(2012) 03 BOM CK 0261

In the Bombay High Court

Case No : Writ Petition No. 11070 of 2011

Siddhivinayak Construction Pvt. Ltd. and Sachin Khanolkar APPELLANT

Vs

Vikas Motiram Desai and Others RESPONDENT

Date of Decision : 29-03-2012

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 36, 36(1)
Constitution of India, 1950 — Article 226, 227
Development Control Regulations for Greater Bombay, 1991 — Regulation 33(7)
Official Trustees Act, 1913 — Section 7, 9
Trusts Act, 1882 — Section 15

Citation : (2012) 4 ALLMR 70 : (2012) 114 BOMLR 1461 : (2012) 4 MhLj 913

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

Bench : Single Bench

Advocate : V.A. Thorat, with Mr. C.S. Kapadia with Mr. Sanjay Jain, Mr. I.J. Nankani and Mr. H.S. Khokawala instructed by M/s. Nankani and Associates in WP No. 11070/2011 and Mr. Prashant Karande in WP No. 1332/12, for the Appellant; Mayur Khandeparkar with Ms. Sakruta Chimalkar, Advocate in CA 296/2012 and Mr. Rajiv Patil instructed by . Mr. Harshad Bhadbhade, Advocate in CA 382/2012, Veerendra Tulzapurkar a/w. Mr. Snehal K. Shah, Ramachandran N., Ashutosh Gavnekar and Mr. Chirag Dave instructed by . Narayanan and Narayanan, Advocate for Respondent Nos. 1 to 8, Mr. R.S. Datar, instructed by . Mr. N. Raja, Advocate for Respondent No. 9 and Mr. R.M. Patne, AGP for Respondent No. 10, for the Respondent

Judgement

G.S. Godbole, J.—Heard Mr. V.A. Thorat, learned Sr. Advocate for the Petitioners in WP No. 11070/11, Dr. Virendra Tulzapurkar, learned Sr. Advocate for Respondent Nos. 1 to 8 in the said Petition, Mr. R.M. Patne, learned AGP for Respondent No. 10, Mr. Datar, Advocate for Respondent No. 9, Mr. Rajiv Patil, Advocate for Applicant in Civil Application No. 382 of 2012, Mr. Khandeparkar, Advocate for Applicants in Civil Application No. 296 of 2012. Both the Writ Petitions have been filed for challenging the Judgment and Order dated 2/9/2011 passed by the learned Charity Commissioner, M.S. Mumbai in Application No. J4/65 of 2011 in proceedings u/s 36(1)(a) of the Bombay Public Trust Act, 1950 (hereinafter referred to as "the said Act."). By the impugned order the Charity Commissioner has accorded sanction to the trustees of "The Late Rao Bahadur Anant Shivaji Desai Topiwalla Charity, Mumbai" for the sale of the trust property admeasuring 3343.57 sq. mtrs. together with the structure known as "Kudaldeshkar Brahmin Niwas", in favour of M/s. Raunak Corporation for monetary consideration of Rs. Six Crores alongwith developed area of 4000 sq. ft. built up to be given to the trust, free of costs, and minimum 460 sq. ft useable carpet area including flower beds, niches and service ducts to the tenants, free of costs, in terms of the Memorandum of Understanding dated 23/5/2011.

2. Writ Petition No. 11070 of 2011 is filed by a private limited company which claims to be engaged into the business of builder and developer and also claims to have submitted voluntary offer on 2 occasions to the trustees of the trust for getting the rights of redevelopment of the trust property.

3. Writ Petition No. 1332 of 2012 is filed by 9 persons who claim to be the beneficiaries of the trust and also claim to be the tenants of the various tenements in the buildings of the trust.

4. Civil Application No. 382 of 2012 has been filed by 4 persons who also claim to be the beneficiaries of the trust and tenants/occupants of the buildings of the trust. The Applicants in this Civil Application are essentially opposing the Writ Petitions and supporting the order of the Charity Commissioner. On the other hand, Civil Application No. 296 of 2012 has been filed by 2 persons who also claim to be the beneficiaries of the trust and tenants of the building owned by the trust.

