(2005) 05 GUJ CK 0021

In the Gujarat High Court

Case No : Special Civil Application No. 3995 of 2005

Nageshwar Vidhya Trust APPELLANT

Vs

Pankajbhai Harishchandra Jani RESPONDENT

Date of Decision : 05-05-2005

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 36, 36B, 37, 39, 41
Civil Procedure Code, 1908 (CPC) — Section 24
Constitution of India, 1950 — Article 226, 309

Citation : (2005) 05 GUJ CK 0021

Hon'ble Judges : K.M. Mehta, J

Bench : Single Bench

Advocate : Kamal Trivedi, A.A.G appears as Amicus curiae, N.D. Nanavati, Adv and Jal Soli Unwala, for Petitioner Nos. 1-3, for the Appellant; D.D. Vyas and Deep D Vyas, to 4, Vidhatri Parekh, for Respondent Nos. 5-6, T.S. Nanavati and Devang Vyas, for the Respondent

Judgement

K.M. Mehta, J.

1.1 Shri Nageshwar Vidhya Trust, petitioner No. 1; Smt. Chandaben Drukeshkumar Upadhyay, Managing Trustee of Shri Nageshwar Vidhya Trust, petitioner No. 2 and Shri Rajnikant Shantilal Joshi, petitioner No. 3, have filed this petition with a prayer that this Court may issue a writ of mandamus or writ in the nature of mandamus or any other appropriate order or direction transferring the following proceedings:

(i) Miscellaneous Judicial Application No. 7 of 2004 along with Suo Motu Application No. 8 of 2004 u/s 41(A) of the Bombay Public Trust Act (hereinafter referred to as "the Act"),

(ii) Miscellaneous Judicial Application No. 10 of 2004 u/s 41(A) of the Act,

(iii) Scheme Application No. 13 of 2004 u/s 50(A) of the Act;

and

(iv) Miscellaneous Judicial Application No. 36 of 2004 u/s 41(A) of the Act pending before respondent No. 7, Joint Charity Commissioner at Surat to any other appropriate Authority/Officer/Charity Commissioner other than respondent No. 7 who is competent to adjudicate upon the above mentioned proceedings under the Act as deemed fit in the interest of justice by this Court.

1.2 The said petition was filed on 9.3.2005. This Court passed orders dated 11.3.2005, 15.3.2005 and 21.3.2005.

1.3 Pursuant to the order passed by this Court, on behalf of the petitioner Mr. N.D. Nanavati, learned senior counsel with Mr. Jal Unwala, learned advocate, appears whereas on behalf of respondent Nos. 1 to 4, Mr. D.D. Vyas, learned senior advocate with Mr. Deep D. Vyas, learned advocate, appears. This Court has not issued any notice. However, as the record of the matter is voluminous and question raised in the petition is delicate one, this Court requested Mr. Kamal Trivedi, learned Additional Advocate General and sr. advocate, to appear as amicus curiae on behalf of respondent No. 7. As Mr. Trivedi is senior advocate, he has requested Mr. T.S. Nanavati, learned advocate, to appear on behalf of respondent No. 7.

2. The facts giving rise to this petition are as under:

2.1 There is an agricultural land bearing old Revenue Survey No. 35/2 (new Revenue Survey No. 38/4) situated at village Magdalla of sub-District Choryasi of District admeasuring 1 Hectare 32 Are and 53 Sq. mtrs. nearly 13253 sq. mt. which is actually measured as 12098 sq. mtr. after deduction which is called (Land - A). There is an another land bearing Revenue Survey No. 75 (new Survey No. 48) situated in village Magdalla of sub-District Choryashi of District Surat which is agricultural land admeasuring 4 Acre 1 Guntha and Hectare 1-62-89 Are = 16,744 sq. mtrs. which is called (Land - B) (hereinafter referred to as "the suit properties").

2.2 From the record it emerges that originally one Shri Mansukhlal Pachhigar was the owner of the suit lands and he has died on 7.3.1993 without making any Will. The pedigree of Mr. Mansukhlal Pachhigar is ad under:

Mansukhlal Pachhigar (died on 7.3.1993) | | | Hasumatiben M. Pachhigar (Wife) | | | -- | | | | | | | | | Subhashchandra Ashokbhai Avantikaben Pachhigar Pachhigar Pachhigar (Son) (Son) (daughter) | | (Husband''s name | | Ashwinbhai) | | -------------------------------- | | | | | | | | | | | | Snehal Bijal Gautam Siddharth

2.3 Shri Mansukhlal Pachhigar''s wife''s name is Hasumatiben Mansukhlal Pachhigar. They had two sons, named Shri Subhashchandra Mansukhlal Pachhigar and Shri Ashokbhai Mansukhlal Pachhigar and a daughter named Avantikaben. Her husband''s name is Ashwinbhai. Subhashchandra Pachhigar has a daughter Snehal and a son Bijal and Ashokbhai Pachhigar has two sons Gautam and Siddharth.

2.4 Petitioner No. 1 is a trust which is duly registered on 17.10.1996 under the Act having its Registration No. E-3873 at Surat. Petitioner Nos. 2 and 3 are trustees of the said trust wherein petitioner No. 2 Smt. Chandaben Drukeshkumar Upadhyay is its Managing Trustee. The object of the trust is educational development by opening primary and secondary schools and also helping other institutes in connection with educational activities. The trust deed of the said trust is produced on record at Annexure-A to the petition. Dhrukeshkumar @ Bankimbhai Upadhyay is the husband of Chandaben, the trustee of the Nageshwar Vidya Trust. The co-trustee is Rajnikant Shantilal Joshi. Rajnikant Shantilal Joshi is the husband of the sister of Dhrukeshkumar @ Bankimbhai, hence Rajnikant Joshi is "Banevi" of Dhrukeshkumar and hence Rajnikant Joshi happens to be "Nandoi" of Chandaben. Hence the two trustees are related to each other. If you see the object of the trust and trust deed it appears that the trustees have only given Rs. 1001/- to the trust and no other amount has been contributed by the trustees.

2.5 The petitioner states that on 24.9.1998 an agreement to sell came to be entered into between the parties namely, Smt. Chandaben Drukeshkumar Upadhayay and Shri Rajnikant Shantilal Joshi in their capacity as trustees of Nageshwar Vidya Trust and Subhashbhai Mansukhlal Pachhigar and Ashokkumar Mansukhlal Pachhigar for the sale of the land of Regular Survey No. 35/2 (new Survey No. 38/4) for consideration of Rs. 38,33,225/- . Out of that part of the amount was paid and the remaining amount was to be paid by the trustees.

2.6A The petitioner further states that another agreement of Sale Deed was executed on 17.10.1998 between the trustees of the trust on one hand - purchaser of the land and Hasumatiben Mansukhlal Pachhigar, widow of deceased Mansukhlal Pachhigar and Subashbhai Mansukhlal Pachhigar on the other hand in connection with land of Revenue Survey No. 75 for consideration of Rs. 51,62,000/-.

2.6B It appears from the record that the main object of the trust is to run educational institute and in view of the said object of the trust which is on the record of the case. The Trust constructed the school on the said building somewhere in 1998 and the school started running in 1998. The trust not only was running the school but also created investment in the said land with a view to see that trust can be able to carry out its object.

2.7 From the record it appears that the said lands were agricultural lands whereas the purchasers were non-agriculturists. It may be noted that Smt. Avanitkaben Pachhigar addressed a notice dated 20.8.2000 to the Chairman of the Surat Urban Development Authority, the Collector of Surat, the Police Commissioner, the District Education Officer, Additional Jilla Pradamik Officer, Ministry of Urban Development and the Gujarat Electricity Board in which it was stated that she is the owner of the part of the land, the land was agricultural land and there is no procedure to make the land as non-agricultural land and still in the said land the trust has constructed a building which is contrary to the provisions of the Urban Land Act as well as the Bombay Land Revenue Code. Therefore, the entire activity carried out by the Trust of running school in the said building premises is contrary to law. Similar notice was also issued in connection with the second land also by Smt. Avantikaben Pachhigar to all the said authorities.

2.8A In view of the aforesaid facts and circumstances of the case, Ms. Avantikaben Mansukhlal Pachhigar had filed Regular Civil Suit No. 411 of 2000 against the trust as well as trustees Smt. Chandaben Drukeshkumar Upadhayay and Shri Rajnikant Shantilal Joshi; Shri Subashchandra Mansukhlal Pachhigar, Ashokkumar Mansukhlal Pachhigar, Smt. Hasumatiben Mansukhlal Sakarlal Pachhigar. In the said suit she has prayed that the trust may not use the property for which agreement to sell has been executed. The said suit was filed on 29.7.2000. The learned Civil Judge (S.D.) passed an order issuing notice on 29.7.2000 and ultimately at by-parte hearing on 23.2.2001 the learned judge partly allowed the injunction application filed by Ms. Avantikaben Mansukhlal Pachhigar restraining the trustees not to interfere with the possession of the property in question.

2.8B Being aggrieved and dissatisfied with the said order the trust filed an appeal on 9.3.2001 before the learned District Judge, Surat. During the pendency of the proceedings, SUDA issued notice dated 26.2.2001 stating that the school building is illegally constructed and for taking a decision, a meeting is convened and they have to remain present. If they did not remain present, SUDA will remove the illegal construction.

2.8C Surat Urban Development Authority (hereinafter referred to as "SUDA") has therefore addressed notice dated 26.2.2001 to Chandaben as to why the said construction should not be demolished and the notice was given and hearing of the notice was fixed on 1.3.2000. Similarly, the Circle Inspector also addressed notice dated 30.1.2002 to Mansukhlal and Hasumatiben Mansukhlal in which it is stated that the trust has constructed the school without permission and the authority will take necessary action.

2.8D As the original owners of the land thereafter made some application before Surat Urban Development Authority (SUDA) and ultimately SUDA issued notice dated 26.2.2001 to remove illegal construction.

2.8E It appears from the record that in the said petition it was stated that though the petitioner trust has entered into an agreement to sell at the price of Rs. 265/- per sq. yard, as the price of the land has gone up, the original owners refused to execute the agreement and demanded Rs. 1500/- per sq. yard and that is how the dispute between the original owners of the land and the trust arisen.

