioner. The reliefs for which such a suit can be instituted have been set out in Sub-clauses (a) to (h) of Clause (iii) of Section 50 of the Act. It is clear that the present case does not fall within Clause (i) of Section 50 of the Act. Mr. Sukthankar contended that the case falls under the first part of Clause (ii), which runs thus:

where a declaration is necessary that a particular property is a property belonging, to a public trust.

Mr. Sukthankar's argument was that the present suit was a suit for declaration, that the amounts lying in fixed deposits belong to the plaintiff, which is a public trust and is, therefore, directly covered by Clause (ii) of Section 50 of the Act. He also laid emphasis upon the relief set out at sub-cl (a) of Clause (iii) of Section 50 of the Act viz., an order for the recovery of the possession of such property or proceeds thereof. I am unable to accept this contention. Section 50 must be read as a whole and reading all the clauses of that section together, it appears to me clear that the scheme of the section is to provide for a suit either by the Charity Commissioner or two or more persons interested in the trust with the consent of the Charity Commissioner in cases where any question relating to the management of the property of the public trust arises. It is true that the wording of Clause (ii) of Section 50 of the Act is apparently wide; but, it is not wide enough to cover a case where the property is claimed by the public trust as its own and that claim is disputed by a stranger. This interpretation finds some support, from the expression used in the second part of cl, (ii) of Section 50 of the Act viz., from any person including a person holding adversely to the public trust. In my view, Clause (ii) as a whole applies to a case where either there is no dispute about the property belonging to the trust and the dispute relates only to the trust being a public trust or to a case where some person has taken possession of the trust property and holds it adversely to the public trust. Clause (ii) is wholly inappropriate to a situation where the trust claims the property as having been donated to it and a third person disputes that donation and sets up

title in himself on the basis of being the rightful owner of the property or an heir to the donor thereof. The underlying object of Section 50 of the Act is to put an embargo on frivolous litigations and the consent of the Charity Commissioner is regarded as a sort of safety valve for avoiding acrimonious and frivolous litigations.

Ordinarily, the trustees of a trust can institute a suit against a third person for the recovery of the trust property. Order 31, Civil Procedure Code, lays down the procedure to be followed in respect of suits to be filed by the trustees against third persons. Rule 1 Order 31, Civil Procedure Code, runs thus:

In all suits concerning property vested in a trustee, ? where the contention is between the persons beneficially interested in such property and a third person, the trustee... shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. ?

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

(Emphasis added)

23. This is a powerfully articulated analysis, and it is direct and plain. I do not see how Mr. Seervai's case falls outside this formulation. The two Plaintiff trusts sue claiming title in themselves; Mukesh and Bharat are private persons who claim title to the same property. A suit by the trust is, following the Gurusiddappa reasoning, perfectly competent.

24. To the same effect is the ratio of the decision of a Division Bench of this Court in *Rajgopal Raghunathdas Somani v. Ramchandra Hajarimal Jhavar*, 1967 (69) Bom.L.R. 472 : 1967 Mh.L.J. 799; *S. P. Kotval CJ & B.D. Bal J Gurusiddappa* does not seem to have been cited or considered by the Division Bench. The suit in question was for possession of immovable properties, inter alia alleging that defendants Nos. 1 and 2 had illegally taken possession of the trust properties. The Civil Judge, Senior Division, decreed the suit. In appeal, the defendants took a plea of a bar under Section 50 of Bombay Public Trusts Act, 1950 ("BPT Act") as it was then known. The Division Bench said:

"Now, in our opinion, it is unnecessary to go into all these questions, particularly the question as to whether on its language Section 50 applies in the present case and. as to the proper construction of the said phrase "Persons having an interest" occurring in that section, for, in our opinion, the present suit is not a suit which would fall within the category of cases contemplated in a, 50. When the law relating to public trusts was separately codified as the Bombay Public Trusts Act, it became necessary to include in it a provision analogous to that contained in Section 92 of the Code of Civil Procedure which did not apply to religious and charitable trusts. Its provisions were never intended to act as a curb upon the normal powers of trustees in the matter of instituting suits. Section 50 itself confers the right upon two or more persons having an in interest in the trust to file a suit whether contentious or not to obtain certain stated reliefs which are to be found mentioned m Clauses, (a) to (h) of the section. In terms the section does not speak of trustees at all and prior to the amendment of the definition in Section 2(10) by substituting the word "includes" for the word "means" the appellant could not reasonably have contended that the word "trustee" means "person having an interest". It was because of the amendment made by the Bombay Act XXVIII of 1953 that the appellants have been enabled to raise the contention that "trustees" will be included within "persons having an interest" under Section 2(10) and therefore "trustees" would be included in the category of "two or more persons having an in interest in the trust" as mentioned in Section 50. Whatever may be the effect of the amendment, it is clear that the section is in the first place both a protective as well as an enabling section. It protects public charities from frivolous suits being brought by persons interested by interposing the condition that the consent of the Charity Commissioner must be obtained. At the same time, it enables two or more persons interested to sue subject to the limitations laid down in the section. That is a necessary safeguard in case the trustees of a public trust fail in their duty to safeguard the property of the trust. The question is whether having: regard to the purpose and object of the section, it was intended to bar every other suit which a trustee could undoubtedly bring as the legal" owner of the property unless the conditions of Section 50 are fulfilled. In our opinion, that was not the intention behind Section 50.

Normally a trustee as the legal owner of the trust properties has all the rights inherent in a natural owner of property and can sue to recover trust property.

That right we do not think was. at all intended to be affected by the provisions of Section 50. But what Section 50 purported to do was to confer upon two or more persons interested in trust property, not necessarily the trustee, the right to move to protect the trust property in the event of the trustees failing to do so. The provisions of Section 92 of the Code of Civil Procedure are analogous to the provisions of Section 50 and prior to the present Code of Civil Procedure, the relevant section in the old Code of Civil Procedure (Act XIV of 1882), was Section 539. The separate right of a trustee de hors the provisions of Section 539 to file a suit for the protection of trust properties was recognised in an early Madras case viz *Nellaiyappa Filial v. Thangama Nachiyar*. (1897) I.L.R 21 Mad. 406.

(Emphasis added)

25. Turning to the provisos to Section 50, as they then existed, the Division Bench in *Somani v. Jhavar* said: *Somani v. Jhavar*, supra; at pp. 479 - 480 of the Bom.L.R. report.

In *O.R.M.O.M. SP. (Firm) v. Nagappa Chettiar* (1940) Bom. L.R. 440 (PC) the plaintiff was suing on behalf of two religious charities. His deceased father was interested to recover from the plaintiff's uncle two amounts of Rs. 10,000 each which had been wrongly credited to the personal account of his uncle after they had been first credited to the accounts of the religious charities. A similar objection was raised that the plaintiff could not bring the suit without the consent of the Advocate-General under Section 92 and their Lordships of the Privy Council negatived the contention as follows (p. 449):

It was suggested in the course of argument that the suit should only have been brought with the consent of the Advocate General under Section 92 of the Civil Procedure Code, but their Lordships think it clear that no such consent is necessary in order that a trustee may recover trust property in the hands of a stranger to the trust.

Budree Das Mukim v Chooni Lall Johurry (1906) I.L.R. 33 Cal. 789, where Mr. Justice Woodroffe analysing the provisions of Section 92 observed (p. 802):

Then has this section done away with or affected rights of suit which existed prior to and independently of it. I think not. If an individual could have sued before, he can, in my opinion, do so now.

and at page 803,

I think the argument addressed to me by learned Counsel for the plaintiffs is sound, namely, that the section is not restrictive, but cumulative in its effect. Its action is shortly this. As regards parties it confers a right on certain persons, who had none before, namely, the Collector or other public officer such as the Legal Remembrancer in Allahabad. ? It is therefore entirely enabling as regards such persons. As regards the general public interested, it is enabling in this sense that two persons may now sue, where it would have been necessary before that all should sue or that some should obtain leave to sue on behalf of the rest. To this

special privilege it annexes a condition to prevent wasteful suits in that it requires that sanction should be obtained.

In that case a curious contention was also advanced that Section 92 would not apply as the defendant in that suit was a mere trespasser and not a trustee and it was answered at p. 805 as follows:

There is no doubt but that claims by trustees against persons, who are strangers to the trust and who set up a title hostile thereto, such as alienees and mere trespassers holding adversely thereto, are not within the section.

In *Vishvanath Govind Deshmane v. Rambhat* (1890) ILR 15 Bom. 148, the same view was taken, in a case where the trustee was suing persons who were not at all entitled to the property sued for and it was held that the case was not covered by Section 92. See also *Kashinath v. Gangubai*. (1930) 32 Bom. L.R. 1687.

Considerable stress was laid by Mr. Varadachari upon the first proviso to Section 50 which says that no suit claiming any of the reliefs specified in this section shall be instituted in respect of any public trust except in conformity with the provisions thereof. It seems to us that the proviso must be read in the light of the totality of the provisions of Section 50 itself. It is a settled rule of construction that the proviso to a section cannot enlarge its scope and that its proper function is merely to carve out an exception from the general rule laid down in the section. What Mr. Varadachari argues is that having regard to this proviso if a suit is filed in which reliefs claimed come within the reliefs (a) to (h) mentioned in Section 50 and those reliefs are in respect of any public trust, then Section 50 would apply in every case. We do not think that the proviso to a section can enlarge the scope of the parent section. We must, therefore, limit the operation of the proviso to what is the true meaning of the main provisions of Section 50. We have already indicated that though Section 50 is couched in somewhat wide language, it is clear from the authorities to which we have referred above that it is "not restrictive but cumulative." It only enables persons having an interest to sue and does not prohibit any suits being filed by trustees or public trusts. The trustee who is in the position of a legal owner of property can sue to recover the property from persons in the position of the defendants who are without any right, title or interest in themselves, (and it must be emphasised here that though Mr. Varadachari has challenged the finding that the defendants are trespassers and have no right, title or interest whatsoever there was very little that could be shown to the contrary) without obtaining any previous sanction.