5. Pleadings in the Writ Petition No. 11070 of 2011 and 2 Civil Applications are complete and in terms of the Order dated 27/1/2012 the parties in Writ Petition No. 11070 of 2011 were put to notice that the Petition will be disposed of finally instead of formally admitting the Writ Petition. Writ Petition No. 1332 of 2012 has been filed thereafter and since the subject matter of the dispute is same, with the consent of the respective Advocates even that Petition is taken up for hearing with Writ Petition No. 11070 of 2011 and is being heard and disposed of though formal notice for final disposal had not been issued in the said Writ Petition.

6. Rule. Rule made returnable forthwith and heard by consent of the parties. Respective Advocates for the Respondents waive service of rule.

ADMITTED FACTS :

7. (a) Property in question is owned by the aforesaid trust. The buildings are constructed prior to 1925 and are therefore categorised as "A" cessed building under the provisions of the Maharashtra Housing and Area Development Act, 1976.

(b) Various tenements in the said buildings have been let out to individual tenants and most of the tenants belong to the same community namely

Kudaldeshkar Adya Gaud Brahmin Community. Certain premises from the buildings are in possession of the trust and the said premises were being used for charitable activities of the trust.

(c) All parties are adidem that the buildings of the trust have now become old and require redevelopment by demolition of the buildings and constructing new building. It is also undisputed that this redevelopment will require cooperation of the tenants/occupants of the buildings. Redevelopment will be governed by the provisions of Regulation No. 33(7) of the Development Control Regulations for Greater Mumbai.

(d) No advertisement was issued by the trustees inviting any application from interested builders/developers who desire to undertake the work of redevelopment. Even before the Charity Commissioner, the Application was filed for dispensing with issuance of public notice. Even the Charity Commissioner did not direct issuance of public notice or advertisement inviting proposals from interested developers/builders nor did the Charity Commissioner issue any notice to the other 3 developers from whom quotations/offers had been taken by the trustees of the trust.

SUBMISSIONS OF ADVOCATES :

8. Mr. V.A. Thorat, Learned Sr. Advocate advanced following submissions :

(a) Development of property of a trust is a matter which falls in the domain of Public Law. The trustees of a public trust are guardians of the properties of the trust and while disposing of such properties they must make every endevour to ensure that the highest price is received by the trust.

(b) He submitted that the only reason given by the trustees for not issuing advertisement and inviting bids was the alleged apprehension of the tenants that nonMaharashtrian developers may cheat the tenants and the alleged intention of the tenants that only some Maharashtrian developer should be appointed. He submitted that such a concept of having only Maharashtrian developer was not only vague but also obnoxious, that every person staying in Maharashtra is Maharashtrian and, therefore, the reason given for not issuing advertisement is a complete eye wash. He invited my attention to the averments in paragraph6 and 10 of the Application filed by the trustees and submitted that the reasons given for dispensing with the public notice are completely false. According to him, in any case, one partner of M/s. Raunak Corporation is not a person of Maharashtrian origin.

(c) He submitted that the alleged 4 offers of 4 developers were curiously received within a span of 5 days from 20/4/2011 to 24/4/2011 and thereafter even without obtaining a valuation report a Memorandum of Understanding was executed on 23/5/2011. Thereafter valuation report dated 7/6/2011 was obtained.

(d) He submitted that the Petitioner had given a voluntary offer on 29/10/2010 (page48) and had thereafter submitted a revised/second offer on 3/11/2011 which specifically refers to the first offer. He submitted that there was no response to the first offer and the Petitioner was completely kept in dark. He submitted that no notice was issued even by the Charity Commissioner. Petitioner could not take part in the proceedings and make an offer before the Charity Commissioner. He submitted that entire action is vitiated by malafides. It was a predetermined action. He submitted that the valuation report was also defective as the Valuer has not taken into consideration the available FSI and potential FSI in case of a redevelopment under DCR 33(7).

(e) He submitted that the reasons given by the Charity Commissioner for accepting request of dispensing with the public notice are also erroneous.