2.8F In view of the aforesaid facts and circumstances of the case, it may be noted that the trust filed Special Civil Application No. 1986 of 2001 before this Court on 17.3.2001 with a prayer for quashing and setting aside notice dated

23.2.2001 issued by SUDA.

2.8G Ultimately, when the aforesaid matter Spl. C.A. No. 1986 of 2001 reached hearing before this Court, this Court (A.L. Dave, J) passed the following order: (19.3.2001)

"Mr. Surti after arguing, seeks permission to withdraw this petition with a view to approach the authority u/s 36(2) of the Town Planning Act. The petition stands disposed of as withdrawn. Mr. Surti also states that such application will be made before 27th of March 2001 and the authority will not demolish till then."

2.8H It emerges from the record that pursuant to the said notice the trust has also filed application dated 15.3.2001 before SUDA for regularisation of the construction because according to them the construction was without lay out plan and without plan and even no permission was taken.

CIVIL SUIT NO. 125 OF 2001 & 126 OF 2001:

2.9 It appears from the record that though the original owners executed Sattakat (agreement of sale) dated 24.7.1998 another agreement of sale dated 17.10.1998 and part of the consideration was paid by the trust, the original owners failed and neglected to execute the Sale Deed after taking consideration and they were not co-operating with the trust, the trust filed Special Civil Suit No. 125 of 2001 against Subashchandra Mansukhlal Pachhigar, Ashokkumar Mansukhlal Pachhigar, Smt. Hasumatiben Mansukhlal Shankarlal Pachhigar and Ms. Avantikaben Ashwinlal Pachhigar in March, 2001 with a prayer that the defendants may not prevent the use of the said land and also for a specific performance of the said land. The said suit was related to agreement dated 24.7.1998 whereas another suit being Civil Suit No. 126 of 2001 related to agreement dated 17.10.1998 against the same defendants and against the same relief. They produced certain documents before the trial court.

SPECIAL CIVIL APPLICATION NO. 2031 OF 2003:

2.10 However, in view of the fact that SUDA has issued notice and as per the contention of Ashokkumar Mansukhlal Pachhigar as SUDA was not taking any action against the trustee, Ashokkumar Mansukhlal has filed Special Civil Application No. 2031 of 2003 before this Court with a prayer that this Court may direct the respondent authority namely SUDA to initiate and finalise the action of removal of illegality committed by the trust and implement the action of demolition, cancellation of recognition as well as disconnection of electric supply which has been obtained illegally. In that petition respondent No. 2 trust filed an affidavit in reply and SUDA also filed affidavit and this Court (Coram: R.K. Abichandani and K.M. Mehta, JJ) passed order on 9.9.2003 on the ground that respondent No. 2 has filed an application before SUDA in respect of the property in question and directed that SUDA will consider the same and take an expeditious decision thereon and ultimately the petition was withdrawn.

3. It appears that on 4.12.2003 a memorandum of understanding was issued

between Babubhai Karshanbhai Patel and Sandip Hasmukhlal Shah on one hand and the trustees of the trust on the other hand. As per the said understanding between the parties if the original land owners execute sale deed in favour of Babubhai Karshanbhai Patel and another, the trustees agree not to object without compromising the interest of the trust and to cancel the agreement for sale executed in the year 1998 which are referred to earlier.

4. From the record it emerges that at the instance of Babubhai Karshanbhai Patel and another the matter was settled between the trustees and the original land owners. As a result of which the trust acting through both the trustees executed the deed of cancellation of agreement for sale referred to hereinbefore with respect to both the lands on 27.1.2004. In view of the said understanding the original land owners returned the amount received by them at the time of execution of the agreement for sale to the trust by way of two cheques. Shri Babubhai Karshanbhai Patel also paid Rs. 20 lakhs in lieu of the construction made by the trust over the land in question.

5. After the aforesaid cancellation of agreement of sale the original owners i.e. Pachhigar family executed sale deed on 29.1.2004 in favour of Shri Babubhai Karshanbhai Patel, HUF, (petitioner in Special Civil Application No. 6433 of 2004) for a total consideration of Rs. 12 lakhs.

6. It appears from the record that the trust in its meeting held on 30.1.2004 passed a Resolution pointing out the above referred facts and resolving to accept a sum of Rs. 20 lakhs and further resolving to handover the actual and peaceful possession of the land and building to Shri Babubhai Karshanbhai Patel, HUF.

7. In January 2004, since the trust was running a school in the construction, the trust requested Shri Babubhai Karshanbhai Patel, HUF, to permit the trust to complete the term and give licence to the trust to enter into the premises till 31.5.2004 so that the interest of the students are not jeopardized.

8. From the record it appears that Shri Babubhai Karshanbhai Patel has permitted the trust to run the school on humanitarian gesture and in the interest of the students who are studying in the school run by the trust on an undertaking from the trust that the said permission would come to an end on 31.5.2004 and no activities would be carried by the trust thereafter.

9.1 It appears from the record that Shri Rajnikant Shantilal Joshi, petitioner No. 3 herein, who was one of the trustees of the trust filed Civil Suit No. 192 of 2004 on 7.4.2004 contending that all his signatures are obtained by another trustee by misleading him.

9.2 It appears from the record that Shri Babubhai Karshanbhai Patel was constrained to restrain the trustees of the trust from entering into the land in question and has demolished the school building on 9.4.2004 on the ground that Shri Babubhai Karshanbhai Patel is a rightful owner having sale deed in his favour.

APPLICATION NO. 7 OF 2004:

9.3 In view of the aforesaid proceedings it appears that Pankajbhai Harishchandra Jani, respondent No. 1; Manishaben Mayurbhai Patel, respondent No. 2; Manojbhai Ratilalbhai Kansari, respondent No. 3; Anilbhai Bhikhubhai Shah, respondent No. 4; herein, who happen to be parents of the students who were studying in the school filed an application before the Joint Charity Commissioner being Nyay Misc. Application No. 7 of 2004 against the trust and two trustees u/s 41(A) of the Act with a prayer to have obtained interim injunction that as regards the subject matter of trust, the Charity Commissioner may call for proceedings of the trust from respondent No. 3 i.e. Additional Charity Commissioner, Surat and examine the obtaining of movable and immovable property. The said Pankajbhai Harishchandra Jani has also prayed that as regards suit land, the trust may not surrender the said land to the original owners without obtaining prior permission of the Charity Commissioner. Respondent Nos. 1 and 2 also produced necessary records before the Charity Commissioner. The said application was filed on 28.4.2004.

9.4 It appears from the record that temporary injunction was also prayed and interim relief was granted in the said application by the Joint Charity Commissioner. The matter was made returnable on 15.5.2004. In the said proceedings Shri Panjakbhai H. Jani also tendered reply at Exh. 8 with certain documents. Manishaben Mayurbhai Patel also gave combined reply of application for injunction and main application Exh. 9. Opponent No. 1 tendered an application to join proposed opponent No. 4 namely, Anilbhai B. Shah, which came to be granted by the Charity Commissioner below Exh. 12. Advocate for applicant applied for appointment of Commissioner which came to be granted on Exh. 13.

9.4A It also appears from the record that somewhere in March 2004 Chandaben filed her appearance and tendered objection Application No. 3 of 2004 on 25.3.2004.

9.4B On 11.5.2004 office of the Joint Charity Commissioner issued directions to the Assistant Charity Commissioner to inquire in respect of the affairs of Nageshwar Trust on six points as stated in the said communication. On 12.5.2004 Chandaben Dhrukeshkumar filed reply and Rajnikant Shantilal Joshi filed reply in connection with the property of the trust.

9.4C On 12.5.2004 opponent Chandaben also filed an application to join her husband Dhrukeshkumar Bankimbhai Indurai Upadhyaya as party opponent No. 4 which was ordered to be kept for hearing. The applicant preferred an application for appointment of Court Commissioner Exh. 54 wherein below order dated 12.5.2004 came to be passed.

9.4D On 14.5.2004 Babubhai Karsanbhai Patel HUF inter alia lodging objections against hearing of the matter as well as the order of appointment of Commission which was partly implemented till that date. On 14.5.2004 the Principal Bhartiben Pradipbhai Trivedi was ordered to be joined as party and matter was ordered to be kept on 15.5.2004 which came to be issued vide Exh. 26. In the further hearing the Charity Commissioner also passed order dated 14.5.2004 that as the suits are pending Commission work should at present be stalled. However, inventory work can be continued. Shri B.K. Patel, Karta of B.K. Patel, HUF, seeks to be joined as a party vide application and he was ordered to be joined as party opponent by order dated 17.5.2004. Chandaben Dhrukeshkumar filed reply to this application. On 17.5.2004 Rajnikant Joshi sought time to file reply to the main application and stay application. On 17.5.2004 the Assistant Charity Commissioner reported to Joint Charity Commissioner the inventory work carried out on 15.5.2004. On 19.5.2004 on behalf of opponent No. 1 an affidavit of Chhaganben Odhavjibhai Vaghani is placed on record for the purpose of reconfirming the fact that Babubhai Karsanbhai Patel on 31.1.2004 in his presence had handed over cheque of Rs. 5 lakh and cash of Rs. 15 lakh which was received by the trustee shri Joshi.

9.4E On 19.5.2004 the District Education Officer addressed a letter to the Joint Charity Commissioner in respect of seeking recognition of Standards I to VII and of English Medium from Standards IV to VII.

9.4F On 21.5.2004 Rajnikant Joshi tenders a list of documents particularly affidavit of Chandaben Dhrukeshkumar Upadhayay in Special Civil Application No. 2131 of 2003 along with documents and communications between the parties since 1998 between Nageshwar Vidya Trust and SUDA authorities. Application No. 8 of 2004:

9.4G From the record it appears that the learned Joint Charity Commissioner initiated suo motu proceedings u/s 41(A) of the Bombay Public Trust Act against the trust, trustees, original owners of the property (Pachhigars), SUDA as well as new purchasers of the school property, Power of Attorney holder of the two trustees, Sub-Registrar of documents, Surat; DEO, Primary Education Officer and Secondary Education Officer, Surat, inter alia fixing the date of hearing on 17.5.2004 and replies to be preferred on or before 15.5.2004. In that proceedings Chandaben filed her reply and other documents which I have referred to earlier also, given in the record particularly letter of DEO, reply filed by Rajnikant Joshi and Dhrukeshkumar Indurai Upadhyay.