(Emphasis added)

26. Eighteen years later, in *Shree Gollaleshwar Dev & Ors. v. Gangawwa Kom Shantayya Math & Ors.*, (1985) 4 SCC 393 the Supreme Court had before a very similar question, in appeal on certificate from a decision of a Full Bench of the Karnataka High Court. Here, a suit was first filed without the Charity Commissioner's consent. On an objection being raised, the suit was dismissed

on the law as it then stood. A fresh suit was filed after consent was obtained. The defendants objected that the plaintiffs, though trustees, were not "persons having interest". The trial court dismissed the suit. The appeal court referred the matter to a larger bench. The Full Bench followed Woodroffe J in *Budree Das Mukim v. Chooni Lal Johurry*, ILR (1906) 33 Cal 789, 807 and held the suit to be one of a representative character, and that Section 50 of the BPT Act and Section 92 of the Code of Civil Procedure, 1908 ("CPC") were in pari materia. The Full Bench held that the definition of a person having interest would not include a trustee; that the nature of the suit by a trustee was a representative action; and therefore two or more trustees could not bring suit with prior written permission of the Charity Commissioner under Section 50(ii) of the BPT Act. This was the context of the decision, and it is important to note that the second suit was filed with the Charity Commissioner's written permission.⁽²⁴⁾ Reversing the Full Bench, in paragraph 14 to 16, the Supreme Court held that while Section 50 creates and regulates the right of the Charity Commissioner or two or more persons interested in the trust to sue, it is a supplementary statutory provision that does not defeat the trustees' rights to bring a suit for recovery of trust property in the usual way. The Supreme Court decreed the plaintiff-trustee's suit.

(24) Again, this was on the definition in Section 2(10) and on the wording of Section 50 before the 1971 amendment. This is clear from paragraph 13 of the Supreme Court decision and also since the second suit (after obtaining permission) was filed in the district court in 1962.

27. All these decisions were considered by a Division Bench of this Court (M. L. Pendse and S. H. Kapadia JJ as they then were) in *Amirchand Tulsiram Gupta and Ors. v. Vasant Dhanaji Patil and Ors.*, 1992 (2) Bom.C.R. 22 : 1992 (94) Bom. L.R. 965. The learned single Judge dismissed the trustee-plaintiffs' suit for a declaration of title and recovery of possession with incidental reliefs in respect of six lands at Bhandup, Mumbai. Prayer (a) sought a declaration that the trustees were the owners of the suit lands and the defendants had no right, title or interest in them, and were trespassers. Prayer (b) sought a decree of possession in favour of the plaintiffs against the defendants. Prayer (c) was for a permanent injunction. The trial court found against the plaintiffs on having established a title; but that apart, it also found that prior written permission of the Charity Commissioner under Section 50 of the BPT Act was necessary, and that without it, the suit was not maintainable. By this time, Section 2(10) had been amended and included trustees in the definition of "person having interest"; and the amended Section 50 was also in play, the suit having been filed in 1974, three years after the 1971 amendment. In paragraphs 6 and 7, the Division Bench rejected the contention that the Charity Commissioner's prior written consent under sections 50 and 51 of the Public Trusts Act was a condition precedent to the institution of a possession recovery suit by trustees against trespassers or persons claiming adverse to the trust; and that a failure to obtain consent must result in a dismissal of the suit. Both *Gurusiddappa and Somani v. Jhavar* were cited and reaffirmed: the separate right of a trustee de hors the provisions of

section 50 to file a suit for protection of trust properties is indisputable. The Division Bench also found that the amendment to Section 2(10) and to Section 50 had no impact on this legal position: trustees were always "persons having interest", even before the amendment. As to Section 50, the Division Bench found that the amendment altered the position not a whit, as the amended section made no departure from the earlier section. The Division Bench also referenced the Supreme Court decision in *Shree Gollaleshwar* and noted the finding that Section 50 is a supplementary statutory provision, not in defeasance of a trustee's right to recover trust property in the usual way, viz., that the right of a trustee to bring a suit in the usual way, that is in exercise of rights under common law is unaffected by Section 50. The Division Bench noted this was the view consistently taken by this Court; and it therefore held that the suit was maintainable even without permission.

28. I have dealt with these cases at some length because they are clearly fundamental to Mr. Sen's case. A point to be noted here, however, is that in none of these cases was there ever a question about the trustees' capacity as trustees-their trusteeship was never in question. As we shall see, when that does happen, and questions are raised about the validity of a plaintiff's claim to trusteeship, very different considerations come into play. At the broadest level, this is merely logical: where the position and capacity of trustees is undoubted, the question is only whether they can sue on title and for possession without the Charity Commissioner's prior permission. Where, however, there is an even more fundamental issue, viz., whether a particular individual is at all properly a trustee, then even before we get to the issue of suit competence, maintainability or jurisdiction, there is the threshold issue of the legitimacy of the claim to trusteeship. This claim has nothing at all to do with the assertion of title, for that proceeds on the assumption that there is no dispute about the legitimacy of the trusteeship, and title is claimed in the trust itself, not by the individual trustees personally. Where an individual's claim to trusteeship is doubted or questioned, however, it must first be shown that he or they are even entitled in law to lay any claim at all to any property. This is an issue that arises in at least two later cases, one of which is critical to Mr. Seervai's opposition to the present suit.

29. Before I proceed to that, I must at this stage refer to certain other provisions of the MPTA. I do so not only because these later cases advert to these provisions, but also because Mr. Seervai's construct depends heavily on their interpretation. For convenience, I have included these in another annexure appended to this judgment; I do not propose to set all of these out at length here, but only to the extent necessary. I will, instead, quickly examine the frame of the relevant sections.

(a) The MPTA says it is an Act to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Bombay. Section 2 contains definition and interpretation provisions. We have already seen Section 2(10), the definition of "person having an interest". A Court is defined to

be, in Greater Mumbai, the City Civil Court and elsewhere, the District Court.(26) A public trust 26. Section 2(4). means an express or constructive trust for either a public religious or charitable purpose or both.(27) It includes places of religious worship, religious and charitable endowments and registered societies formed for a religious or charitable purpose or both.(28) A "trustee" means a person in whom either alone or in association with other persons, the trust property is vested and includes a manager.(29) Charitable purposes are defined in Section 9.

(26) Section 2(4).

(27) Section 2(13).

(28) That is, societies registered under the Societies Registration Act, 1860.

(29) Section 2(18).

(b) Chapter IV deals with registration of public trusts. Registration is mandatory. Section 17 requires the keeping of books, indexes and registers. The particulars of the required entries are set out. These include, inter alia, particulars of movable and immovable property, their value and description.

(c) Section 19 speaks of an enquiry for registration. When an application is made for registration under Section 18, the Deputy or Assistant Charity Commissioner must enquire and ascertain many things, including, importantly for our purposes, whether any property is the property of such a trust.(30)

(30) Section 19(ii).

(d) Once that enquiry is complete, Section 20 says that the Deputy or Assistant Charity Commissioner must record his findings with reasons and then may make an order for payment of the registration fee.

(e) Section 21 then speaks of "entries in the register". This is the register mentioned in Section 17 and the entries are to be of the findings recorded under Section 20 (pursuant to the enquiry under Section 19). These entries are said to be "final and conclusive".(31)

(31) Section 21(2).

(f) Then follow other provisions regarding changes in the entries, (32) and allied matters. Under Section 22(2), the Deputy or Assistant Charity Commissioner may hold an inquiry to verify the correctness of the entries in the register or to ascertain whether there has been any change in those entries. Should a change be found, a reasoned order is required, and it is appealable; and those changes are to be noted in the register. Once again, these corrected change entries are final and conclusive.

(32) Section 22.

(g) Section 26 speaks of certain cases where entries in the register are to be made or amended, evidently a necessary corollary to the preceding sections. It

reads thus:

26. ENTRIES IN REGISTER TO BE MADE OR AMENDED IN CERTAIN CASES

(1) Any Court of competent jurisdiction deciding any question relating to any public trust which by or under the provisions of this Act is not expressly or impliedly barred from deciding shall cause copy of such decision to be sent to the Charity Commissioner and the Charity Commissioner shall cause the entries in the register kept under section 17 to be made or amended in regard to such public trust in accordance with such decision. The entries so made or amended shall not be altered except in case where such decision has been varied in appeal or revision by a court of competent jurisdiction. Subject to such alterations, the entries made or amended shall be final and conclusive.

(2) Where the Charity Commissioner decides any question in relation to any public trust or passed any order in relation thereto, he shall also cause the entries in such register to be made or amended in regard to such public trust in accordance with the decision so given or order passed by him ; and thereupon, the provisions of subsection

(1) shall apply in relation to entries so made or amended as they apply in relation to entries made or amended according to the decision or order of a court.

(h) Section 31 bars suits on behalf of unregistered trusts; and this also applies to claims of set off or other proceedings to enforce any rights on behalf of such a public trust.

(i) We then have the provisions of Sections 50 and 51. I have already noted these earlier.

(j) We are next concerned with Sections 79 and 80, and these must be set out.

79. DECISION OF PROPERTY AS PUBLIC TRUST PROPERTY

(1) Any question, whether or not a trust exists and such trust is a public trust or particular property is the property of such trust, shall be decided by the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal as provided by this Act.

(2) The decision of the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal, as the case may be, shall, unless set aside by the decision of the Court on application or of the High Court in appeal be final and conclusive.

80. BAR OF JURISDICTION

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

(Emphasis added)

30. Church of North India v. Lavajibhai Ratanjibhai and Ors., (2005) 10 SCC 760, is a Supreme Court decision on which both sides rely. The matter came up from the Gujarat High Court and was chiefly under Section 80 of the BPT Act. A brief look at the facts is necessary. In the last years of the 19th century, American missionaries set up a church in Valsad, Gujarat to propagate Protestantism, and to set up and manage churches for people of that faith. This was called the "Brethren Church". Its activities are said to have included not just evangelism but extended to education, health services, and various social and charitable works. In 1930, a Continuation Committee was appointed by representatives of the Brethren Church and other churches meeting in a Round Table Conference in New Delhi. The purpose included, apparently, a proposal to amalgamate several churches. This Continuation Committee evolved a broad proposal for unification of various churches. The participating churches accepted this. The First District Church of the Brethren in India was registered as a religious society under the Societies Registration Act, 1860. A second Round Table Conference followed in 1951, again in New Delhi, and this resulted in the constitution of a Negotiation Committee intended to continue deliberations for the union of the constituent churches. Five other associations were included in that committee. The Brethren Church (First District Church of the Brethren) was registered as a public trust in Gujarat bearing No. E-643, Bharuch in terms of the BPT Act. The Negotiating Committee made its final recommendations. This was called the "4th Plan of the Union" and published in a volume entitled "Plan of Church Union in North India and Pakistan". The principal recommendation of the Committee was that all six uniting churches be dissolved and consolidated into a single church to be known as "The Church of Northern India" ("CNI"). This was to be the legal continuation and successor of the erstwhile united churches. All properties, assets, obligations etc. of the erstwhile united churches were to vest in and devolve upon the CNI. The 4th Plan publication was circulated to the governing bodies of the uniting churches for their respective domestic decisions. In mid-February 1970, a majority of the members resolved to effect the dissolution of the society. In November 1970, the Negotiating Committee decided to formally inaugurate the CNI at Nagpur. The Brethren Church then placed the resolution for dissolution of the society "at the altar"; explicitly affirmed that the CNI would be the legal continuation and successor of the Brethren Church; and further, that all the rights, titles, claims, estates and the interests of the Brethren Church together with its privileges and obligations would vest in the CNI as its legal heir on or from the date of inauguration. In 1976, The Church of North India Trust Association was registered as a company under the Companies Act, 1956.