9. Advocate Mr. Karande, for the Petitioner in Writ Petition No. 1332 of 2012 apart from adopting submissions of Advocate Mr. Thorat, advanced following submissions :

(a) Relying on clauses 26 to 31 A of the Constitution of Trust he submitted that the learned Charity Commissioner has ignored the principle of interest of the beneficiaries and has not applied the mind to the scheme of the trust and objectives of the trust. He submitted that no reasoning has been given by the Charity Commissioner as to how the objects of the trust will be fulfilled. He submitted that there is a complete lack of transparency in the actions of the trustees. He relied upon the roznama of the proceedings before the Charity Commissioner and pointed out that the Application was filed on 21/6/2011. It was thereafter taken on board on 2/8/2011 and time was taken to file the consents of the tenants. He submitted that the consents of all the tenants are not filed and the consents of only about 25 persons which were obtained in a hurry were filed and the hearing took place on 10th August, 2011. On the same day, the hearing was concluded and the proceedings were closed for orders and were adjourned to 24/8/2011 and thereafter the impugned order is passed on 2/9/2011. He submitted that the Charity Commissioner has not exercised his functions and duties as guardian of charities. He submitted that the entire proceedings before the Charity Commissioner were decided in great hurry. No public notice was issued nor any notice was given to the tenants.

(b) Mr. Karande relied upon the Judgment of the Full Bench in the case of Sailesh Developers & Anr. vs. Joint Charity Commissioner & ors. 2007(3) Mh. L.J. 717 and contended that the law laid down in this Judgment is being completely ignored by the Charity Commissioner.

10. Mr. Khandeparkar, Advocate for the Applicants in Civil Application No. 296 of 2012 supported the submissions of the Advocate Mr. V.A. Thorat and Advocate Mr. Karande and advanced following submissions:

(a) He pointed out that the MOU was executed even prior to obtaining valuation report which shows predetermined action of the trustees in collusion with Raunak Corporation.

(b) He submitted that there was no reasonable basis for arriving at the conclusion that the consideration of Rs. Six Crores was the best possible consideration which could be fetched by the trust.

(c) He submitted that the offer of Raunak Corporation was misleading, since in the offer it was offered that minimum usable carpet area to the residential tenant would be 450 sq. ft. whereas no such provision is made in the MOU. He submitted that for redevelopment project under DCR 33(7), guidelines have been issued by the Government and the tenancies have to be considered with the relevant date of the year 1996.

(d) He submitted that nobody has examined and verified whether the so-called consents of the tenants which were produced before the Charity Commissioner are consents given by the actual tenants or persons who are held to be eligible as tenants.

11. Dr. Tuljapurkar, learned Sr. Advocate for the Respondent Nos. 1 to 8 advanced the following submissions :

(a) The argument of Mr. Karande regarding consents of tenants and legitimacy of consents of the tenants etc. are not relevant, and the enquiry has to be restricted only in respect of the matters which are germane to proceedings u/s 36 of the Act.

(b) Petitioner in Writ Petition No. 11070 of 2011 is a private developer. It was not a party to the proceedings before the Charity Commissioner. The Petitioner had never submitted a bid prior to the application made by the trustees. Therefore, the Petitioner has no locus standi to file and prosecute the Writ Petition.

(c) Dr. Tuljapurkar submitted that the trust had never received the so called offer of the Petitioner submitted on 29/10/2010. He invited my attention to paragraph19 of the Affidavit of Vikas M. Desai which specifically denies receipt of offer letter dated 29/10/2010. He submitted that unless the Court is in a position to reach a conclusion that the price offered by the developer chosen by the trustees is so low that it shocks conscience of the Court or unless it was found that the valuation report was incorrect, the High Court has no jurisdiction to interfere in the matter. He submitted that there are discrepancies in the statement made in the Petition and in the letter dated 3rd November, 2011 and that there is no reference of prior discussion in the Writ Petition whereas the letter makes reference of alleged prior discussion.

(d) He submitted that giving of advertisement is not a must and whether in a given case advertisement was necessary or not depends on the facts of that case. Due publicity will be necessary only in case of outright sale but in the facts of the case like present one where it is a case of development followed by sale, the provisions of Maharashtra Ownership Flats Act, 1963 are attracted and trustees become promoters and this situation warrants the trustees to select only that developer in whom they have confidence in as much as his action and inaction may result in civil/criminal consequences.

(e) He submitted that the proposal of the Respondent No. 9 was not accepted immediately and time of one month had elapsed in between so that the Respondent No. 9 can show that he has won the confidence of the tenants and only after the Respondent No. 9 was able to convince the trustees that majority of tenants have confidence in Respondent No. 9; the proposal was accepted. Relying on paragraphs 8 to 10 of the Affidavit in Reply filed by the Respondent Nos. 1 to 8 it was submitted that Respondent No. 9 was selected as it was thought that would be able to deal with the 122 tenants and the work of development will go on smoothly.