9.4H The District Education Officer addressed a letter dated 14.5.2004 informing that the school premises have been demolished on 11.5.2004. He has also produced account books of the school for the year 1997-98, 1998-99 and 1999-2000. These accounts show that the trust has received Rs. 5 lakhs by cheque and Rs. 20 lakhs by cash which does not seem to be reflected therein. On 18.5.2004 the office of the Primary Education Officer informed the Joint Charity Commissioner about several irregularities of the school and stated that inquiries have been initiated and show cause notices have also been sent. On 18.5.2004 the District Education Officer informed the learned Joint Charity Commissioner certain findings with respect to the affairs of the management of the school.

9.4-I On 19.5.2004 Babubhai K. Patel tendered on record copies of documents containing plaint in Regular Civil Suit No. 411 of 2000, Special Civil Application No. 1986 of 2001 filed by Nageshwar Vidya Trust against Suda and the application filed before SUDA which has been stated earlier. Affidavit of Chhaganbhai Odhavjibhai Vaghani also produced on 18.5.2004 in the proceedings to corroborate the fact that on 31.1.2004 in the presence of Babubhai Karsanbhai Patel an amount of Rs. 5 lakh was paid by cheque and Rs. 15 lakh was paid by cash to trustee Shri Rajnikant Joshi. In both application Nos.7 of 2004 and 8 of 2004 the Charity Commissioner on 4.6.2004 passed a detailed order running into about 80 pages and while passing the said orders, he has given 32 separate directions to the trust and other people.

9.5 Being aggrieved and dissatisfied with the aforesaid order of the Charity Commissioner, Babubhai Karshanbhai Patel, HUF, karta of Babubhai Karshanbhai Patel in whose favour the original land owners have executed sale deed, filed petition before this Court being Special Civil Application No. 6433 of 2004. The said petition was filed on 7.6.2004. It was submitted that u/s 41(A) of the Act the Charity Commissioner has power to give directions for proper administration of the trust. In the guise of Section 41 of the Act the Charity Commissioner has decided title dispute which is not within his jurisdiction.

9.6 It may be noted that one Prafulbhai Chhaganbhai Panseria claimed that he is the owner of the land being old Revenue Survey No. 75 which is given new Revenue Survey No. 48 of village Magdalla of sub-District Choryashi of District Surat. According to him the said land was purchased by him from the original owners by a registered sale deed dated 29.1.2004. He has also challenged the orders of the Charity Commissioner dated 4.6.2004 passed u/s 41(A) of the Act in Special Civil Application No. 6900 of 2004 which was filed on 17.6.2004. In both the petitions the challenge was for quashing and setting aside the order dated 4.6.2004 passed by the Charity Commissioner.

9.7 When the aforesaid matter was placed before this Court, this Court (Coram: Jayant Patel, J) passed order on 4.8.2004. The Court admitted the matters and passed the following orders:

"(ii) By way of ad interim order directions qua the possession of the property rights and construction issued by the Charity Commissioner shall remain stayed with further order that the petitioner as well as the respondent trust either itself or through its trustees shall maintain status quo in respect of the possession, construction and the ownership of the property in question. So far as the other directions of the Charity Commissioner pertaining to internal administration of the trust are concerned the same shall continue to operate and it will be open to the Charity Commissioner to pass further consequential orders without disturbing the rights of the petitioner of the land in question.

(iii) It would be open to the Charity Commissioner to place the report before this Court, if not by filing affidavit at the time of final hearing."

9.8 Pursuant to the aforesaid order it appears that the Charity Commissioner has made further report dated 23.12.2004 before this Court which is on page 926 of the paper book. Thereafter the matter was placed again before this Court (Coram: K.S. Jhaveri, J) passed the following order:

"The report of the Charity Commissioner is placed on record. In pursuance of the earlier directions, it will be open for the Joint Charity Commissioner to take appropriate action as requested by him in the report dated 23rd December 2004 which has been placed on record today.

Writ to be sent to the Joint Charity Commissioner forthwith".

9.9 Meanwhile Pankajbhai Harishchandra Jani, Manishaben Mayurbhai Patel, Manojbhai Ratilalbhai Kansari and Anilbhai Bhikhabhai Shah, respondents herein, in Special Civil Application No. 6433 of 2004 had filed Civil Application No. 764 of 2005 before this Court with a prayer that this Court may clarify the order passed by this Court on 4.8.2004 with a request that the said order of the Court may not come in way of the Joint Charity Commissioner to initiate the scheme u/s 50A of the Bombay Public Trusts Act and it would be open to the Joint Charity Commissioner to take over the possession and administer the properties in question himself or by a high-ranking officer nominated by him and to run the administration of the institution being Nalanda Gurukul Vidyalaya situated on the old Survey No. 35/2 and 75 and new Survey No. 38/4 Mouje Magdalla, Tal. Choryasi, Dist. Surat. The said Civil Application was filed on 5.2.2005 and in that matter this Court (Coram: Jayant Patel, J) passed a detailed order dated 16.2.2005 and stated that as regards possession, construction and ownership of the property, the same shall be maintained by the trust and it was made clear that the order of status quo shall not operate as bar to the Charity Commissioner in issuing directions for ensuring the protection of the property also.

Application By Shri Rajnikant Shantilal Joshi u/s 41(A) of the Trust being Application No. 10 of 2004:

10. Meanwhile Rajnikant Shantilal Joshi, one of the trustees of the trust, filed an application on 15/16-6-2004 before the Charity Commissioner u/s 41(A) of the Act. In the said application the applicant has made Chandaben Dhrukeshkumar Upadhayay as one of the opponent and after narrating all these facts he has prayed that the applicant is allowed to carry on administration of the trust and the respondent may not restrain them and therefore the Charity Commissioner may pass necessary orders. It was further prayed that the trust is running a school and if the trustees desire to pay amount of salary to the teachers as well as non-educational staff then the respondent may not interfere with the same as well as to administer the school. (The said application was filed on 15.6.2004.) (page 210)

10.1 In that case the Charity Commissioner has issued notice to Chandaben Dhrukeshkumar Upadhayay on 17.9.2004 (page 231). Thereafter Chandaben Dhrukeshkumar Upadhayay appeared before the Charity Commissioner and filed her reply.

10.2 It appears from the record that in the said proceedings being application No. 10 of 2004 u/s 41(A) of the Act, the trust filed an application in which it was stated that originally there was difference and dispute between the trustees and therefore there was complaint and allegation between the trustees. However, ultimately they have resolved the said difference and dispute and therefore they desired to withdraw the said application u/s 41(A) of the Act. The Charity Commissioner has stated that along with the said application there is another application being Application No. 36 of 2004 which is also pending and as regards Nyay Misc. Application No. 7 of 2004, as this Court has passed order on 4.8.2004, the Charity Commissioner has placed the matter for further hearing. The said order dated 3.1.2005 is produced on page 279 of the paper book.

10.2A From the record it appears that in that case i.e. application No. 10 of 2004, various documents have been filed and various orders have been passed by this Court from time to time particularly orders of this Court in Special Civil Application Nos. 16738 of 2004 and 6433 of 2004 were produced before the authority and ultimately on the applicant tendered an application stating that during the course of proceedings before the Forum he has had the feeling that there is no likelihood of getting fair justice and hence appropriate proceedings are likely to be moved before the High Court. Therefore, the proceedings be deferred. Meanwhile the trust has also filed an application that the admission process will be conducted by the trustees along with the principal and the same will be published in Gujarat Samachar and Gujarat Mitra. The said application was posted for hearing on 9.3.2005.

10.2B On 9.3.2005 the arguments in the matter were heard and the same was posted for orders on 11.3.2005. However, because of the present proceedings, the Charity Charity Commissioner has not passed any order.

PROCEDURE OF SCHEME APPLICATION NO. 13 OF 2004:

11 It may be noted that Pankajbhai Harishchandra Jani, Manishaben Mayurbhai Patel, Manojbhai Ratilal Kansari and Anilbhai Bhikhubhai Shah have stated that they have interest in the activity of trust. It appears that they are parents of the students who are studying in the school run by the trust. They have filed this application on 1.11.2004 for creating a scheme for the trust u/s 50A of the Act which provides power of the Charity Commissioner to frame, amalgamate or modify the schemes. In the said scheme, it was prayed before the Charity Commissioner to sanction the scheme for administration of the trust. They have also suggested certain point for the scheme. The said point has to be considered and they have alleged certain mismanagement of the trustees in the trust as well as certain irregularities and therefore they have suggested certain changes in the trust deed. They have also suggested the schemes and names of the trustees. The said application has been produced at pages 299 to 306 of the paper book and the scheme has been produced from pages 307 to 319. They had also filed

an application that during the pending of the scheme the Charity Commissioner may appoint some trustees which is on pages 322-324.

11.1 In the said application Smt. Chandaben D. Upadhayay and others filed reply before the Charity Commissioner on 1.12.2004 contending that the applicant has no right to frame the scheme and the application filed by the applicant is not maintainable. The trustees also raised a preliminary contention that whether the application for scheme is maintainable or not.

11.2 It emerges from the record that the applicant has made endorsement to the said application and the opponent has filed application with a view to delay the proceedings.

11.3 It appears from the record that on 20.12.2004 exh. 23 came to be tendered that the preliminary issue of maintainability be heard and taken up first wherein below order passed by the Joint Charity Commissioner below Exh. 17 and 23 inter alia holding that the application raising preliminary issue is not maintainable and the matter is posted for cross examination on 6.12.2004 at 14.55 hours. Vakalatnama of Shri Omkar Dave came to be placed for Chandaben. On the said date itself an application Exh. 24 came to be tendered seeking time to approach the High Court which was rejected followed by an application exh. 25 to keep cross examination on 21.12.2004 which was also rejected followed by an application exh. 26 seeking certified copies which was granted and after recording short cross examination the matter posted on 27.12.2004.