31. Four persons, later arrayed as defendants Nos. 1 to 4, all said to be initially part of the CNI and parties to the February 1970 resolution contended that the First Brethren Church was never dissolved and continued to exist. They obstructed the functioning of the CNI in various ways, including in particular worship services. They claimed to represent the First Brethren Church. Persons

claiming to be former office bearers of the Brethren Church brought suit in the District Court, Senior Division, Bharuch in 1979. The CNI was joined as defendant no. 5, though no reliefs were sought against it. The Brethren Church itself was not joined. The plaintiffs said that the CNI was the deemed legal successor of the Brethren Church; all the rights, titles, claims, estates and interests of the latter, and its privileges and obligations, vested in the CNI with effect from the date of the 1970 Nagpur inauguration. That, the plaintiffs said, operated to dissolve the Brethren Church; and the CNI was then registered in 1976 although the vesting in its favour took place some six years earlier in 1970. There seems to have been little dispute that local churches or congregations that wished to continue on the old constitution were at liberty to do so till the Third Ordinary Synod, scheduled for 1977. It seems that the first four defendants asserted their independent right to hold all the movable and immovable properties of the "Valsad Brethren Church" or congregation. The 1st defendant claimed to be the pastor of the Valsad Brethren Church and its treasures; defendants Nos. 2 to 4 were committee members, with defendant No.2 claiming to be the secretary. These four persons started writing to banks asking them not to deal with the Pastorate Committee of Ankleshwar and Valsad, and claiming to be the only ones legally entitled to deal with the financial affairs of those pastorates. The 2nd defendant also challenged the authority of the elected treasurer of the Ankleshwar Church. The 3rd Defendant and his associates issued a statement declaring their intention to sever all ties with the CNI and to, as it were, hoist the flag of ecclesiastical independence. These actions were impeached in the suit before the Bharuch District Court. The original defendant No. 4 in his written statement filed in the said suit took a categorical stand that there had been no dissolution of the Valsad Brethren Church and that its separate entity was not lost. According to him, the constituent Brethren Churches were temporarily suspended till revived, and, thus, the contesting defendants were entitled to work for and on behalf of the Brethren Church. In the meantime, the CNI got itself registered with the Charity Commissioner by an order dated 12th May 1980, effective 19th November 1971. One of the causes of action in the suit was the purported constitution of a special committee by the defendant Nos. 1 to 4 (in addition to the other acts of challenge and obstruction). The plaintiffs were clear that their suit involved questions as to the rights of property of the former Brethren Church. They sought declarations that the First District Church of Brethren had ceased to exist; and that the CNI was the legal continuation and successor of the First District Church of Brethren and had the full panoply of right of all titles, estates, claims and interests, and that the constitution, decisions and resolutions of the CNI, its Synod and the Gujarat Diocesan Council bound all pastorates in Gujarat, including those said to be functioning as local churches or congregations under the First District Church of Brethren. The plaintiffs also sought perpetual injunctions against defendants Nos. 1 to 4.

32. At some point in these proceedings, the Charity Commissioner was

impleaded. He filed a written statement. In this, he pleaded a jurisdictional bar to the suit under Section 80 of the BPT Act.

33. The District Court decreed the suit on 31st March 1984. An appeal succeeded. The CNI filed a Second Appeal. That was dismissed. The CNI filed a Special Leave Petition to the Supreme Court.

34. On the question of Section 50, the Supreme Court said:

81. In *Shree Gollaleshwar Dev and Ors. v. Gangawwa Kom Shantayya Math and Ors.* (1985) 4 SCC 393, it was held: (SCC pp.402-403, para 14)

"14. It is clear from these provisions that Section 50 of the Act created and regulated a right to institute a suit by the Charity Commissioner or by two or more persons interested in the trust, in the form of supplementary statutory provisions without defeasance of the right of the manager or a trustee or a shebait of an idol to bring a suit in the name of idol to recover the property of the trust in the usual way. There is therefore no reason why the two or more persons interested in the trust should be deprived of the right to bring a suit as contemplated by Section 50ii(a) of the Act. Although sub-section (1) of Section 52 makes Sections 92 and 93 of the Code inapplicable to public trusts registered under the Act, it has made provision by Section 50 for institution of such suits by the Charity Commissioner or by two or more persons interested in the trust and having obtained the consent in writing of the Charity Commissioner under Section 51 of the Act."

82. The provisions of the Act and the Scheme thereof leave no manner of doubt that the Act is a complete code in itself. It provides for a complete machinery for a person interested in the trust to put forward his claim before the Charity Commissioner who is competent to go into the question and to prefer appeal if he feels aggrieved by any decision. The bar of jurisdiction created under Section 80 of the Act clearly points out that a third party cannot maintain a suit so as to avoid the rigours of the provisions of the Act. The matter, however, would be different if the property is not a trust property in the eye of law. The civil court's jurisdiction may not be barred as it gives rise to a jurisdictional question. If a property did not validly vest in a trust or if a trust itself is not valid in law, the authorities under the Act will have no jurisdiction to determine the said question.

(Emphasis added)

35. Mr. Sen points out that *Church of North India* cites *Shree Gollaleshwar* and does not distinguish it in any way. The point to be noted, he says, is that while dismissing the CNI's appeal, the Supreme Court was concerned with that other threshold issue, viz., whether or not the plaintiffs were "trustees" properly so called. Their position as trustees was always under challenge. The second prayer sought a declaration as to CNI's status as the trust in which the property vesting took place. This is a point of differentiation, he submits, and I believe correctly. If we return to *Church of North India* and to earlier paragraphs, we find that the

Supreme Court held in terms that prayers (a) and (b), the base declarations, were such that a Civil Court could never have granted them.⁽³⁴⁾ Even the injunction prayer could not have been granted without a determination that the plaintiffs had the legal right to own the properties of the First District Church of the Brethren. The plaintiffs needed, the Supreme Court said, "to establish that they could file a suit for enforcement of the right of the appellant [the Church of North India as a religious trust and such a legal rights vests either in the plaintiff or in the appellant herein indirectly." The point to be noted is that the Church of North India was not the plaintiff. It was arrayed as the 5th Defendant. The plaintiffs were persons claiming to be former office bearers of the Brethren Church, and the declarations they sought were not in their capacity as trustees of the CNI at all. The suit sought reliefs for the benefit of the CNI, joined as defendant No.5. Thus, the position of the plaintiffs vis-a-vis the trust and qua trustees was always more than somewhat doubtful.

(34) Church of North India, *supra*, paragraphs 74 and 75, SCC pp. 786, 787.

36. More fundamentally, the distinction that Mr. Sen so correctly draws puts us, I think, squarely within the frame of the Shree Gollaleshwar ratio to the extent that decision draws a distinction between a representative suit under Section 92 of the CPC and one under Section 50 of the MPTA or the BPT Act. The suit in the Bharuch District Court was of the former variety, a representative action at best, for the benefit of the CNI, a defendant. No question arose here of a saving of the inherent powers and duties of trustees. In *Gafoor Ali Hussain v. Ram Mahadik & Ors.*, 2000 (1) Bom. C. R. 797 H.L. Gokhale J of this Court (as he then was) followed *Amirchand* and said in terms that Section 50 does not mean that trustees do not have the power to bring suit: "the trustee is the legal owner of the property and enjoys all the rights inherent in a natural owner of property and can sue to recover trust property. Section 50 cannot apply as a bar to the substantive right of the trustee to institute suit. No permission under Section 51 is necessary in such a case."⁽³⁶⁾

(36) In *Surayya Afzal Khan v. Raza Shah Fakir Takiya and Masjid Trust*, 2006 (4) Mh. J. J. 544, Mohta J took a similar view.

37. This distinction assumes importance because in at least one later case decided by a single judge of this Court, where all these authorities were cited, a similar issue arose. In *Rajiv K. Mehta v. Mrs. Rekha H. Sheth & Ors.*, 2014 (3) Bom. C.R. 771, R. D. Dhanuka J had before him two applications by the 1st and 13th defendants to reject or dismiss the suit. There, the plaintiff claimed to be trustee of the Lilavati Kantilal Mehta Medical Trust, which own, operates and run the Lilavati Hospital in Bandra, Mumbai. There, the plaintiff cited *Amirchand*, *Shree Gollaleshwar* (AIR 1986 SC 231), *Gurusiddappa and Somani v. Jhavar*, among others. These were distinguished *inter alia* on the ground that in those cases, the status of the plaintiffs as trustees was undisputed.⁽³⁸⁾ In the *Rajiv Mehta* case, that dispute was very much at the forefront. Dhanuka J found that on an overall reading, the suit was filed by a person claiming trusteeship against

inter alia other trustees, alleging breach of trust, negligence, misconduct and wilful default. That, Dhanuka J said, brought the suit squarely within Section 50(i), (ii), (a), (d) and (f). The plaintiff sought a money decree in favour of the trust, a defendant. A question arose whether the suit was for enforcement of the plaintiff's personal civil rights or was on behalf of the trust and acting as a trustee of the trust. The distinction, therefore, regarding the capacity in which the suit is brought is entirely material to a discussion under Section 50.

(38) See paragraph 47 of the decision in the Manupatra report regarding Amirchand, for instance.

38. Paragraph 96 of Chursh of North India, SCC Report, p. 791 (P.2564, Para 100). reads thus:

96. In Keki Pestonji Jamadar v. Khodadad Merwan Irani (AIR 1973 Bom 130 : (1972) 74 Bom LR 198 (FB)), the question was as to whether the author of a trust was the lawful owner of the property of which he has created the trust. The Full Bench of the Bombay High Court held that the author of the trust has no title over th property and Section 80 would not operate as a bar.