(f) He submitted that the non giving of advertisements or inviting offers by the trustees or by the Charity Commissioner cannot be fatal to the decision unless it can be shown that the offer sanctioned by the Charity Commissioner is so low that it cannot be considered to be beneficial to the Trust. It is submitted that the object of ordering advertisements is not to arrange a swayamwar but to ascertain true price if there is a doubt about the price offered by the developer or the purchaser.

(g) He submitted that in the present case, there cannot be any doubt in as much as an independent Valuer''s Report was submitted to the Charity Commissioner. It was submitted that except for the ipse dixit of the Petitioners that the Valuation Report is not correct, no material is produced to show that the valuation made by the Valuer is wrong. It was submitted that no other Valuation Report is procured or produced before this Hon''ble Court to show that the price offered by Respondent No. 9 is so low that it cannot be considered to be beneficial to the Trust. It was submitted that the challenge to the valuation report is baseless and since no other valuation report was produced this Court should not disregard the valuation done by the approved valuer.

(h) It is therefore submitted that there is no sustainable challenge to the sanction granted by the Charity Commissioner. It is submitted that the entire material on record clearly shows that the Charity Commissioner properly applied his mind before granting sanction.

12. Mr. Datar, Advocate appearing for the Respondent No. 9 developer advanced following submissions :

(a) It was pointed out that the building in question was a cessed building and redevelopment is allowed under DCR 33(7) which contemplated consent of atleast 70 per cent tenants/occupants for the redevelopment. He submitted that out of 122 tenants/occupants 92 representing more than 70 per cent have executed MOUs with Respondent No. 9 reposing confidence in the ability of Respondent No. 9 and giving consent for redevelopment by the Respondent No. 9. He submitted that the consent of the tenants is essential for the ultimate development and unless such consent is obtained, nobody can redevelop the property. He submitted that since more than 70 percent tenants have accepted the Respondent No. 9 as developer, this Court should not interfere in its jurisdiction under Article 226 or 227 of the Constitution of India, particularly when the necessity of redevelopment is admitted by all the parties and the said necessity is to be fulfilled by the trustees. He submitted that the interest of the tenants was of paramount importance as most of the tenants/occupants were the beneficiaries of the trust and hence, the trustees had a right to ensure that the best interest of the tenants/occupants is achieved.

(b) He submitted that even prior to the filing of the Petition a development agreement has been executed and registered on 22/11/2011, sum of Rs. One Crore from out of the total agreed consideration payable to the trust has been paid to the trust by Respondent No. 9. A huge amount of stamp duty of Rs. 64,84,300/has been deposited. In short it was submitted that the Respondent No. 9 has acted on the sanction and has changed his position to such an extent that it was now an irreversible situation.

(c) It was submitted that in project like the present project of redevelopment of dilapidated/old buildings, the Judgment of Full Bench in the case of Shailesh Developer (supra) cannot be applied and in such cases the trustees had a very wide discretion and the discretion exercised by the trustees cannot be interfered with unless malafides are specifically proved and unless it is shown that the actions of the trustees have caused loss to the trust.

(d) He submitted that apart from the consideration of Rs. 6 Crores to be paid to the trust, the Respondent No. 9 was also obliged to pay corpus fund to the Society of occupants of the new building to take care of enhanced Municipal taxes and was offering a constructed area of 4000 sq. ft. to trust which was free of cost and the market value of which will be not less than Rs. 10 Crores. He submitted that the offer given by the Petitioner in Writ Petition No. 11070 of 2011 was less as compared to the total price offered by the Respondent No. 9.

13. Mr. H. Bhadbhade, Advocate for the Intervenors/ Applicants in Civil Application No. 381 of 2012 strongly opposes the Petition. Apart from adopting submissions of Dr. Tulzapurkar and Advocate Datar, he submitted that most of the tenants have faith in the ability of Respondent No. 9. They have personally visited project of Respondent No. 9 and even if the Petitioner offers a higher consideration to the tenants, the tenants are not ready to go with the Petitioner as a developer. He submitted that with a view to avoid further delay, this Court should not interfere. He also submitted that the offer of the Petitioner does not match the offer of Respondent No. 9 as the Petitioner has not offered any constructed area to the trust. He submitted that the Petitioner has been blacklisted by the MHADA Authorities for various illegalities committed by the Petitioner and in such a situation, this Court should not entertain the Petition at the instance of the Petitioner.