11.3A The Joint Charity Commissioner has passed order dated 20.12.2004. In the said order it was stated that a public notice was also issued in view of the scheme on 2.11.2004 and thereafter fixed cross-examination of the applicant and rejected the preliminary objection of the opponent.

11.4 Being aggrieved and dissatisfied with the said order Smt. Chandaben D. Upadhayay filed Special Civil Application No. 16738 of 2004 before this Court on 23.12.2004 and on 24.12.2005 this Court (Coram: K.S. Jhaveri, J) passed the following order:

" Rule returnable on 28th January, 2005. To be heard with SCA No. 6433/2004. The pleadings to be completed before the said date.

It is made clear that the petitioner will abide by the order of the Charity Commissioner dated 4th June 2004 and also the order of this Court dated 4th August, 2004. It is directed that the petitioner will not act on behalf of the trust without express resolution of the trust and subject to supervision as directed by this Court in the order dated 4th August 2004. In the meantime the proceedings of Exh. 17 (Scheme Application No. 13/04) are stayed. It will be open for the parties to move this Court in case of breach of any of the aforesaid orders."

11.4A When the aforesaid petition was pending, Civil Application No. 764 of 2005 was filed by Pankajbhai Harishchandra Jani before this Court with a prayer that this Court may review the order passed earlier on 4.8.2004 and the order of

4.8.2004 will not come in any way of the Joint Charity Commissioner to initiate the scheme under Sec. 50A of the Bombay Public Trusts Act and it will be open to the Joint Charity Commissioner to take over the possession and administer the properties by a high-ranking officer nominated by him. The said application was filed on 5.2.2005. There, this Court (Coram: Jayant Patel, J) has passed order on 16.2.2005 and passed certain directions.

SCHEME NO. 36 OF 2004:

12. It appears from the record that one Dipakbhai Karshanbhai Patel, Vanrajbhai Kanjanlal Chasmawala whose children are studying in the school run by the trust also filed an application before the Charity Commissioner against the trust as well as Smt. Chandaben Drukeshkumar Upadhayay and Shri Rajnikant Shantilal Joshi, Additional Charity Commissioner and Dhrukeshbhai Indurai Upadhayay for obtaining direction of the Charity Commissioner u/s 41(A) of the Act. The said application was filed with a prayer that the Charity Commissioner may grant the application of the applicant. The Charity Commissioner may sanction the Scheme u/s 56A of the Act and till the said application has been granted as per the provisions of Section 47 of the Act day to day administration of the trust can be operated by them and respondent Nos. 1 and 2, namely Chandaben Upadhayay and Rajnikant Shantilal Joshi as well as Dhrukeshbhai Indurai Upadhayay may not interfere with the working of the trust and immovable property of the trust may also be preserved and protected. The said application has been filed on 6.11.2004 being Application No. 36 of 2004 which is on page 550 of the paper book.

12.1 In the said proceedings Chandaben appeared and sought time to file reply. Written statements were placed before the Charity Commissioner, Chandaben requested to postpone pronouncement of order in the said proceedings till the returnable dates of Special Civil Application Nos. 16738 of 2004 and 6433 of 2004 filed before this Court.

12.2 In January, 2005 Chandaben informed the learned Joint Charity Commissioner bringing on record the copies of Resolution of the trustees dated 3.1.2005 and 6.1.2005 stating that parties have settled the matters and that Shri Dhrukeshkumar has been removed as Honarary Secretary of the trust and a copy of the notice issued to Dhrukeshkumar dated 4.1.2005 was placed on record.

12.3 On 24.1.2005 certified copy of the terms of settlement arrived at between the parties in Civil Suit No. 126 of 2001 confirming the fact that the school property has been sold to other purchasers and that the trust releases all its claims thereon is placed on record of present proceedings. Chandaben reiterated her request for release of the operation of the bank account vide application exh. 18. On 31.1.2005 group applied to the office of the Charity Commissioner that certain expenses have been incurred at their end and as to what would be the status of the reimbursement of the said expenses. 12.4 On 4.3.2005 Chandaben applied vide exh. 26 to stay the order dated 25.2.2005 and produced a copy of affidavit filed in Civil Application No. 1194 of 2005 in Special Civil Application No. 16738 of 2004 and copy of the L.P.A. and Civil Application filed in the L.P.A. against the order passed in Civil Application No. 764 of 2004 in Special Civil Application No. 6433 of 2004 dated 16.2.2005 passed by the learned Single Judge and also sought for time and further expressed inability to proceed with the matter due to paucity of papers and produced compliance report of order dated 25.2.2004.

12.5 On 11.3.2005 Chandaben brought to the notice of the learned Joint Charity Commissioner the filing of Special Civil Application No. 3995 of 2005 having placed before this Court which is the present petition. The Charity Commissioner out of deference of this Court has not passed any order.

12.6 In view of the aforesaid proceedings which I have narrated hereinbefore, the trust, petitioner No. 1 and the trustees have filed the present petition under Article 226 of the Constitution for a writ of mandamus or direction transferring all the proceedings pending before respondent No. 7 the Joint Charity Commissioner, Surat to any other appropriate authority/officer/Charity Commissioner on the ground that the Charity Commissioner is biased against the petitioners.

CONTENTION OF MR. N.D. NANAVATI, LEARNED SR. COUNSEL ASSISTED BY MR. JAL UNWALA, LEARNED ADVOCATE FOR THE PETITIONERS:

13.1 It is the case of the petitioner trust that respondent No. 8 namely Shri Drukeshkumar Indurai Upadhyay has no concern with the trust. However, respondent No. 8 happens to be husband of distressed wife - petitioner No. 2 who is living separately due to certain matrimonial dispute between them. It is the case of the petitioner that instead of allowing the trustees to peacefully govern and administer the trust in proper manner, some of the parents namely respondent Nos. 1 to 6 of the students who are studying in the school and respondent No. 8 are coming in the way of the administration in question. It is the allegation that respondent No. 7 is acting at the dictates and terms of respondent No. 8 and respondent No. 8 remains present before the Charity Commissioner though he is in no way related to the present issue in question inasmuch as respondent No. 8 has been removed in his capacity as the Secretary of the Trust by Resolution dated 3.1.2005 unanimously passed by the trust.

13.2 It is the case of the petitioner that as regards Scheme Application No. 13 of 2004 for which I have made a reference earlier on 1.11.2004 some of the parents have made an application for framing a new scheme. In spite of the order passed by the Charity Commissioner dated 4.6.2004 and 4.8.2004 in Misc. Application No. 7 of 2004 and Suo Motu Application No. 8 of 2004, however, the Charity Commissioner on 1.11.2004 without hearing anybody and without affording any opportunity to the trust or trustees, straightway passed order for framing the issues. The said order is part of the record and the proceedings. The trustees have filed reply. The have filed reply where they stated that they can frame new scheme. In the proceedings also some orders have been passed on 28.12.2004.

13.3 The allegation of the petitioners is that the Charity Commissioner is not giving time and not accommodating them. It is the case of the petitioners that against the order passed by this Court dated 16.2.2005 (Coram: Jayant Patel, J), Letters Patent Appeal was filed and order was passed by the Division Bench of this Court.

13.4 It was further stated that though this Court granted stay of some of the proceedings, still respondent No. 7 going ahead of the matter and passed order dated 24.2.2005. It was further stated that though the Charity Commissioner is served the order of this Court dated 24.12.2004 which was subsequently clarified on 16.2.2005 still he insists on the presence of the trustees.

13.5 The petitioners have alleged bias in view of the attitude of respondent No. 7 in the proceedings. It may be noted that petitioners have not alleged bias on the ground that there is a pecuniary bias or any personal bias of the Charity Commissioner against the petitioners. Their case is that respondent No. 7 is showing undue haste in the proceedings and some of the attitudes of the Charity Commissioner show that he is biased in this behalf. It was further stated that the Charity Commissioner is giving undue and unwanted audience to respondent No. 8 who is not a trustee. It is the case of the petitioners the conduct of respondent No. 7 in showing over enthusiasm in proceeding with Scheme No. 14 of 2004 in spite of stay granted by this Court on 24.12.2004 also smacks of bias and therefore the petitioners would like to see that the proceedings mentioned above are not proceeded with by the Charity Commissioner, respondent No. 7.

14. The learned counsel for the petitioners submitted that this Court may transfer the proceedings as the Charity Commissioner is biased. In support of the same, he has relied on the decision of the Hon''ble Supreme Court in the case of State of West Bengal and Others Vs. Shivananda Pathak and Others, In view of the peculiar facts of the case, the Hon''ble Supreme Court in paras 25, 26, 27 and 28 on pages 524-525 of the said judgement has held as under:

"para 25 - Bias may be defined as a preconceived opinion or a predisposition or predetermination to decide a case or an issue in a particular manner, so much so that such predisposition does not leave the mind open to conviction. It is, in fact, a condition of mind, which sways judgements and renders the judge unable to exercise impartiality in a particular case.

para 26 - Bias has many forms. It may be pecuniary bias, personal bias, bias as to subject-matter in dispute, or policy bias etc. In the instant case, we are not concerned with any of these forms of bias. We have to deal, as we shall presently see, a new form of bias, namely, bias on account of judicial obstinacy.

para 27 - Judges, unfortunately, are not infallible. As human beings, they can commit mistakes even in the best of their judgements reflective of their hard labour, impartial things and objective assessment of the problem put before them. In the matter of interpretation of statutory provisions or while assessing the evidence in a particular case or deciding questions of law or facts, mistakes may be committed bona fide which are corrected at the appellate stage. This explains the philosophy behind the hierarchy of courts. Such a mistake can be committed even by a Judge of the High Court which are corrected in the letters patent appeal, if available.

para 28 - If a judgement is overruled by the higher court, the judicial discipline requires that the judge whose judgement is overruled must submit to that judgement. He cannot, in the same proceedings or in collateral proceedings between the same parties, rewrite the overruled judgement. Even if it was a decision on a pure question of law which came to be overruled, it cannot be reiterated in the same proceedings at the subsequent stage by reason of the fact that the judgement of the higher court which has overruled that judgement, not only binds the parties to the proceedings but also the judge who had earlier rendered that decision. That judge may have his occasion to reiterate his dogmatic views on a particular question of common law or constitutional law in some other cases but not in the same case. If it is done, it would be exhibitive of his bias in his own favour to satisfy his egoistic judicial obstinacy."