39. Keki Pestonji Jamadar v. Rodabai Khodadad Merwan Irani, AIR 1973 Bom 130 : (1972) 74 Bom LR 198 (FB) was indeed Mr. Sen's next halt and, for some reason I was wholly unable to understand, his citing of it drew a quite alarming amount of ire from Mr. Seervai (even by his own standards), who claimed that it has been distinguished at least seven times, including by the Supreme Court. I understood Mr. Sen to cite Keki Pestonji Jamadar only to suggest that the Charity Commissioner does not enjoy exclusive jurisdiction to decide all questions in all circumstances and at the instance of all persons relating to title to property. The question before the Full Bench was whether Sections 79 and 80 covered a determination of whether the author or settlor of a trust was the lawful owner of the property he settled in trust. The Full Bench held that those sections did not cover such a case, and that a civil court's jurisdiction was not barred. The Full Bench held that in deciding whether or not Section 80 is attracted, one must look to the substance, and not the form, of the claim made in the suit and the real relief sought. If the determination of that relief involves a decision on a question that, under the Act, only an authority or officer is empowered to do, there is an ouster of jurisdiction. That ouster is not to be readily inferred; the twin conditions of Section 80 must be met: viz., first, the question must be one that the MPTA says must be decided by an officer or authority under that act; and, second, that it must be a matter in respect of which the decision of the officer or authority is said by the statute to be final and conclusive. On the question of Section 79 and the claim to jurisdictional exclusivity vesting in the Charity Commissioner to determine title disputes, the Full Bench said this:(41)

(41) Keki Pestonji Jamadar, supra, Bom. L. R. pp. 208 - 210.

"The third question relegated to the decision of the Deputy or Assistant Charity Commissioner is whether the "particular property is the property of such trust".

This clause is couched in words of doubtful import leading to the expression of divergent views as regards its scope. Learned Counsel for the appellant contends for the view that as the question whether the particular property is the property of the trust cannot be answered without deciding whether the author of the trust had the right or title to the property conveyed to the trust, the authorities must decide this latter question and, indeed, it is their function and duty to decide it. It is urged that questions of title to the particular property are thus required to be decided in inquiries under Section 19 and the jurisdiction of the Civil Court to decide those questions is barred under Section 80. The contesting respondents contend for the rival view that the question whether the author of the trust had title to the property conveyed to the trust is outside the scope of the inquiry under Section 19 and therefore, the jurisdiction of the Civil Courts to decide or deal with that question is not barred. The learned Government Pleader has pointed out the merits and demerits of both the views but he has given good reasons why the contention of the Respondents should be accepted in preference to that of the appellant.⁴² Having considered the matter in all the aspects presented before us, we are of the opinion that the respondents are right in their contention. The purpose of the Act, the procedure prescribed in inquiries under Section 19, the absence of any remedy under the Act to those who were not parties to the inquiry under Section 19 but whose anterior or superior title would be concluded by the decided in that inquiry and the general scheme of the Act, all tend to show that questions of title to the trust property are outside the scope of the inquiry under Section 19.

42. My emphasis of this phrase stems only from a deep sense of loss when law officers of the State could be relied on for a neutral view; here the two law officers in question, Mr. Gumaste and Mr. S. C. Pratap (later a judge of this Court) commended the view that the civil court's jurisdiction was not ousted, and the matter was not thoroughly tribunalized. Such an approach is, sadly, very nearly extinct today.

?

Neither the Act nor the Rules contemplate that persons who claim adversely to the trust or who dispute the right or title of the author of the trust to the trust property must be heard in the inquiry under Section 19. In fact, Section 19 and R. 7-A (1) only reckon applications under Section 18 which are to be made by trustees and applications by "any person having interest in a public trust". Surely, persons in the position of Rodabai and Baimai are not persons "having interest in a public trust". They are interested in the assertion of their own private title to the property and in disputing the right of Jamshedji to convey that property to the trust. ? ?

?

And speaking of remedies, what is truly important is that the Act provides no remedy to a person whose title is deemed to have been concluded by the order

of the Deputy or Assistant Charity Commissioner, without affording to him an opportunity of being heard. The argument is that the decision that a particular property belongs to the trust involves the determination that it belongs to no one else and therefore, after the Deputy or Assistant Charity Commissioner records a decision in the inquiry, the Civil Court has no jurisdiction, in view of Section 80, to decide any question regarding title to the particular property. It is legitimate to inquire: if Section 80 bars the suit, does the Act provide a remedy to the aggrieved person, as a self-contained Code should provide?

(Emphasis added)

40. Mr. Sen points out that this decision was followed, fairly recently, by a Division Bench of this Court in *Ramnarayan Sahu v. State of Maharashtra*, 2005 (2) Mh.L.J. 95. There, the Court held that the statutory procedure for an inquiry under Section 19 is wholly unsuited to a proper and effective adjudication of disputed titles to trust property. This is a decision of 17th September 2004, before the Supreme Court decision of 3rd May 2005 in *Church of North India*; but, as I have noted, the Supreme Court did not, in paragraph 96 of *Church of North India*, overrule the Full Bench decision or say it was not good law.

41. Now Keki Pestonji Jamadar referenced several Rules as they then existed to demonstrate procedural inadequacy. I do not think it necessary to examine this aspect any further. It is sufficient to note that many of those Rules have since been changed. For instance, the procedure under the Small Causes Courts acts are made applicable under Rule 7; evidence may now be recorded verbatim instead of only as a memorandum under Rule 11; and importantly, notice is now issued inviting objections from all persons concerned. The question is whether Keki Pestonji Jamadar is confined to the peculiar fact-situation in which it was decided - in particular the state of the rules and the unamended statute - as Mr. Seervai seems to contend, or whether, as Mr. Sen and Mr. DeVitre say, it enunciates a more fundamental principle of broader application. *Samastha Lad Vanjari Samaj, Ram Mandir Trust by its Trustees (Budho Motiram Dhakane and others) v. Waman Kisan Sanap & Ors.*, 1976 Mh. L.J. 806 was decided by a Division Bench of this Court on 19th December 1975. It thus predates by nearly thirty years the decision in *Church of North India*. Here, Hajarnavi and Mukhi JJ decided a Letters Patent appeal that raised a question of law as to the power and jurisdiction of the Charity Commissioner and other authorities under the BPT Act "to decide questions which are required to be decided or dealt with by them under the relevant provisions of the Act." The appellant trust was a very old one, dating back to the late 19th century or early years of the 20th century. It was finally registered in 1958 after the necessary enquiry. At the time of registration, one particular property at Jalgaon was not included as one its holdings. In 1962, the trustees applied under Section 22 of the BPT Act; that was treated as an application under Section 22-A. The Assistant Charity Commissioner held the property to be of the trust. On 19th June 1967, He ordered the relevant entry to be made and directed that suitable steps be taken for recovery of possession. A

tortuous litigation followed. It ended in a First Appeal before this Court. A single Judge (Vaidya J) concluded on 25th September 1973 that the decision of the Assistant Charity Commissioner (of 1967), and the subsequent decisions of the Joint Charity Commissioner (25th September 1969) and of the Assistant Judge, Jalgaon (6th December 1971) were all without jurisdiction in view of the Full Bench decision in Keki Pestonji Jamadar viz., that disputed questions of title cannot be decided by authorities under the Act but only by a Civil Court. The Letters Patent Appeal was against Vaidya J's order. Factually, it seems that the land in question was acquired for the trust by an individual but remained in the name of the individual who so acquired it, one Narayan Ughadu Vanjari, then the chief trustee. On his death, the names of his heirs were entered on the record of rights; erroneously, said the trustees, because the trust had always been in possession of the land. The question that was to be decided by the Assistant Charity Commissioner under Sections 19(ii) and 22-A of the BPT Act was whether this property was the property of the trust. The respondents to the Letters Patent appeal, the heirs and grandchildren of the deceased chief trustee Vanjari, claimed the land to be their own by inheritance. They thus set up a title hostile to the trust. It was they who contended that the Assistant Charity Commissioner could make no such enquiry. The Division Bench addressed itself to what exactly the Full Bench decided in Keki Pestonji Jamadar.

42. Analysing the Full Bench decision, the Division Bench said that the inescapable conclusion was that what the Full Bench decided was that the jurisdiction of a Civil Court was not barred when the question was of the title of a third person asserting a title hostile to the trust. The Full Bench did not, the Division Bench said, hold that the statutory authorities did not have the jurisdiction to decide whether a particular property was that of the trust. That decision was left to the authorities. The Division Bench said:

25. In our opinion, the conclusion is inescapable that what the Full Bench has decided is that questions of title to the trust property are outside the scope of an inquiry under section 19 of the Act so that disputed questions of title are not to be dealt with by the Deputy or the Assistant Charity Commissioner and this authority has to confine itself to determination of those questions and those questions only which it is required to decide under the provisions of the statute.

26. Now, it is obvious that it can never be said with any show of reason that if a third party were to set up a claim or title to the property in question, then that would have the effect of stopping the authorities under the Act from performing their duty of making such inquiries and taking such decisions as are permissible to them under the provisions of the statute.

43. The object and purpose of the BPT Act and the MPTA is to regulate and administer public trusts, not to settle disputed titles to properties alleged to belong to the trust. A person who sets up a claim hostile to the trust is never a person having interest in the trust. That much is certain. Therefore, in the Division Bench's view, what the Deputy or Assistant Charity Commissioner has

to decide is whether there is sufficient material to conclude that the particular property is the property of the trust. If he finds so, he must have the necessary entry made in the register. To arrive at this conclusion, he must make an enquiry. He may even find that the property is claimed by a third party. But, as the Full Bench said, and as the Division Bench explained:

38. The Deputy or the Assistant Charity Commissioner, therefore, must hold the inquiry in the prescribed manner and if he is satisfied that the property which is claimed on behalf of the trust is the property of the trust, then he must record a finding accordingly. He may even say, if the facts of the case so show, that particular property is being claimed by a third party adversely to the trust. But as has been held by the Full Bench, it is not for him to adjudicate upon the question of title as such, in the sense that a Civil Court adjudicates a title and gives a judgment declaring the title of a particular person.

39. It is, of course, conceivable that the Deputy or the Assistant Charity Commissioner may come to the conclusion that the particular property claimed on behalf of the trust does not belong to the trust. If he arrives at such a conclusion, then he is merely performing his duty to decide the question (being the third question, as mentioned in the Full Bench judgment) relegated to him as to whether a particular property is (or is not) the property of the trust. If he comes to the conclusion that the particular property is not the property of the trust, then he keeps it out and it does not matter to him as to who has title to such a property, so long as he is satisfied that it is not the property of the trust.

40. On the other hand, he may also come to the conclusion that there is sufficient material before him to show that the particular property of the trust, even though there be a third party who is claiming a title to that very property.