14. Mr. V.A. Thorat, learned Sr. Advocate for the Petitioner in WP No. 11070 of 2011 advanced following submissions in rejoinder :

(a) Respondents No. 1 to 8 ("the Trust") have created a make believe situation of inviting offers. The alleged offers are all dated within 4 days of each other 21.4.2011 to 24.4.2011; similar in language and contents; two of them are not even on letter heads and don''t have phone numbers. The process of accepting offer of Respondent No. 9 is couched in secrecy and is suspicious, arbitrary and illegal.

(b) The Trust without making independent inquiries has accepted offer of Respondent No. 9 on 26.4.2011. The valuation report is procured much later only with a view to mislead and misguide the Charity Commissioner.

(c) It is pertinent to note that Trust property has been valued above Rs. 12 crores as per Stamp duty Ready Reckoner.

(d) "Maharashtrian Developer" would mean any developer who is a resident of Maharashtra. In any event no such category is recognised by the Bombay Public Trusts Act, 1950. One of the partners of Respondent No. 9(Mr. Vijay Mody) is in fact not of Marathi descent, as alleged and portrayed by the Trust.

(e) Petitioners'' offer dated 29.10.2010 was duly received by the Trust, but was neither considered by it nor disclosed to the tenants. Reference to the said offer dated 29.10.2010 is made in Petitioners'' letter dated 7.11.2011. The Trust has not denied receipt of the letter even after receipt of Petitioners'' letter dated 07.11.2011.

(f) Immediately on receipt of letter dated 7.11.2011, the Trust and Respondent No. 9 hurriedly executed the Development Agreement on 22.11.2011. Neither the Trust nor Respondent No. 9 can claim any equities for actions post 7.11.2011 or in any event post the interim order dated 20.12.2011 passed by this Court.

(g) The record of the Charity Commissioner reflects that alongwith the application filed on 21.6.2011 no consent of any tenant was filed. Hearing is stated to be held on 02.08.2011 and adjourned for producing consents to 10.8.2011. On 10.8.2011 some so called consents are produced out of which several are signed by Respondent Nos. 1 to 8.

(h) The Charity Commissioner has not made any inquiry as required and merely accepted the stand of the Trust and Respondent No. 9. Except the Trust and Respondent No. 9 no one else is either party to the proceedings, nor given notice of proceedings.

(i) The Charity Commissioner has not issued notices even to the so called other 3 offerers.

(j) Since the Petitioners had no notice of proceedings they could not place their offer before the Charity Commissioner. The Petitioners therefore have locus to bring the facts to the notice of this Hon''ble Court. The Petitioners have deposited Rs. 2 crores to show their bonafides as against Respondent No. 9 who has paid only Rs. 1 crore to the Trust.

(k) The reasons given for dispensing with public notice are without any basis. In view of the fact the Trust property is akin to public property, it has to be alienated/sold by way of a public auction only after inviting offers from public by way of public notice. Reliance was placed on the Judgment of Chenchu Rami Reddy and Another Vs. Government of Andhra Pradesh and Others, Sailesh Developers & ors. (supra) and Yafa Jacob Simon & Anr. v/s. The Joint Charity Commissioner & ors. Bombay High Court Writ Petition No. 7233 of 2011.

(l) Whether an outright sale or alienation of development rights, both are transfer of rights of trust in immovable property attracting S. 36 of BPT Act. Hence no distinction can be drawn on the basis that what the Trust has granted is only development rights.

(m) The Trust is an occupant of several premises on the Trust property. Hence, under Development Control regulation 33(7) the Trust is entitled to minimum of 330 square feet carpet area or the area equivalent to each of the premises occupied by it, as per certification of the competent authority. The Petitioners have offered to every occupant, including the Trust an area which is more by atleast 25% of the entitlement of every occupant. Thus as per even Petitioners'' offer the Trust would be entitled to about 4000 square feet built up area.