14.1 Thereafter, the Hon''ble Supreme Court has, in para 29 relying upon the observations of Frank J of the United States in Linahan In Re (138 F 2d 650) and in para 31 relying on the judgements in the case of A.K. Kraipak and Others Vs. Union of India (UOI) and Others, ; Dr. S.P. Kapoor Vs. State of Himachal Pradesh and Others, Mineral Development Ltd. Vs. The State of Bihar and Another, and also relying on some English cases, observed in para 33 on page 526 as under:

"Bias, as pointed out earlier, is a condition of mind and, therefore, it may not always be possible to furnish actual proof of bias. But the courts, for this reason, cannot be said to be in a crippled state. There are may ways to discover bias; for example, by evaluating the facts and circumstances of the case or applying the tests of "real likelihood of bias" or "reasonable suspicion of bias" de Smith in Judicial Review of Administrative Action, 1980 Edn., pp. 262, 264, has explained that "reasonable suspicion" test looks mainly to outward appearances while "real likelihood" test focuses on the court''s own evaluation of the probabilities."

14.2 In para 35 of the said judgement on page 527, ultimately, the Hon''ble Supreme Court has observed as follows:

"Applying these principles in the instant case, it will be seen that although the judgement passed my Mr. Justice Ajit Kumar Sengupta in the first writ petition in which he had given a direction that the respondents shall be promoted with effect from 13.3.1980 was set aside, he (Mr. Justice Ajit Kumar Sengupta), in the subsequent writ petition between the same parties, gave a declaration that the respondents shall be treated to have been promoted with effect from 13.3.1980.

Significantly, such a declaration was not prayed for and what was prayed in the subsequent writ petition was a direction to the State Government to pay arrears of salary of the higher post with effect from 13.3.1980. To put it differently, in the first writ petition Mr. Justice Ajit Kumar Sengupta commanded: "Promote the respondents with effect from 13.3.1980", in the second writ petition, he directed: "Treat the respondents as promoted with effect from 13.3.1980". There is hardly any difference between the two judgements. In fact, the second writ petition constitutes a crude attempt to revive the directions passed by Mr. Justice Ajit Kumar Sengupta in the first judgement and, curiously, Mr. Justice Ajit Kumar Sengupta, sitting in the Division Bench, wrote a second time, a judgement which was already overruled. He garnished the judgement by innocuously providing that arrears would not be payable to the respondents nor will the respondents affect the seniority of others. But the garniture cannot conceal the deceptive innocence as it is obvious, on a judicial scrutiny, that the paramount purpose was to rewrite the overruled judgement."

14.3 The learned counsel has further relied on the judgement of the Hon''ble Supreme Court in the case of Manak Lal Vs. Dr. Prem Chand, in which at para 4 on page 429 the Hon''ble Supreme Court has observed as follows:

"In dealing with cases of bias attributed to members constituting tribunals, it is necessary to make a distinction between pecuniary interest and prejudice so attributed. It is obvious that pecuniary interest however small it may be in a subject matter of the proceedings, would wholly disqualify a member from acting as a judge. But where pecuniary interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice."

14.4 The learned counsel has also relied on the judgement of the Hon''ble Supreme Court in the case of A.K. Kraipak and Others Vs. Union of India (UOI) and Others, particularly paragraph Nos. 15 and 21 of the said judgement.

14.5 The learned counsel has further relied on the judgement of the Hon''ble Supreme Court in the case of Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, particularly para 10 on page 2165.

CONTENTION OF MR. D.D. VYAS, LEARNED SENIOR COUNSEL WITH MR. DEEP D. VYAS, LEARNED ADVOCATE, FOR RESPONDENT NO. 1 (ON CAVEAT):

15. The learned counsel for respondent No. 1 has opposed the application. In fact Manoj Ratilal has filed affidavit dated 14.3.2005 opposing the application of the petitioner. He first submitted that the petitioner has committed a contempt and acted contrary to the orders of this Court and therefore the petitioner cannot be heard.

15.1 In the affidavit it was submitted that as there are large scale financial irregularities being committed by the trust. The property which was agreed to be purchased by the trust for an amount of Rs. 89,95,687/in September-October, 1998 over which a construction of worth Rs. 50 lakhs has been made by the trust in 1998 and after getting the permission from the authority, a school was started in the said property. It was submitted that some of the property was sought to be transferred by an agreement in the name of sister''s son of petitioner No. 2. However, two documents have been executed in the name of two parties for Rs. 23 lakhs and Rs. 12 lakhs i.e. in all Rs. 35 lakhs only in 2004. It was submitted that the said property belonged to the trust. It was submitted that the aforesaid transactions have been made without even making an application for permission to transfer as required u/s 36 of the Act. He further submitted that as per the order of the Charity Commissioner the directions have been given regarding internal administration of the trust and the same are allowed to be continued to operate and it was directed that it will be open to the Charity Commissioner to pass further consequential orders without disturbing the rights of the petitioner of the land in question. It will be open to the Charity Commissioner to place the report before this Court, if not by filing affidavit at the time of final hearing. It has been observed in the said order that at the same time, so far as internal administration of the trust is concerned, the Charity Commissioner can supervise and can issue directions. The Charity Commissioner may also issue direction including to inquire as to whether any trustees have misused their position or have acted against the interest of the trust or not. The said order has been passed by the Charity Commissioner on 23.12.2004.

15.2 The learned counsel submitted in the aforesaid report a further order has been passed by this Court on 24.12.2004 where it has been observed that the report of the Charity Commissioner is placed on record. In pursuance of the earlier directions, it will be open for the Joint Charity Commissioner to take appropriate action as requested by him in the report dated 24.12.2004 which has been placed on record. The writ of the said order was sent to the Joint Charity Commissioner.

15.3 In that proceedings Civil Application No. 764 of 2004 was filed before this Court and order was passed on 16.2.2005 wherein it was observed that the Charity Commissioner would be at liberty to issue appropriate directions for internal administration of the trust considering the facts and circumstances, as may be brought to the notice keeping in view the larger interest of the trust. It was further submitted that the Court may declare that the order of status quo shall not operate as bar to the Charity Commissioner in issuing directions for enquiring the protection of the property also.

15.4 It was further submitted that if the petition is entertained it would frustrate the aforesaid orders passed by this Court. It was further submitted that the present petition for transfer is not maintainable in view of the fact that the petitioners have not come with clean hands and that they want to avoid serious financial irregularities which may tantamount to the misappropriation of the funds of the trust and mismanaging the trust property. It is in that view that the present petition has been filed.

15.5 The learned counsel submitted that the Charity Commissioner has passed certain directions in Judicial Miscellaneous Application No. 7 of 2004 and Suo Motu Judicial Miscellaneous Application No. 8 of 2004 which the petitioners have tried to avoid. The petitioners failed to comply with the directions. If the Charity Commissioner takes any action they will be in difficult position and therefore the present petition has been filed to avoid the said action.

15.6 The learned counsel has further submitted that pursuant to the directions of this Court (Coram: Jayant Patel, J) the Joint Commissioner had inquired into the matter about the misdeeds of the present petitioners, pursuant to which a report has been filed before this Court and this Court (Coram: K.S. Jhaveri, J) has been pleased to observe that it will be open for the Joint Charity Commissioner to take appropriate action as requested by him in the report dated 23.12.2004 which has been placed on record. It was submitted that at no point of time at the time of placing the report or subsequent thereto, the present petitioners had alleged bias. That it is only after the order was passed by this Court (Coram: Jayant Patel, J) the proceedings have been filed to circumvent the orders passed by this Court. It was submitted that in all the four proceedings which I have referred to the petitioners have sought adjournments which on the face of it is bad.

15.7 It cannot be said that the Charity Commissioner is showing undue haste. The petitioners desire to delay the proceedings and the Charity Commissioner is proceedings with the matter because there is an order passed by this Court. Therefore, the action of the Charity Commissioner cannot be said to be bias. Non-granting of adjournments would not be a ground for alleging bias.

15.8 It was further submitted that the suit filed for specific performance relating to the property in question before the Court of Civil Judge, Surat, has been withdrawn. In fact, constant efforts have been made to transfer the possession of the property which is still with the trust, to Shri B.K. Patel who is a builder.

15.9 It was submitted that only application No. 36 of 2004 is kept for orders on 11.3.2005, this petition for transfer of proceedings is circulated before this Court on the same day in order to frustrate the directions given by this Court pursuant to the report of the inquiry submitted by the Joint Charity Commissioner.

15.10 It was submitted that several baseless allegations have been levelled that the scheme Application No. 13 of 2004 has been proceeded with. It has been submitted that all the applications made before the Charity Commissioner were with a clear cut pre-planned intention to frustrate the proceedings and orders of this Court.

15.11 It was further submitted that the allegation of bias seems to have been made only in order to extricate themselves from and to avoid actions likely to be taken against them because of the serious financial and other mismanagement made by petitioner Nos. 2 and 3.

15.12 Mr. D.D. Vyas, learned senior advocate, has relied on the judgement of the Hon''ble Supreme Court in the case of Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and others (2001) 1 SCC 182 particularly pars 26 and 27 which read as follows:

"para 26 - "Bias" in common English parlance means and implies - predisposition or prejudice.

para 27 - The concept of "bias" however has had a steady refinement with the changing structure of the society: modernisation of the society, with the passage of time, has its due impact on the concept of bias as well. Three decades ago this Court in S. Parthasarthi Vs. State of Andhra Pradesh, proceeded on the footing of real likelihood of "bias" and there was in fact a total unanimity on this score between the English and the Indian Courts."

15.13 He has also relied on the decision of the Hon''ble Supreme Court in the case of G.N. Nayak Vs. Goa University and Others, particularly paragraphs 33, 34 and 36. Para 33 reads as under:

"Bias may be generally defined as partially or preference. It is true that any person or authority required to act in a judicial or quasi-judicial matter must act impartially.