(Emphasis added)

44. Therefore, the Division Bench said, this was a matter of levels. The authorities under the Act could go a distance, but no further:

41. After giving the matter and the observations of the Full Bench our careful consideration, we have come to the conclusion that it is really a matter of levels. The Deputy or the Assistant Charity Commissioner is duty bound, as required by the statute, to decide the question relegated to him that the particular property is or is not the property of the trust. His power and jurisdiction, therefore, extends to that level or limit upto which he can so decide without touching on disputed questions of title.

42. If he stops at that level, as he must, then it is always open to a third party, as held by the Full Bench, to assert his hostile claim, either by filing a suit in a Civil Court for a declaration that the property belongs to him, or to claim such a title by way of defence in any other proceedings that may be adopted in relation to that property.

43. If, as has been held by the Full Bench, questions of title to the trust property

are outside the scope of inquiry under section 19, then no real difficulty arises because nothing in the decision of the Deputy or the Assistant Charity Commissioner or other authorities under the Act will affect any anterior or superior title or any question as to whether the author of the trust was the lawful owner of the property because all those questions will be decided in appropriate proceedings by a Civil Court.

44. In other words, these questions operate at a different level than that at which the Charity Commissioner has to decide the questions which he is required to decide under the statute.

45. It bears repeating that the Full Bench of this Court in Keki Pestonji's case (*supra*) did not decide, and, indeed, could not in the face of the statute, decide that the authorities under the statute were not to decide the specific question which had been relegated to them by the statute, namely, whether any particular property was the property of the trust or not merely because a third party has laid a claim in himself to that property.

47. A correct reading of the Full Bench decision reveals that the true owner, if there be any, is not affected by an inquiry under section 19, because the question that has to be decided by the Deputy or the Assistant Charity Commissioner is a different question operating at a different level.

(Emphasis added)

45. I have set this out at some length because it seems to me that Mukhi J drew a clear, though arguably fine, distinction between (1) an adjudication of title and (2) deciding whether a property was that of the trust. The first is the province of the Court. A third party making a hostile claim is not bound by a Charity Commissioner's decision under (2). The question of ouster of a civil court's jurisdiction in such cases of disputed title adjudications cannot, therefore, arise.

46. In *Shri Deodatta Gopal N. Angal v. Parvati Nandan Ganpati Deosthan & Ors.*, Second Appeal No. 169 of 1989; decided on 9th and 10th January 2008, A.S. Oka J was concerned with a second appeal in a trespass action brought by the trustees of a registered public trust. The Assistant Charity Commissioner held the land to be the property of the trust and made an entry in the register to that effect. The appellant contested the suit. He claimed that the land was his private property. This was a clear property title dispute. The trial court decreed the suit. The appellate court confirmed the decree. Having considered the Full Bench in *Keki Pestonji Jamadar* and the Division Bench in *Samastha Lad Vanjari Samaj*, Oka J held that the issue of title would have to be decided by a civil court independently of any finding recorded by the authorities under the BPT Act. Any order or finding of a Charity Commissioner does not prove title or serve as an adjudication of rival claims to title. There is, therefore, no ouster of a civil court's jurisdiction.(46)

(46) See also: *Abhishek Ravishankar Agrawal v. The Assistant Charity*

Commissioner & Anr., Writ Petition No. 4403 of 2008, decided on 4th December 2008 (B. P. Dharmadhikari J), which follows the same line.

47. Mr. DeVitre for Ravindra, Nakul and Nayan, supporting the Plaintiffs says that this is a pure question of law. Mukesh and Bharat are strangers to the trust. They are not persons having interest in the trust and do not fall within the definition of Section 2(10). They set up a claim adverse and hostile to the trust, and they do so in the teeth of their own acceptance that the Contrex shares formed part of Ramanlal's estate. On any reading of it, therefore, there are now two conflicting claims to title between the Plaintiffs - two trusts and their trustee, his trusteeship being undisputed - and Mukesh and Bharat, Defendants Nos. 2 and 3. These Defendants now say that the shares passed to them and did not form part of Ramanlal's estate. They say too that during his lifetime Ramanlal was not the sole owner of these shares. They dispute his right to make any bequest of these shares. According to them, under law and under the Articles of Contrex, these shares must be transmitted to them exclusively.

48. In Mr. DeVitre's submission, and I do believe he is correct, Section 79 has no application. If what the contesting Defendants say is correct, then, he submits, there is no need for a provision such as Section 26. Broadly speaking, an adjudication of competing titles is out of the purview of the Charity Commissioner - as the Division Bench said in *Samastha Lad Vanjari Samaj*, it is a matter of levels, and the Charity Commissioner can go only up to a point and no further. There is no question of ouster of a civil court's jurisdiction.

49. On the question of Section 50, he submits, again correctly in my view, that this never operates as a bar. It is enabling and expansive, and its contours and purpose are now well established. Nothing in Section 50 is in defeasance of the right of undisputed trustees to bring suit to establish the trust's title, when disputed by an outsider, to trust property. *Amirchand* settles this, and it has not been disturbed.(47)

(47) See also: *Pandurang Sakharam Patil v. Nanded Parsi Anjuman Trust*, 2011 (1) Bom. C.R. 764, per S. S. Shinde, J, which says the question is no longer *res integra*.

50. As to the apparent conflict between *Church of North India*, where it says that the BPT Act is a complete code, and the Full Bench decision in *Keki Pestonji Jamadar*, which says it is not, the answer lies in simply this: that in respect of the areas that it does cover, the MPTA is indeed a complete code. Where there are areas outside that act, it cannot in that sense be "complete" so as to cover them. In any case, this is a bit of circular reasoning. Following the Full Bench and the Division Bench that followed it, if there is no ouster of a civil court's jurisdiction in adjudicating disputed titles, then the question of the code being complete or not is surely academic. It bears repetition here that the *Church of North India* case had one fundamental aspect that marks it to be unique in this raft of cases: the question of whether a particular trust ceased to exist and

merged into another. That is clearly something for the MPTA authorities to decide, not a civil court. That is different from an undisputed trust laying claim to a property and this being disputed by another claimant who sets up a rival claim. The question in Church of North India was about a trust's succession and its continuance.

51. I find it exceedingly difficult to accept Mr. Seervai's arguments on exclusivity in such matters (adjudications as to disputed titles) vesting only in the authorities under the MPTA. Far too many incongruities result. For instance, had Mukesh and Bharat filed suit in this Court for a declaration of ownership of the Contrex shares, that suit would be maintainable. But, on Mr. Seervai's formulation, the present Plaintiffs would not be able to enter a defence, let alone a counter-claim, without the Charity Commissioner's written permission. That determination, on his construct, would be "barred". Or take the case of a suit on title with a prayer for possession. If Mr. Seervai is correct, the first prayer would have to be "decided" by the Charity Commissioner; and the Civil Court would then have to "decide" the question of possession, because that is not an order that the Charity Commissioner can ever grant. He can only direct that steps be taken to recover possession - meaning, of course, the filing of a suit. This also means that the finding of the Charity Commissioner binds a Civil Court's adjudication of title. What Deodatta Angal suggests, however, and this binds me, is that Section 79 operates only to deny a Civil Court the jurisdiction to decide not a challenge to the correctness of a finding on entries made (or directed to be made) in the register but the initial enquiry and finding as to whether that property is property of the trust and whether an entry should be made. This is the meaning, and the only meaning, that the phrase "any question whether ... particular property is the property of such trust" must receive.

52. There is yet another anomaly too, one that I am entirely unable to reconcile, and this is the facial disconnect between a plea under Sections 79 and 80 and one under Sections 50 and 51. The plea on the former speaks to a wholesale ousting of jurisdiction, not a qualified ousting of jurisdiction. If Mr. Seervai bases his case on that facet, then no question of "prior written permission" under Sections 50 and 51 can ever arise. The argument on Sections 50 and 51 proceeds on the basis, as indeed it must, that the suit is otherwise competent and maintainable, i.e., that the jurisdiction of the Civil Court is not barred or ousted, but that suit requires prior leave in writing of the Charity Commissioner. With that leave, there is no impediment to a Civil Court hearing the suit. The two arguments are distinct and operate in different spheres, and I think the conflation of these is wholly unnecessary and entirely incorrect. In any case, it seems to be clear that trustees (whose trusteeship is not in issue) have inherent rights - and, in common law, the duty - to take all necessary steps in regard to trust property. This includes filing a suit, and no permission from the Charity Commissioner is necessary. This is the ratio in *Amirchand*, and it has not been disturbed once. It has been followed regularly. Those who are not "persons having an interest", but seek to bring suit under Section 50(i) to (iii) also need

not obtain leave. It is only persons having interest and seeking to bring suit under those sub-clauses, and who also not undisputed trustees (in the sense of their trusteeship being questioned) who need permission. (48)

(48) In *Shri Samarth Seval Mandal & Ors. v. Shri Ramdas Swami Sansthan Trust & Ors.*, 2011 (4) ALL M.R. 237, B.R. Gavai J said since the plaintiffs did not claim to be persons interested in the defendant trust, no question of permission under Section 50 was necessary, and the trial court had the necessary jurisdiction.

53. I do not see the purpose behind Mr. Seervai's citing of *Dhulabhai v. State of Madhya Pradesh*, [1968 3 SCR 662 and *Kesha Appliances Pvt Ltd. & Ors. v. Royal Holdings Services Ltd & Ors.*, 2006 (1) Bom. C.R. 545. I am not deciding the constitutionality or vires of Section 79 and 80, and the principles in these cases are too well-established to admit of any dispute. The question is not whether there is an ouster since there is a remedy; that is perhaps an oversimplification. What is in issue is the precise frame of what it is the authorities under the MPTA can do under Section 79(1) and which the Civil Court is barred from doing.

54. Mr. Seervai puts it like this: if the trust owns property and it is encroached, the trust can file a trespass action. But if the question is of determination of whether it is trust property, the trust must go through the rigour of Section 19 to 22, and that is covered by Section 79. Again, this begs the question; and it is, I think, fully answered not only by the Full Bench in *Keki Pestonji Jamadar* but clarified and focussed by Mukhi J in *Samastha Lad Vanjari Samaj*. At the cost of repetition, a question of whether or not a property is trust property is not an adjudication of title. It is only a determination, following an enquiry, whether on the material before the Charity Commissioner, a suitable entry to that effect should or should not be made in the register. But that is not the same as an "adjudication of title"; that is something a Civil Court can always do. To adjudicate is to rule upon judicially; and an adjudication is the process of resolving a dispute.(51) To succeed, Mr. Seervai must show that the entire gamut of property-title disputes for adjudication as between a trust (represented by persons whose trusteeship is unquestioned) and an outsider fall within Section 79. Ex facie, this cannot be. For example, a suit that seeks to set aside a document that purports to confer or transfer title on the ground that it is vitiated by fraud, misrepresentation or coercion, and then seeks a declaration that the property in question vests in the trust is clearly not something that the Charity Commissioner can ever determine. That is the sort of adjudication that only a Civil Court can make. What Mr. Seervai suggests amounts to - and this is the necessary implication, whether Mr. Seervai says it or no - I think, reading Sections 79 and 80 of the MPTA as covering a wholly unwarranted and a constantly expanding universe of issues well beyond matters that lie within the confines of that Act. Neither logic nor law support such a view; nor am I prepared to accept an interpretation that would result, even implicitly, in that kind of untrammelled expansiveness.

(51) *Black's Law Dictionary*, 7e, p. 42. It is not, I think, of any assistance to say

that the Charity Commissioner has all the trappings of a judicial tribunal: see *K. Shamrao & Ors. v. Assistant Charity Commissioner*, (2003) 3 SCC 563. That was, first, in the context of a contempt action; and, second, this is hardly an authority for an over-broad proposition that a Charity Commissioner is but a Civil Court in another name. The two function distinctly, and the Charity Commissioner's remit is limited by a special statute to the specific issues or matters specified in the statute; not, as in the case of a Civil Court, to every matter properly litigatable.

55. Given this approach, I do not think Mr. Seervai's reliance on the Supreme Court decision in *Yeshwantrao Laxmanrao Ghatge & Anr. v. Baburao Bala Yadav*, (1978) 1 SCC 669, carries him any further. There, the Supreme Court approved of a Bombay High Court decision in *Dev Chavata v. Ganesh Mahadeo Deshpande*, (1970) 72 Bom L. R. 469 : AIR 1970 Bom 412, but held it to be correct in the facts of that case, though not fully and squarely applicable to the case before the Supreme Court. In the Bombay case, the Charity Commissioner had "exclusive jurisdiction to decide as to whether the suit land belonged to the trust". Nobody disputes this; even the Full Bench decision in *Keki Pestonji Jamadar* does not say to the contrary, and Mukhi J made this amply clear in *Samastha Lad Vanjari Samaj*; Oka J's ruling in *Deodatta Gopal Angal* puts the matter beyond all controversy.

56. I find Mr. Seervai's reliance on the Division Bench decision in *Charu K. Mehta v. Lilavati Kirtilal Mehta Medical Trust & Ors.*, 2013 (1) Bom. C.R. 23 : 2013 (3) ALL M.R. 206 : 2013 (3) Mh. L.J. 269 as inapposite and misdirected as his reliance in a late sur-rejoinder to *Samastha Lad Vanjari Samaj*. Both decisions seem to me to clearly undermine his case rather than further it. Charu Mehta was an appeal from a decision of a single Judge on an Originating Summons filed under Rule 238 of the Bombay High Court (Original Side) Rules. Again, as in the case before Dhanuka J, the dispute was about the trust that runs the Lilavati Hospital. The plaintiff was a permanent trustee-for-life of the 1st defendant trust, the Lilavati Kirtilal Mehta Medical Trust. The Originating Summons sought an interpretation of the Trust Deed dated 5th July 1978 in regard to the appointment of trustees, their powers and the mode of administration of the trust. There were disputes between the trustees on these issues. The Division Bench judgment (Dr. D. Y. Chandrachud J, as he then was and A. A. Sayed J) covers, inter alia, an analysis of the MPTA. Paragraphs 30 to 4055 deal with the bar of jurisdiction under Sections 79 and 80 of the MPTA. In this part, the Division Bench considered the Full Bench decision in *Keki Pestonji Jamadar*, and the decisions in *Dhulabhai*, *Shamrao* and *Church of North India*, among others. The single Judge had held that the Assistant Charity Commissioner could not entertain an application in the nature of an Originating Summons. Dr. Chandrachud J speaking for the bench said:

30. ? The test under Section 80 is whether the question which is raised before the Civil Court is a question which is required by the Act to be decided or dealt with by an officer or authority constituted under it. Where that is so and such a

decision of an officer or authority is made final and conclusive under the provisions of the Act, the jurisdiction of the Civil Court would stand barred.

32. In view of the provisions of Section 9 of the Code of Civil Procedure, 1908, the ouster of jurisdiction of a Civil Court is not readily assumed or lightly inferred. Ouster of jurisdiction has to be either explicit or necessarily implied. In *Dhulabhai v. State of Madhya Pradesh* : AIR 1969 SC 78 which is the locus classicus on the subject, the Supreme Court has held 55. Of the Manupatra report. Paragraphs 31 to 41 of the original text. that where the statute gives a finality to the orders of special tribunals, the jurisdiction of the Civil Courts must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant, but is not decisive to sustain the jurisdiction of the Civil Court. But where there is no express exclusion, an examination of the remedies and the scheme of the Act to find out the intendment becomes necessary and the result of the enquiry may be decisive.

33. A Full Bench of this Court in *Keki Pestonji v. Khodadad Merwan Irani* : AIR 1973 Bom 130 enunciated the test to be applied in determining as to whether the jurisdiction of the Civil Court is barred under Section 80. ? The Full Bench held that for deciding whether Section 80 is attracted in a given case, "one must consider what, in substance and not merely in form, is the nature of the claim made in the suit and the real relief sought therein". ? The Full Bench held that a contest regarding the title of a third party has no place in the scheme of the Act. Hence, a question as regards the title of a third party to trust property was held not to be a question incidental to the determination of the main question whether a particular property is the property of the public trust.

? ? ?

36. The provisions of Section 80 of the Bombay Public Trusts Act, 1950, in relation to the State of Gujarat came up for consideration before the Supreme Court in *Church of North India v. Lavajibhai Ratanjibhai* : (2005) 10 SCC 760. ...

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

Summons, is required to be determined or dealt with by an authority under the Act whose decision on such a matter is final and conclusive, the jurisdiction of the Civil Court would have to be held to have been ousted.

38. In holding that the jurisdiction of the Court in the Originating Summons was not barred, the Learned Single Judge held that what is made final and conclusive under the provisions of Section 22(3) are the entries made by the Assistant Charity Commissioner and not the findings on the basis of which those entries are made. This view of the Learned Single Judge, with respect, overlooks that under sub-section (3) of Section 22, the entries which the Deputy or Assistant Charity Commissioner makes have to be in accordance with the findings which require an amendment or deletion of the entries. The findings of the Deputy or Assistant Charity Commissioner constitute the foundation while the entries which he makes are consequential. Section 22(3) makes an amendment of the entries "so made" final and conclusive subject to an amendment on occurrence of a change or cancellation of the entries. The entries made are a consequence of the finding and finality cannot attach to one without the other. To hold otherwise would be to defeat the legislative intent. This principle of law can be regarded as being settled by the judgment of the Supreme Court in *Hasan Nurani Malak v. S.M. Ismail*. : AIR 1967 SC 1742. Under the Act, the remedy of a suit was available to have a finding of the Registrar set aside and on the final decision of the suit, the Registrar was required to correct entries made in the Register in accordance with the decision. While reversing the finding of the High Court, the Supreme Court held that the Registrar was obliged to make an entry in the register whether his finding was in the affirmative or in the negative. The Supreme Court held that though it is an entry which is made which has been given finality, a remedy was made available in the form of a suit against the finding of the Registrar and where such a finding is set aside, the Registrar has to correct the entry made in the register in accordance with his finding. The Supreme Court held that the cause of action of such a suit is thus "the finding and not the entry which is merely consequential".

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

question which the Assistant Charity Commissioner is required to decide or deal with, and with finality. Once the two requirements of Section 80 are fulfilled, the bar is attracted. ?

(Emphasis added)

57. I simply do not see how this decision in any way assists Mr. Seervai. It does not in any way detract from the principle that an adjudication of a disputed title to property between a trustee whose position as such is not in question and an outsider who is not a "person having interest" is not within the remit of the Charity Commissioner and, therefore, not covered by Section 79 so as to oust the jurisdiction of a Civil Court. To the contrary, it seems to me that Charu Mehta explicitly re-affirms that principle.

58. In any case, there is Section 72 of the MPTA. Sub-section (1) specifically contemplates a suit to challenge the correctness of an entry by the authority regarding, inter alia, whether or not any particular property is trust property:

72. APPLICATION FROM CHARITY COMMISSIONER'S DECISION UNDER SECTION 40, 41, 41C AND 43 (2) (A) AND (C) , 50A, 70 OR 70A, ETC.

(1) Any person aggrieved by the decision of the Charity Commissioner under section 40, 41, 41C and 43(2)(a) and(c), 50A, 70 or 70A or on the questions whether a trust exists and whether such trust is a public trust or whether any property is the property of such trust may, within sixty days from the date of the decision, apply to the court to set aside the said decision.

(Emphasis added)

This is clearly in line with that "duality" noted in the Full Bench decision in Keki Pestonji Jamadar and in Samastha Lad Vanjari Samaj: the Charity Commissioner cannot adjudicate title so as to pronounce or determine ownership, but he can decide whether or not it is property of the trust; and his decision is specifically subject to a challenge under Section 72; and the result of that decision will require a correction to the entry following Section 26.

59. I also do not see why Mr. Seervai thought it necessary to cite Mrs. Jankibai Prahladrai Brijlal Seksaria v. Kashinath Raghunath Kelkar & Ors., AIR 1972 Bom 199. Similarly, Mr. Seervai also cited the decision of J. M. Shelat J, as he then was, sitting singly in the Gujarat High Court in Kuberbhai Shivdas & Anr. v. Mahant Purshottamdas Kalyandas & Ors., 1961 (II) Guj. L.R. 564. I find this referenced at page 211 of the Bom. L. R. report of the Full Bench decision in Keki Pestonji Jamadar, and it is therefore inappropriate to examine the Gujarat decision any further. This decision of a learned single Judge of this Court was delivered before the Full Bench decision in Keki Pestonji Jamadar. It relied on Taraben Baldevdas v. Charity Commissioner, AIR 1957 Bom 42 : (1955) 57 Bom. L.R. 1069, specifically disapproved by the Full Bench:

36. It remains now to consider the decisions of this Court which have led to this

reference. In *Taraben Baldevdas v. Charity Commr.*, (1995) 57 Bom. L.R, 1069 the petitioner had filed a suit in a Civil Court against the respondents for declaration that she was the owner of a certain sum of money lying in deposit with the respondents and that no one else had any right, title or interest in that sum. A preliminary issue was raised whether the suit was barred by Section 80 of the Act. During the pendency of the suit, respondents submitted an application to the Deputy Charity Commissioner for determining whether the sum lying in deposit with them constituted a trust and whether the trust was a public trust within the meaning of the Act. The petitioner raised a preliminary contention that the Deputy Charity Commissioner had no jurisdiction to entertain the application as the question relating to the existence of the trust was involved in the suit. That contention having been rejected, the petitioner applied under Section 10 of the Civil Procedure Code, for stay of the proceedings before the Deputy Charity Commissioner. A division bench of this Court (Bavdekar and J. C. Shah, JJ.) held that as the Civil Court had no jurisdiction to decide the question whether the sum in the hands of the respondents was the property of the public trust, the application before the Deputy Charity Commissioner could not be stayed.