"If however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices" (Per Frank, J in Linahan, Re (1943) 138 F 2d 650)

para 36 reads as under:

"As we have noted, every preference does not vitiate an action. If it is national and unaccompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate a decision. For example, if a senior officer expresses appreciation of the work of a junior in the confidential report, it would not amount to bias nor would it preclude that senior officer from being part of the Departmental Promotion Committee to consider such junior along with others for promotion."

CONTENTION OF LEARNED ADDITIONAL ADVOCATE GENERAL MR. KAMAL TRIVEDI WITH MR. T.S. NANAVATI, LEARNED ADVOCATE:

16. On the other hand on behalf of the Charity Commissioner, though this Court did not issue notice, this Court requested Mr. Kamal Trivedi, learned Addl. Advocate General, to appear on behalf of the Charity Commissioner as amicus

curiae and he has readily with humility accepted the suggestion and appeared along with Mr. T.S. Nanavati, learned advocate. He has invited my attention to the record of the case.

16.1 First he has relied on the judgement of the Hon''ble Supreme Court in the case of Saiyad Mohammad Bakar El-Edroos (dead) by Lrs. Vs. Abdulhabib Hasan Arab and Others, particularly para 5, 6 and 7 and the Apex Court has considered the provisions of Section 50A of the Bombay Public Trust Act where it has been held in para 6 as follows:

"This empowers the Charity Commissioner to frame, amalgamate or modify a scheme for the proper management of a public trust. Under sub-section (1) he could initiate proceedings for the proper management or administration of a public trust and to frame and settle a scheme. He has two options - either to initiate proceedings suo motu or when two or more persons having interest in the public trust make an application before him, in writing, in the prescribed manner. We find, the object of the aforesaid Bombay Public Trusts Act, 1950 as revealed through its preamble is to regulate and make better provisions of the administration of public, religious and charitable trusts within the State of Maharashtra. The Charity Commissioner is appointed through a notification u/s 3 having very wide powers and duties conferred primarily u/s 69 Chapter VII and other provisions of the Act. It has been the concern of legislature to provide with such laws and entrust officers with such power to regulate, supervise the management and functioning of a public trust and endowment in a manner so as to give optimum benefit to the public at large. It was primarily this lack of proper machinery the Bombay Trust Act, 1935 was replaced by the present aforesaid Act of 1950. It is for this reason the Charity Commissioner and other set of officers are created as watchdogs for effective control and supervision of public trusts of all kind. Section 35 confers power on the Charity Commissioner in a given circumstance to issue general or special order to permit the trustees of any public trust to invest money in any manner. Before alienating any immovable property of a public trust, a previous sanction of the Charity Commissioner is required u/s 36, maintain a register of moveable and immovable properties to be in a manner as prescribed by the Charity Commissioner u/s 36-B, power of inspection and supervision u/s 37. u/s 39, a report is to be submitted to him regarding findings on the question, whether or not a trust or the person connected with the trust has been guilty of gross negligence, breach of trust, misappropriation or misconduct which resulted in loss to the trust. He can issue orders on such reports u/s 40 and can direct the resultant loss to be charged from such defaulting person, payable to the public trust u/s 41. Section 41(A) empowers him to issue directions for proper administration of the trust and institute inquiries on receipt of complaints u/s 41-B. He can suspend, remove or dismiss any trustee of a public trust on receipt of report u/s 41-B. Any person interested in a public trust may apply to the Charity Commissioner u/s 47A for the appointment of a new trustee etc. In cases of breach of public trust or trustee u/s 50 and notwithstanding this in cases he has reason to believe that for proper management or administration of a public trust he may frame and settle a scheme u/s 50A. Section 69 gives duties, functions and powers of the Charity Commissioner. It is in this background Section 50A, for the questions raised, has to be screened. Thus, we find that the Charity Commissioner is crowned with very wide powers to check and control the irregularities, malpractices and misconduct in the functionings of any public trust. Also to supervise, regulate, settle a scheme for the proper management or administration of a public trust, in fact involved in almost every step of the functioning of a public trust.

Para 7 - Sections 50A infuses the Charity Commissioner with power in addition to Section 50 to frame, amalgamate or modify any scheme in the interest of proper management of a public trust. This is exercised either suo motu when he has reason to believe it is necessary to do so or when two or more persons having interest in a public trust make an application to him in writing in the prescribed manner. This merely enables the Charity Commissioner to initiate proceedings for settling a scheme for the proper management or administration of a public trust. In the background of the setting of various provisions, the object of the trust, the Charity Commissioner being clothed with sufficient power to deal with all exigencies where a public trust or its trustees stray away from its legitimate path and where the materials are before him or placed before him by the said two persons, then to hold abatement of proceedings on application of any procedural laws not only would amount to the curtailment of his power but make him spineless and helpless to do anything in the matter of a public trust eroding the very object of the Act. This is a too restrictive interpretation to be accepted."

16.2 The learned counsel has also relied on another judgement of the Hon''ble Supreme Court in the case of Gangadhar Janardan Mhatre Vs. State of Maharashtra and Others, particularly paras 1, 4, 9 and 13 of the said judgement. He has further relied on the judgement of the Hon''ble Supreme Court in the case of Madhya Pradesh Special Police Establishment Vs. State of Madhya Pradesh and Others, particularly para 14 on page 800 which reads as under:

"As has been mentioned above, the Division Bench had noted this case. The Division Bench, however, held that even though this principle may apply to the case of a Chief Minister, it cannot apply to a case where Ministers are sought to be prosecuted. We are unable to appreciate the subtle distinction sought to be made by the Division Bench. The question in such cases would not be whether they would be biased. The question would be whether there is reasonable ground for believing that there is likelihood of apparent bias. Actual bias only would lead to automatic disqualification where the decision maker is shown to have an interest in the outcome of the case. The principle of real likelihood of bias has now taken a tilt to "real danger of bias" and "suspicion of bias" {See: Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant (2001) 1 SCC 182, , paras 27, 33 and 35 and Judicial Review of Administrative Action, by de Smith, Woolf and Jowell (5th Edn. at p. 527) where two different spectrums of doctrine have been considered.}"

16.2A He has also relied on para 21 of the said judgement.

16.3 The learned counsel has also relied on the judgement of this Court in the case of Combined Enterprises and Others Vs. Vimlaben Naginbhai Patel, particularly para 2 of the judgement which deals with transfer of the case. Para 2 of the said judgement reads as follows:

"Transfer of a suit is not to be made in a light hearted fashion. The principle governing the general power of transfer and withdrawal u/s 24 of the CPC is that the plaintiff is the dominus litis and as such entitled to institute his suit in any forum which the law allows him. The Court should not lightly change that forum and compel him to go to another Court with consequent increase in inconvenience and expense of prosecuting his suit. Balance of convenience in favour of proceedings in another Court albeit is a material consideration but may not always be a sure criterion justifying transfer. Convenience of other parties and the expenses likely to be incurred by them are also to be considered. The belated nature of the application for transfer and the fact that several proceedings have been gone through in a suit are factors which have to weigh with the Court declining an application for transfer."

16.4 He has also relied on another judgement of this Court in the case of Rajkot Cancer Society v. Muni. Corporation, Rajkot reported in 1987(2) G.L.H. 133 . He has also relied on the judgement of the Hon''ble Supreme Court in the case of Bihar State Mineral Dev. Corpn. and Another Vs. Encon Builders (I) Pvt. Ltd., and the relevant paragraphs are: paras 18 to 23 on pages 423-425 and in para 30 on page 426 it is observed as under:

"As in the instant case, the test of bias on the part of Appellant 2 is fully satisfied, the impugned order is unassailable. As bias on the part of the second appellant goes to the root of his jurisdiction to act as an arbitrator, the entire action is a nullity."

16.5 The learned counsel has also relied on the judgement of the Madhya Pradesh High Court (Indore Bench) in the case of Ratanlal Vs. Suresh Kumar, particularly paras 11, 12, 13 and 18

16.6 The learned counsel has submitted that in the present case one of the grounds of allegations is bias which has been raised when the trustees have difference of opinion between them and then they decided to withdraw the proceedings between them. The Charity Commissioner felt that once the matter is of the public trust the parties cannot automatically withdraw the proceedings. The learned counsel submitted that that fact cannot be treated as bias because in the PIL before the Hon''ble Supreme Court in the case of Saiyad Mohammad Bakar El-Edroos (dead) by Lrs. Vs. Abdulhabib Hasan Arab and Others, the petitioners desired to withdraw the petition and the Hon''ble Supreme Court did not allow them to withdraw and criticised the action.

16.7 The learned counsel submitted that similar principle applies here when the trustees have the inter dispute and thereafter they want to settle and therefore that action cannot be treated as bias in this case because the Hon''ble Supreme Court has also refused to withdraw the PIL. He submitted that the application before the Charity Commissioner is also public interest and they cannot be simply withdrawn by suit filed by the plaintiff against the defendant which is in the private realm.

17. It may be noted that the scope of the matter is very narrow. It is true that the petitioners have not alleged any personal bias or peculiar bias against the Charity Commissioner. The only ground of bias is that the Charity Commissioner is making unnecessary haste in deciding the matter though there are genuine reasons for adjournment.

CONCLUSION AND FINDINGS:

18 I have considered the facts and circumstances of the case. It may be noted from all the various proceedings which have been set out earlier, the facts emerge that two trustees who are themselves related have only had a corpus of Rs. 1000/- on the trust. However, they initially executed Satakat of the two properties from the original owners, namely, Pachhigars (1) on 24.9.1998 and (2) 17.10.1998 and thereafter they have invested a huge amount and constructed school building but ultimately did not finally execute the Sale Deeds. Thereafter, various proceedings have been initiated and the Electricity Board and SUDA have taken action. Original petitioner had filed Special Civil Application No. 1986 of 2001 which was withdrawn by the petitioner. Thereafter, Ashokbhai Mansukhlal Pacchigar had filed Special Civil Application No. 2031 of 2003 in which the trust had filed petition and from the record it appears that they have also filed application before SUDA to regularise the construction as they have not taken prior permission for construction. It was also stated that the land was agricultural land and that they have not converted the said land as Non-Agricultural land before purchasing the same. So all these facts show that the trustees have not acted legally and bona fide. It may be noted that ultimately they had to surrender the land to the original owners and the original owners sold the land to Babubhai Karsanbhai Patel for which also the trust has got valuable consideration. However, there is nothing on the record as to how this consideration was received by the trust. Ultimately the school building has been demolished.

18.1 All these facts show that the Charity Commissioner has to take various actions and in this situation if the Charity Commissioner has to initiate various proceedings namely, application No. 7 of 2004, application No. 8 of 2004 and thereafter various proceedings before the Charity Commissioner, namely, Scheme Application No. 13 of 2004, Judicial Misc. Application No. 36 of 2004 and when the Charity Commissioner has to pass order from time to time, it shows that the Charity Commissioner has acted bona fide and legally.

18.2 It may be noted that Rajnikant Shantilal Joshi has filed FIR No. I-204 of

2004 dated 16.5.2004 inter alia alleging that the builders have taken wrongful possession of the property and the school property was demolished by the builders by using various machines which is also reflected in the suo motu proceedings. This fact is also brought on the record by the co-trustee Rajnikant Shantilal Joshi in his reply exh. 52 filed on 9.5.2004 and 10.5.2004 and the builder using strong arm tactics and anti-social elements have demolished the school premises.

18.3 It may be noted that the petitioners had filed Special Civil Suit Nos. 125 of 2001 and 126 of 2001 for specific performance and they have withdrawn the said suits.

18.4 I have been informed that appeal has been filed by parent association and the same is pending. Regular Civil Suit No. 192 of 2004 is also pending. Regular Civil Suit No. 411 of 2000 is also pending. All these have a chequered histry and therefore all these facts show that the trustees have not acted bona fide and therefore the Charity Commissioner was entitled to initiate action.

19. I have also considered the facts and circumstances of the case. I have also considered various orders passed by this Court and when the Charity Commissioner tries to pass an order as per the directions of this Court and that he cannot readily grant adjournment to a party, the party cannot treat this action amounting to bias. The law on bias has been explained by the Hon''ble Mr. Justice C.K. Thakkar (now the Judge of the Hon''ble Supreme Court) in the Law of Writs, 5th Edition, where the learned author has discussed the principle of bias from page 197. On page 197 the meaning of bias has been given. After considering three types of bias, namely, pecuniary bias, personal bias and official bias the learned author has also considered the test of real likelihood of bias on page 213 of the book. On page 214 the learned author has also observed as under:

"Reasonable apprehension in the mind of a reasonable man is necessary. Such reasonable apprehension must be based on cogent materials. (Secretary to Government, Transport Deptt., Madras Vs. Munuswamy Mudaliar and Another, Again there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. (International Airports Authority of India Vs. K.D. Bali and Anr,

19.1 H.W.R. Wade on Administrative Law, Ninth Edition (2004), on page 464-465 has considered as under:

"Much confusion has been caused in the past by the concurrent use of differently formulated tests for disqualifying bias. Many judges have laid down and applied the "real likelihood" formula, holding that the test for disqualification is whether the facts, as assessed by the Court, give rise to a real likelihood of bias (R.V. Rand (1866) LR 1 QB 230), and this test has naturally been emphasised in cases where the allegation of bias was farfetched. Other judges have employed a "reasonable suspicion" test, emphasising that justice must be seen to be done, and that no person should adjudicate in any way if it might reasonably be thought that he ought not to act because of some personal interest."

On page 467 of the said book, the learned author has further observed as under:

"This change in the test - and the shift in perspective - was firmly based in the necessity of ensuring public confidence in the administration of justice. (The Strasbourg jurisprudence (as well as the traditional common law) stressed this: See, for instance, Belilos V. Switzerland (1988) 10 EHRR 466, para 67 and above, p. 453). The House of Lords made clear though that the "fair-minded and informed observer" would adopt a "balanced approach" (ibid) and was "neither complacent nor unduly sensitive or suspicious" (Lord Bingham in Lawal (ibid) adopting a phrase of Kirby J. in Johnson V. Johnson (2000) 200 CLR 488 (para 53). Although aware of legal traditions that might enhance impartiality, he or she might be critical of them. (ibid).

This assessment of the response of the "fair-minded and informed observer", although in essence a return to the old test of reasonable suspicion, will be difficult to predict. It is important that fanciful and unmeritorious allegation of bias are discouraged and that proper regard is had to the context in which the issue arises. The remark by Lord Bingham that "the administration of justice requires higher standards today than was the case even a decade or two ago (Lawal, para 22) may be a harbinger of even more exacting standards."

19.1A De Smith on Judicial Review of Administrative Action, 5th Edition, on pages 526-527 at paras 12-009 and 12-010 has observed about what is "reasonable suspicion of bias". The relevant paragraphs are as under:

"para 12-009 - Various tests have been applied to establish the limits of apparent bias. At the one extreme, the courts disallow any decision where there has been a "reasonable suspicion of bias". At the other extreme, a decision maker will only be disqualified where there is a "real likelihood of bias". "Real likelihood" can refer to either the possibility or the probability of bias. In respect of either test, there are two variants: Under the first, the suspicion or likelihood of bias is derived in the circumstances of the case from the point of view of the "reasonable man". Under the second variant, the courts themselves decided the matter, based upon the impression they have of bias in the circumstances of the case.

para 12-010 - The various tests of bias thus range along a spectrum. At the one end a court will require that, before a decision is invalidated, bias must be shown to have been present. At the other end of the spectrum, the court will strike at the decision where a reasonable person would have a reasonable suspicion from the circumstances of the case that bias might have infected the decision. In between these extremes is the "probability of bias" (this being closer to the "actual bias" test) and the "possibility of bias" (this test being closer to that of reasonable suspicion)."

19.2 De Smith on Judicial Review of Administrative Action 5th Edition on page 532 discussed the principle of likelihood of bias because of personal attitudes and relationships and ultimately on page 539 discussed the possibility of bias because of attitudes towards the issue. In para 12-030 it is observed as under:

"Disqualification for bias may exist where a decision maker has an interest in the issue by virtue of his identification with one of the parties, or has otherwise indicated partisanship in relation to the issue."

19.2A Administrative Law by I.P. Massey, sixth edition (2005) on page 180 the learned author has observed as under:

"The problem of bias arising from preconceived notions may have to be disposed of as an inherent limitation of the administrative process. It is useless to accused a public officer of bias merely because he is predisposed in favour of some policy in the public interest. Lord Devlin once said, "The judge who is confident that he has no prejudices (or bias) at all is almost certain to be a bad judge. Prejudice cannot be exorcised, but like a weakness of the flesh it can be subdued. But it has first to be detected."

19.3 Rule against bias - the first principle means that the adjudicator should be disinterested and unbiased; that the prosecutor himself should not be a judge; that the judge should be a neutral and disinterested person; that a person should not be a judge in his own cause; that a person interested in one of the parties to the dispute should not, even formally, take part in the adjudicatory proceedings. The basis of this principle is that justice should not only be done, but should manifestly and undoubtedly be seen to be done. It is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially and it is of the essence of the judicial decision and judicial administration that judges should be able to act impartially, objectively and without bias.

19.4 Onus for proving bias - It may be noted that as has been held by the Hon''ble Supreme Court in the case of S. Pratap Singh v. State of Punjab (AIR 1964 SC 74) it is for the persons seeking to invalidate an order to establish the charge of bad faith. It has to be remembered that such charge may be made easily or without a sense of responsibility, and that is why it is necessary for courts to examine it with care and attention. { Kedar Nath Bahl Vs. The State of Punjab and Others, Bias admittedly negates fairness and reasonableness by reason of which arbitrariness and mala fide move creeps in.

19.5 Mere surmise and conjecture are not enough to determine whether a person is biased in a case. There must exist circumstances from which a reasonable man would think it probable or likely that the officer in question is prejudiced against the aggrieved person. As to the test of likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. For determination of existence of bias, there should be specific allegation of any mala fide or bias.

19.6 Bias - meaning - The word "bias" in popular English parlance stands included within the attributes and broader purview of the word "malice" which in common acception means and implies "spite" or "ill-will". It is now well settled that mere general statements will not be sufficient for the purposes of indication of ill will. There must be cogent evidence available on record to come to the conclusion as to whether in fact there was existing a bias which resulted in the miscarriage of justice.

19.7 It may be noted that in this case several proceedings were initiated by the Charity Commissioner and several orders have been passed . The petitioners have not whispered about bias. It may be noted if the petitioner felt that the Charity Commissioner was bias he ought to have raised this contention from the beginning. The allegation of bias must be raised in the beginning. The petitioners were aware about the proceedings before the Charity Commissioner and in fact they have participated in the same and they had knowledge of all relevant facts. They were also aware about their rights to raise objection about bias. They deliberately did not raise this objection at the beginning but whenever they felt that the decision might come against them they decided to raise the allegation about bias. It appears that the petitioners have not raised this contention from the beginning. The Court is of the view that the petitioners precluded from raising the objection on the ground of waiver and acquiescence.

"Waiver and acquiescence - The right to impugn proceedings tainted by the participation of an adjudicator disqualified by interest or likelihood of bias may be lost by express or implied waiver of the right to object. There is no waiver or acquiescence unless the party entitled to object to an adjudicator''s participation was made fully aware of the nature of the disqualification and had an adequate opportunity of objecting. Once these conditions are present, a party will be deemed to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest practicable opportunity."

(See: Halsbury''s Laws of England, Fourth Edition, Reissue, 1(1) Administrative Law Admiralty, page 172, para 91.)

19.8 In the case of State of Punjab v. V.K. Khanna reported in AIR 2001 SC 343 the Hon''ble Supreme Court in para 8 on page 347 has observed as under:

"The test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event, however, the conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained. If on the other hand allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefore would not arise."

19.9 United States Court of Appeals - For the District of United States Court of Appeals - For the District of Columbia Circuit, Argued March 7, 1995 decided July

21, 1995 - Nos. 93-7220 and 93-7222 - Scott J. Rafferty Appellant v. NYNEX Corporation, et al. - Appellees

As the Supreme Court has observed, a judge may.... be exceedingly ill disposed towards the defendant (but) the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings.... As Jerome Frank pithily put it:

"Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgements of the actors in those cort-house dramas called trials, he could never render decisions."