37. Shah, J., who delivered the judgment of the Bench examined the scheme of the Act and observed; "Now, jurisdiction of such amplitude having been conferred under the Act upon the Deputy or Assistant Charity Commissioner or the Charity Commissioner to decide questions set out in Section 19, and jurisdiction of the Civil Courts having been simultaneously excluded, it would be difficult to hold that the civil court has jurisdiction to decide the same questions over again in a civil suit." It was urged that if that be the true view of the matter, the title of a person may be lost by a conclusive determination even though he has had no opportunity of being heard. This contention was expressly left open, as it was unnecessary to decide it. The decision therefore is not an authority for the proposition that titles of third parties can be held concluded by the decision recorded in the inquiry under section 19. The decision however proceeds on the basis that a contest on title is within the purview of that inquiry and to that extent the decision, with very great respect, is not correct. A provision of ouster like the one contained in Section 80 does not depend for its application upon whether the person who raises the particular question in the suit was or was not a party to the proceeding before the tribunal in which the exclusive jurisdiction to decide that question is vested. the decision whether the trial of a question is barred under Section 80 depends on whether that question is to be decided by the Deputy or Assistant Charity Commissioner. If the question is outside the pale of the inquiry envisaged by Section 19, the Civil Courts would have jurisdiction to decide or deal with the question. Evidently, the various considerations which have been presented before us were not placed before the learned Judges who decided *Taraben's Case*.

(Emphasis added)

60. Mr. Seervai's reliance on *Virupakshayya Shankarayya v. Neelakant*

Shivacharya Pattadadevaru, 1995 Supp (2) SCC 531 : (AIR 1995 SC 2187) seems to me to be inapposite and does not lay down or enunciate any principle that can be applied to the case at hand. The dispute in that case was about the claimant's position or role, and there was a great deal of controversy about the precise nature of the suit. If it was for a declaration of status, the suit would fail as time-barred; if for possession, it was incompetent without leave. Here again, there is that primary distinction of the position of a plaintiff qua trustee being challenged or, at any rate, not undisputed.

61. I will at this stage note, with some dismay - for reasons I will come to immediately next - some of the other authorities Mr. Seervai cited. Mahibubi Abdul Aziz v. Sayed Abdul Majid & Ors., 2001 (3) Bom. C. R. 33; per A. M. Khanwilkar J, as he then was a decision of a learned single Judge of this Court did not note the Full Bench decision in Keki Pestonji Jamadar at all. Neither did the decision in Lakhanlal Brijal Purohit & Ors. v. Marwadi Samshan Hanuman Mandir, 2006 (4) Bom. C. R. 827; per S. A. Bobde J, as he then was. Indeed, a Civil Application for review of Lakhanlal was allowed, as Mr. Sen points out. Marwadi Samshan Hanuman Mandir v. Lakhanlal & Ors., Miscellaneous Civil Application (Review) No. 661 of 2014. Then there is the decision of another learned single Judge of this Court in Keshav Narayan Bharti v. State of Maharashtra, 2007 (2) Mh. L. J. 469, which inter alia held that a suit for a declaration that a property was not the property of a public or private trust was barred under Section 80 of the MPTA. All three of these were distinguished by another learned single Judge of this Court in Shree Hanuman Mandir Alibag v. Satischandra Bhalchandra Gurjar & Ors., 2014 (2) Bom. C. R. 221 again placed by Mr. Sen. The other decision cited by Mr. Seervai, Arjun Kisan Bhagat v. Nana Laxman Tapkire, 2007 (5) Bom. C. R. 581 is clearly distinguishable, for there the plaintiffs were not trustees but devotees of a deity installed on private land. They sought the framing of a scheme as a public trust. The district court's appellate order saying that the civil court did have jurisdiction was reversed. The plaintiffs did not, the court said, claim any independent title or right (para 27). In any case, Arjun Kisan Bhagat closely followed Keshav Narayan Bharti, which in turn is now held not to be good law in Shree Hanuman Mandir.

62. In any case, as Mr. DeVitre points out, Keshav Narayan Bharti dealt with issues regarding entries in the register and is therefore distinguishable even otherwise. I believe he is correct in saying that there is a consistent line of decision of this Court that establish that it is not within the scope of the Charity Commissioner's enquiry to adjudicate questions of absolute title. That enquiry is limited to sufficiency for the purposes of entries in the register. Not one of the decisions cited treat the Full Bench decision in Keki Pestonji Jamadar as not binding. Any question of absolute title is, therefore, not final or conclusive before the Charity Commissioner. Once there is such a question, the case falls within the Charu Mehta enunciation, as also that of the Division Bench in Samastha Lad Vanjari Samaj. In this case, there is, as I have first noted, a set of alternative prayers. The Plaintiffs specifically aver an absolute title to the shares.(65) This is

met with a hostile and opposing claim to absolute title in Mukesh's Additional Affidavit in Reply.(66)

(65) Complaint, paragraph 22, pp. 11 - 12.

(66) Notice of Motion, paragraph (p), pp. 43 - 45.

63. I noted earlier my dismay at some of the decisions Mr. Seervai cited. This is not because they were cited at all, but because of what it is that Mr. Seervai would have me do on the basis of those decisions - two of which did not notice the Full Bench decision in Keki Pestonji Jamadar and three of which were later distinguished by another learned single Judge of this Court in Shree Hanuman Mandir. I have already found Mr. Seervai's reliance on Samastha Lad Vanjari Samaj and Charu Mehta to be of no assistance to him. As I see it, what he asks is not terribly much: merely that I hold that the Full Bench decision in Keki Pestonji Jamadar is not good law; that it has been distinguished "at least seven times" (not that I can tell, and not that this is shown); that I distance myself in addition from the decisions in Gurusiddappa, Somani v. Jhavar Ramnarayan Sahu, Shree Deodatta Gopal N. Angal, Abhishek Agrawal, Shree Hanuman Mandir; and that I hold that the Division Bench decisions in Samastha Lad Vanjari Samaj, Amirchand and Charu Mehta are wrong or that they all hold Keki Pestonji Jamadar to be inapplicable, confined to the statutory condition as it then existed, and no longer good law. All this I am supposed to do on the basis of a peculiarly culled out reading of Church of North India though that decision does not suggest anything approaching Mr. Seervai's extreme formulation. What he asks therefore is merely the impossible.

64. A few general principles may be drawn from the foregoing discussion.

(a) Trustees whose position qua trustees is not in dispute have an inherent right which is the same as the right of every owner of any property to bring a suit for an adjudication of title. Such a suit does not need prior permission of the Charity Commissioner under Section 50 of the MPTA.

(b) A substantive suit for an adjudication of title is not hit by the jurisdictional bar of Sections 79 and 80 of the MPTA. The determination of whether or not a property is the property of a trust is for the purpose of an enquiry, findings and making an entry in the register. It is not an adjudication of title of the kind a Civil Court can do.

(c) The correctness of any entry in the register is liable to challenge, including under Section 72 in a suit; and, following Section 26, an order of a court on that must result in the necessary changes being effected in the register.

(d) Where the plaintiff's claim to being a trustee is questioned and is disputed, prior permission under Section 50 is necessary. The plaintiff in such an action is a person having interest in the trust, but he does not have within himself the inherent powers available to trustees whose position is undisputed.

(e) Where the persons in question are not persons having interest in the trust, as for example rank outsiders claiming a hostile title independently in themselves, then, too, no permission can ever be obtained from the Charity Commissioner under Sections 50(i) to (iii) of the MPTA.

(f) The jurisdictional bar under Sections 79 and 80 only applies to those acts that the Charity Commissioner and other authorities are required by the statute to do. It does not extend to matters beyond the purview or powers of those authorities.

65. The suit is maintainable. The jurisdiction of this Court is not barred under Sections 79 and 80 of the MPTA. There is no question of any prior written permission being required under Sections 50 and 51 of the Act.

D. Limitation

66. First, the relevant provisions from the Schedule to the Limitation Act, 1963.

58. To obtain any other declaration.

Three years

When the right to sue first accrues.

69. For other specific movable property.

Three years

When the property is wrongfully taken.

106. For a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate against an executor or an administrator or some other person legally charged with the duty of distributing the estate.

Twelve years

When the legacy or share becomes payable or deliverable.

113. Any suit for which no period of limitation is provided elsewhere in this Schedule.

Three years

When the right to sue accrues

67. Mr. Seervai does not press a claim, previously made in the filings, under Article 58. He confines himself to submission under Articles 69 and 113. Properly applied, he says, these put the Plaintiffs out of Court. Nothing of the kind, Mr. Sen quickly retorts; for the applicable articles are either Article 58 or Article 106.

68. Mr. Sen's argument goes like this. The suit seeks a declaration. The right to sue for such a declaration arises only when there is a clear and unequivocal threat to infringe the right sought to be established. *Daya Singh & Anr. v. Gurdev*

Singh & Ors., (2010) 2 SCC 194. In the present case, that "clear and unequivocal threat to infringement" did not arise till 21st August 2013 when Mukesh and Bharat, through M/s Jhangiani, Narula & Associates, first demanded the transmission of the 100 Contrex shares to their names and alleged that the shares did not form part of Ramanlal's estate.(68) Till then, they showed no signs of disputing this; indeed, those shares were included in the Schedule of Assets to the petition for probate to Ramanlal's Will and Codicil, and both Mukesh and Bharat filed Affidavits consenting to that grant.(69) The suit was filed on 11th April 2015, well within a three-year period that would commence from 21st August 2013 (at the earliest; more correctly from the date of receipt of that letter). In a suit for a declaration that, say, a lease subsisted and its termination was invalid, the "right to sue" accrues upon the first infringement or clear threat to infringement of the right in respect of which the declaration is sought. Board of Trustees of Port of Kandla v. Hargovind Jasraj & Anr., (2013) 3 SCC 182.

(68) Complaint, Ex. "Q", pp. 254 - 259.