19.10 "Impartiality does not imply the absence of a point of view, even one expressed before the adjudication is over. As Judge Jerome France once wrote:

"If "bias" and "partiality" be defined to mean the total absence of preconceptions..... then no one has ever had a fair trial and no one ever will. The human mind..... is no blank piece of paper..... Interest, points of view, preferences, are the essence of living" In re Linahan 138 F.2d 650 (2d Cir.)

19.11 (2001 UT APP 397 Campbell, Maack & Sessions, a Utah Professional Corporation, Plaintiff, Appellee v. Janice L. Debry, Defendant, Appellant, Opinion (for Official Publication) Case No. 990810-CA - Filed (December 13, 2001) (only relevant material paragraph is reproduced)

25. "Were we to consider Debry''s claim of bias on the part of the trial court, we would begin with the understanding that " `{if} bias'' and `partiality'' [are to] the mind of the judge, then no one has ever had a fair trial and no one ever will." In re J.P. Linahan, Inc., 138 F. 2d 650, (2d Cir. 1943) . In fact, " `[t]he traditional view is that if a judge can be disqualified for bias following a comment..... during the court proceedings, there is no limit to disqualification motions and there would be a return to "judge shopping" '' ". Madsen V. Prudential Fed. Sav. & Loan Ass''n 767 p. 2d 538 (Utah 1988) (quoting L. Abramson, Judicial Disqualification under Canon 3C of the Code of Judicial Conduct, 23 (1986)."

26. Finally, because [a judge''s] fact-finding is based on his estimates of the witnesses, of their reliability as reporters of what they saw and heard, it is his duty, while listening to and watching them, to form attitudes towards them. He must do his best to ascertain their motives, their biases, their dominating passions and interests, for only so can he judge of the accuracy of their narrations. ....

He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgements of the actors in those court-house dramas called trials, he could never render decisions.

(Linahan 138 F. 2d at 653(footnote omitted)"

(Re: para 19.9 to 19.11 - extracts taken from Website fine law.com)

19.12 What is excellence in a Judge:

"An "excellent" judge is impartial and fearless. He is independent of the executive and the legislature, but equally important, he is independent of his own predilections and prejudices. He is free of "isms". He is patient and courteous, but realises that he is a manager of the court''s time. He pays full attention to the arguments advanced before him, but is duty-bound to curb irrelevant or frivolous arguments. He is learned in the law, but has the humility to learn from the arguments advanced by counsel. He delivers judgements in time."

(Re: "Excellence in a judge" - Speech on Law Day delivered by the Hon''ble the Chief Justice of India Mr. Justice R.C. Lahoti on November 26, 2004 reported in (2005) 2 SCC (J) issue page 1 at page 16)

20 I have considered the facts of the case. I have also discussed various proceedings namely Judicious Misc. Application No. 7/2004, Suo Motu Application No. 8/2004 u/s 41(A) of the Act , Judicial Application No. 10 of 2001 u/s 41 of the Act, Scheme Application No. 13 of 2004 u/s 50A of the Act and another Application No. 36 of 2004 u/s 41A of the Act before the Charity Commissioner and various proceedings initiated by the trust, original owners and the order passed by this Court from time to time.

21. It may be noted that various orders have been passed by this Court and this Court directed the Charity Commissioner to decide some of the proceedings in accordance with law.

22. In view of these facts and circumstances of the case the allegation of the petitioner that the Charity Commissioner is not granting adjournments to the petitioner trust and the contention that he is showing over enthusiasm in proceedings with the matters has no substance because the Charity Commissioner is directed by this Court to decide the matter in accordance with law as early as possible. Therefore, there is no question of eagerness or over enthusiasm shown by the Charity Commissioner. Being an authority under the Act over which this Court has supervisory jurisdiction under Article 226 of the Constitution when this Court directs him to decide the matter he is bound to decide the same in accordance with law as early as possible. This fact is sufficient to prove that the Charity Commissioner is not biased

23. Another contention that respondent No. 8 who has nothing to do with the trust he remains present before the Charity Commissioner. However it is a question of fact that this Court is not aware as to why and in what capacity respondent No. 8 remains present and what are his submissions and how the Charity Commissioner considers his submission, these are questions of fact and the presence of respondent No. 8 does not reflect any pecuniary, personal or official bias against respondent No. 7, namely, the Charity Commissioner.

Therefore, in any view of the matter, mere fact that respondent No. 8 remains present before the Charity Commissioner, one cannot attribute bias against the Charity Commissioner.

24. The learned advocate for the petitioner has made strong reliance on the judgement of the Hon''ble Supreme Court in the case of State of W.B. and Others v. Shivananda Pathak and others (supra). Before appreciating the ratio of the said judgement, it is necessary to consider the facts of the case in detail which are set out hereinafter:

In that case there was a question of service condition of some of the officers as per the Rules made under Article 309 of the Constitution came up before the Calcutta High Court. In the writ petition it was alleged that though six permanent Upper Division Clerks were available, the respondents namely, State Government, Labour Commissioner of that Writ Petition had intended to fill up the higher posts by promoting the temporary Upper Division Clerks and not the Assistant Computers who being eligible for promotion to the posts under the West Bengal Subordinate Labour Service were entitled to be considered for such promotion. Consequently, they prayed for a writ of mandamus as well as certiorari for setting aside the said action. The said writ petition reached before the Calcutta High Court. Learned Single Judge Mr. Justice Ajit Kumar Sengupta passed order allowing the petition. The said order was challenged by way of Letters Patent Appeals before the Division Bench of the High Court and the Division Bench allowed the appeal and set aside the impugned order of the learned Single Judge and the Division Bench gave certain directions. Pursuant to the directions of the Division Bench, the Government again promoted certain persons. The said subsequent action was again challenged before the Calcutta High Court praying certain relief. The said matter came up before the learned Single Judge of the Calcutta High Court. The learned Single Judge disposed of the writ petition with certain directions based on the judgement of the Division Bench. The said order of the learned Single Judge was challenged before the Division Bench comprising of Mr. Justice Ajit Kumar Sengupta and Mr. Justice Shyamal Kumar Sen. The abovementioned Division Bench by its judgement dated 21.7.1992, allowed the appeal with the direction that the respondents shall treat the Assistant Computers to have been promoted to the Subordinate Labour Service with effect from 13.3.1980. It was further directed that although they will not be entitled to any arrears of salary with effect from that date, their basic pay in the scale of pay would be fixed by treating 13.3.1980 as the date of their promotion without, however, affecting the seniority and other benefits of the persons already promoted to the Subordinate Labour Service. The pay so fixed was made payable to them with effect from July, 1992. This judgement was challenged before the Hon''ble Supreme Court. It was contended that one of the Judges of the Division Bench Mr. Ajit Kumar Sengupta has reiterated his view which he has earlier decided as a Single Judge though the same view was set aside by earlier Division Bench.

25. In view of the facts which I have narrated above, where the learned Judge once decides the matter which order was set aside again the learned Judge out of that proceedings when the matter comes up the Division Bench where the learned Judge was a party to the Division Bench passes an order which he has passed originally as a single Judge and adheres to the same. In that peculiar facts and circumstances of the case the Hon''ble Supreme Court has held that the learned Judge has shown bias and it was a case of pre-conceived obstinacy and the trial vitiated on the said ground. Therefore, this is a case of pre-judging a situation which amounts to a bias.

26. However in the present case the facts are quite different. The Charity Commissioner has not shown any pre-conceived view in the matter. He has decided the matter in accordance with law and in fact as stated by the learned Additional Advocate General in SAIYED''s case (supra) where the Hon''ble Supreme Court has considered the cope of Section 50A of the Act the order of the Charity Commissioner is absolutely in consonance with the said principles laid down by the Hon''ble Supreme Court. Therefore the order passed by the Charity Commissioner is absolutely valid just and in consonance with the provisions of the Act and Rules and other decisions of the Hon''ble Supreme Court from time to time. The petitioners have not been able to show that the order passed by the Charity Commissioner is contrary to and inconsistent with the said principles laid down by the Hon''ble Supreme Court and the High Court. The learned counsel for the petitioners has not been able to show that any infirmity or illegality in the order of the Charity Commissioner.

27. I have considered the affidavit filed by the respondents. I have also considered judgements cited by the learned counsel for the respondents, namely, Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and others (supra) and G.N. Nayaj v. Goa University (supra). These two judgements have taken a little shift in the principle of bias which I have stated earlier. For arriving at the finding that in this case the Charity Commissioner has not biased, I have considered the principle laid down by the Hon''ble Supreme Court in the said two judgements.

28. In view of the above judgements cited by the learned counsel for the parties, I am of the view that the principles of bias have been little shifted and it will not be possible for this Court to come to the conclusion that the Charity Commissioner has shown some bias and therefore the proceedings pending before him may be transferred to some other Court.

28.1 In this case the only ground which has been alleged is that the Charity Commissioner has shown undue hurry in disposing of the cases. In my view when the adjudicating authority has a lot of cases pending and if he desires to dispose of the cases as quickly as possible, this is a case of welcome nature rather than criticising the same. Not only that the Charity Commissioner has shown his quckness in disposing of the matter but there were certain directions passed by this Court directing him to dispose of the matter. Therefore, the Charity Commissioner is legally duty bound to dispose of the matter as quickly as possible. Therefore, in my view, the Charity Commissioner has acted absolutely justly, bona fide and legally and therefore, there cannot be question of bias on the part of the Charity Commissioner.

28.1A In coming to the aforesaid conclusion I have relied on various authorities of bias.

28.2 In view of the aforesaid discussion, the petition requires to be rejected and the same is rejected with no order as to costs.

29 Before concluding this Court is beholden to Shri Kamal Trivedi, learned senior counsel and Shri T.S. Nanavati, learned advocate, who appeared at the request of the Court as amicus curiae and also extends gratefulness to Shri N.D. Nanavati, learned senior counsel with Mr. Jal Unwala, learned advocate and Mr. D.D. Vyas, learned sr. counsel with Mr. Deep D. Vyas who have rendered their valuable assistance to this Court in resolving this delicated and complicated issue.