(69) Complaint, Ex. "J", pp. 153 - 154, and Ex. "K", pp. 155 - 156.

69. Article 69 has no application, Mr. Sen says, because there is no "wrongful taking" of the property. That would involve an assertion, to begin with, and might involve property being taken from the Plaintiffs and kept from them. Even that possession of the actual share certificates by Mukesh and Bharat must be unlawful or adverse to the Plaintiffs, and that did not happen till their attorneys' letter of 21st August 2013. The starting point of limitation must be unlawful possession or adverse possession. Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee, (1889) XVI I.A. 137 (Judicial Committee of the Privy Council).

70. Mr. DeVitre relies on the Supreme Court decision in Mst. Rukhmabai v. Lala Laxminarayan and Ors., AIR 1960 SC 335 : (1960) 2 SCR 253, for a discussion on the concept or principle of "accrual of the right to sue", although that decision was under Article 120 of the earlier Limitation Act (equivalent to Article 113 of the 1963 Act). The Supreme Court said:(73)

(73) Paragraph numbers follow the Manupatra report.

30a. This leaves us with the only surviving question, namely, whether the suit was barred by limitation. ? This Article was subject to judicial scrutiny both by the Judicial Committee as well as by the High Court of various States. The leading decision on the subject is that of the Judicial Committee in Bolo v. Koklan (1930) L.R. 57 : 20 I.A. 155. Therein, Sir Benod Mitter, observed:

"There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

32. The said principle was restated and followed by the Judicial Committee in

Annamalai Chettiar v. A. M. K. C. T. Muthukaruppan Chettiar I.L.R. (1930) Rang. 645 and in Gobinda Narayan Singh v. Sham Lal Singh I.L.R. (1930) IndAp 125. The further question is, if there are successive invasions or denials of a right, when it can be held that a person's right has been clearly and unequivocally threatened so as to compel him to institute a suit to establish that right. In Pothukutchi Appa Rao v. Secretary of State A.I.R. 1938 Mad. 193, a Division Bench of the Madras High Court had to consider the said question. In that case, Venkatasubba Rao J., after considering the relevant decisions, expressed his view thus:

"There is nothing in law which says that the moment a person's right is denied, he is bound at his peril to bring a suit for declaration. The Government beyond passing the order did nothing to disturb the plaintiff's possession. It would be most unreasonable to hold that a bare repudiation of a person's title, without even an overt act, would make it incumbent on him to bring the declaratory suit".

33. The legal position may be briefly stated thus: The right to sue under Article 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.

(Emphasis added)

71. In other words, a mere denial of the plaintiff's right by the defendant is insufficient. There must be actual interference with the plaintiff's rights. This furnishes the starting point of limitation. National Sports Club of India & Ors. v. Nandlal Dwarkadas Chhabria & Ors., 1997 (3) Bom. C.R. 565. In Mr. Sen's and Mr. DeVitre's formulation, it is Article 106 that will apply because the executors of Ramanlal's estate (the Ashers) are joined to the action, and the Plaintiffs seek their legacy under testamentary instruments against a hostile claim. That legacy was "payable or deliverable" once probate was obtained, on 13th December 2007, and if 12 years are reckoned from that date, the suit is well within time. If Article 113 or Article 58 are applied, then, too, the suit, in their submission, is in time, because of the foregoing position regarding the accrual of the right to sue. Article 69 would have no application, for a share certificate is unlike a bearer bond or cash: mere possession of it confers no ownership. There can be therefore no question of "wrongful taking" or of the application of that Article. Mukesh and Bharat's attorneys' letter made it clear that what they sought was no mere formality. There is, after all, a distinction between a right to the shares or a right in the shares and a right to possession of the physical artefact of the share certificates. By itself the possession of the share certificates is never hostile. It is the assertion of exclusive entitlement to the right in the shares that sets up an adverse claim, and it is this that furnishes a starting point of limitation.

72. But even if Article 69 does apply, time can only begin to run from the date of "wrongful taking" of the property. That date can only be the date on which the contesting Defendants Nos.2 and 3, Mukesh and Bharat, set up a claim adverse to the Plaintiffs. Until that time, there was nothing wrongful - indeed, they had made no claim at all. *Kaikhushroo Manekshah Talyarkhan v. Gangadas Dwarkadas & Ors.*, AIR 1936 Bom 322, per Rangnekar J, pp. 325 - 326. A "wrongful taking" in the context of an estate might well apply to one who, though not entitled, retains to himself or herself part of the estate in defeasance of the estate administration obligations. There, it is the duty of the person charged with administration of the estate to take steps to recover that property, and the right to do that accrues from the moment administration is due. *Adarsh Kaur Gill v. Ajit Singh*, (2009 157 DLT 137 (DB)).

73. Mr. Seervai says, and I think he is correct, that Article 106 can never be invoked against his clients. That Article would only apply as against those charged with the distribution of the legacy or the estate. This does not mean only executors or administrators, but any person legally bound to pay the legacy or share in the estate. Neither Mukesh nor Bharat have any such duty. *Ghulam Mohammad v. Ghulam Husain Shaikh & Ors.*, [1932 Oudh Weekly Notes 399 (PC)]; *Sri Nathji & Ors. v. Mt. Panna Kunwar*, AIR 1935 All 239 : 1934 All LJ 230.

74. As to Article 113, Mr. Seervai says there is no question of setting an adverse or hostile claim. All that Mukesh and Bharat sought was the deletion of the name of the deceased Ramanlal. Their own names were already on the shares. The letter from M/s Jhangiani Narula and Associates could hardly be said to set up a hostile claim.(78)

(78)I will not dwell on *Kobad Rustomji Noble v. Nelly Rustomjee Noble*, 2008 (5) Mh. L. J. 289, cited by Mr. Seervai since, as Mr. Sen points out, that decision was set aside by consent in appeal on 18th September 2008.

75. Mr. Seervai's argument is that if the executors of Ramanlal's estate were charged with a duty, then the right to sue them to enforce that duty arose not on the date of the grant of probate, but on the date of death, for under Section 227 of the Indian Succession Act, a probate is effective from the date of death. *Subhadra Rani Pal Choudhary v. Sheirly Weigal Nain & Ors.*, (2005) 5 SCC 230. This means, according to him, that the suit should have been filed within three years of 22nd March 2007, when Ramanlal died. I do not think it is possible to accept this submission at all. The "relating-back" of a probate under Section 227 of the Indian Succession Act, 1925 is to ensure that all intervening acts of the executor from the death of the testator to the grant of probate are not invalidated. This does not mean that the "cause of action accrues" on the date of death. The estate vests in the executors, and title vests in and passes through them; the Indian Succession Act says so in Section 211. But these executors can claim no right as executors till such time as probate is obtained in view of the provisions of Section 213 of the Indian Succession Act. See: *Komal Suresh Chainani v. Haresh Chetan Thadani & Ors.*, Chamber Summons No. 40 of 2013 in

Testamentary Suit No. 93 of 2000, order dated 29th July 2013, paragraph 8; per R.D. Dhanuka J. Therefore, to merely say that probate "relates back" to the date of death of the deceased seems to me to be quite beside the point. That relating-back, as I have noted, is only to save the intervening acts (of preservation and maintenance of the estate, say, payment of taxes, etc.) from invalidation. The executors could not have been sued qua executors till they obtained probate, and that was only on 13th December 2007. At that stage, there was no question of suing them or anybody else - no cause of action had accrued.

76. I do not think Mr. Seervai is correct in saying that his clients' attorneys' letter of 21st August 2013⁽⁸¹⁾ was entirely innocuous. In paragraphs 11(f and 11(g) of that letter, Mukesh and Bharat called on Contrex and its directors to delete Ramanlal's name from the certificates in respect of these 100 shares and to show them as solely held by Mukesh and Bharat. This is by no means a demand for completion of an administrative formality or a ministerial act. It is clearly an assertion that all these 100 shares belong to Mukesh and Bharat. I do not see how it is at all possible for Mukesh and Bharat to deny that they have laid claim to these shares or that they have disputed that the shares could ever form part of Ramanlal's estate. Mukesh says so in paragraph 9 of his first Affidavit in Reply.⁽⁸²⁾ In paragraphs 6 and 7 of his Additional Affidavit, he makes the claim more emphatically, saying that only he and Bharat are entitled to the suit shares.⁽⁸³⁾ This only arises because of the demand made in their attorneys' letter of 21st August 2013.

(81) Plaint, Ex. "Q", pp. 254 - 259.

(82) Notice of Motion, p. 18.

(83) Notice of Motion, pp. 26 - 27.

77. In my judgment, the Plaintiffs had no cause of action accruing to them against Defendants Nos. 2 and 3 at any time before the 21st August 2013 letter. That is the first time when those Defendants made a claim that, if allowed, would put paid to the bequest to the two Plaintiff trusts under the residuary clause of Ramanlal's Will. This is the date when, under Article 69, the shares could be said to be first "wrongfully taken", i.e., the date on which a claim to the rights in those shares was "wrongfully taken". Whether the Plaintiffs' claim falls under Article 69 or Article 113 makes as good as no difference, for the starting point is the same. It is not the date of Ramanlal's death, nor the date of grant of probate, but the date when Mukesh and Bharat first laid claim to the shares in their personal names.

78. The suit is, thus, within time.

E. RELIEFS AND ORDER

79. I turn finally to the frame of reliefs. As Mr. DeVitre pointed out, and as I noted, there are other questions of law relating to the Articles of Contrex and the Companies Act, 1956. I have not addressed these in this judgment; none have

argued those points before me. Both sides agreed to defer those other issues till after the present issues were decided.

80. I note that a statement was made on 16th April 2015 by Defendants Nos. 2 and 3 in regard to the shares and the exercise of rights in respect of those shares. This statement will continue pending the final disposal of the Notice of Motion. I am given to understand that there has been in the time since no dividend payout and, therefore, no additional order is required in that regard.

81. The Plaintiffs seek to move for further ad-interim or interim reliefs. Mr. Dasgupta for Defendants Nos. 2 and 3 also points out that the 3rd Plaintiff has since passed away, and amendments to the Plaint and the Notice of Motion are necessary. I will consider all these applications on the next date.

82. As regards the pending Company Petition No. 20 of 2015 before the National Company Law Tribunal under Sections 397 and 298 of the Companies Act, 1956, I can make no order at this stage in regard to those proceedings.

83. List the Notice of Motion for hearing and final disposal on Friday, 23rd September 2016.

84. I regret the inordinate delay in delivering this judgment. Even given the intricacy of the arguments, I admit the delay is unconscionable; my sincere apologies to the counsel and the parties.