CONSIDERATION OF SUBMISSIONS :

15. Section 36 of the BPT Act is a unique provision which confers power on the Charity Commissioner either to grant or refuse sanction for a particular sale/ alienation of the property of a public trust. The proceedings u/s 36 are not in the nature of a lis or contest between the parties for adjudication of contesting claims. The Charity Commissioner is required to ensure that the transfer/ alienation is in the interest of and for the benefit of the trust. Unless and until the satisfaction of the Charity Commissioner in respect of two crucial aspects is reached namely (1) the need for alienation and (2) the adequacy of price for alienation; the Charity Commissioner cannot grant sanction. The Charity Commissioner is expected to act as a guardian of charities and as such guardian, the Charity Commissioner is expected to take into consideration all the relevant factors which are germane to an enquiry regarding the adequacy of consideration and the benefit to the trust. In that context the enquiry by the Charity Commissioner is a quasi judicial enquiry and before granting sanction the Charity Commissioner has to bear in mind the interest, benefits and protection of the trust.

16. The property of a public trust is not the private property of the trustees and cannot be dealt with or disposed of as a private property. The property is held by the trustees only for the benefit of the beneficiaries of the trust and thus the trustees act in a fiduciary capacity. The trust property is not the personal property of the trustees and as a custodian of public trust the Charity Commissioner is enjoined to ensure that the trust property is not alienated unless the alienation is in the interest of the trust and the Charity Commissioner

is also enjoined to ensure that nothing less than the full market price of the property is received by the trust. The power to issue lawful direction u/s 36 is very wide. Section 36 itself puts fetters on the powers of the trustees and the Charity Commissioner being the guardian of the trust has to supervise and monitor the activity of alienation of the trust property. Since a large number of members of public are beneficiaries of the trust, the property of the trust partakes the character of a public property. The law in respect of scope of power u/s 36 is well established by various Judgments of this Court including Full Bench Judgment to which reference would be made in due course. In deciding the controversy involved in the present Petition, this Court must have due regard to the law laid down by this Court and the Supreme Court.

EXISTENCE OF COMPELLING NECESSITY FOR ALIENATION:

17. In the facts of the present case none of the parties have disputed the need of redevelopment of the trust property by demolition of the old buildings and construction of a new building in its place. In fact the need to alienate the trust property is not seriously disputed. A perusal of the impugned Judgment shows that the Charity Commissioner was conscious of the fact that the buildings of the trust are very old. The Charity Commissioner has framed point No. 1 about compelling necessity for development and in paragraph11 of the impugned Judgment, the Charity Commissioner has held thus :

The trustees are being duly bound to see the preliminary objects may be safeguarded, have proposed to develop the trust property which is very old. Infact one of the structures was required to be pulled down. It is brought to my notice that all the trust buildings are constructed prior to 80 years and there are 122 tenants residing in the property in question, majority of which belongs to ''The Kudal Deshastha Gaud Brahmin Community''.

In the same paragraph, it is further held as under :

It appears from the audited statements of accounts filed on record that trust is not earning any income from the aforesaid property and that annual rent of Rs. 3.00 lakhs received from the tenants is required to be spent equally on expenses towards taxes, repairs and maintenance of the property. According to the applicants, the structures were constructed in the property in the year 1925 or thereabout. The property is in dilapidated condition. The trustees have passed resolution in their meeting held on 22032011 (Exh. 9) for the redevelopment of the property. It is clear from the affidavit of the applicant No. 4 (Exh.2) which is in support of the application that property is in dilapidated condition and the trust is not receiving any income from the said property. In view of the aforesaid facts, I am of the opinion that there is compelling necessity to redevelop the property.

This finding of the Charity Commissioner is not challenged by any of the Petitioners. It is not shown that this finding is in any way contrary to the factual situation. The trust is getting meger income from the trust property and considering the age of the buildings it is but natural that a substantial amount is required to be spent for maintaining those. At present the trust property is not fetching any positive income. In view of this I see no difficulty in upholding the first finding of the Charity Commissioner about compelling necessity.

LOCUS STANDI OF THE PETITIONERS :

18. This takes me to the next crucial issue about the locus standi of Petitioners in Writ Petition No. 11070 of 2011. Dr. Tulzapurkar strongly urged that the Petitioners in this Petition had never been approached by the trustees, they had never submitted any bid for redevelopment prior to the passing of the impugned order nor were they present before the Charity Commissioner and they being complete strangers to the entire trust and not even claiming to be the beneficiaries have no locus standi to file and prosecute the Petition. However, in so far as the Petitioners in Writ Petition No. 1332 of 2012 are concerned, the fact that they are tenants and beneficiaries of the trust was not seriously disputed.

19. In this context it is necessary to note that both the Petitions are being heard together, several challenges in both the Petitions are identical and overlapping and the Petitioners in Writ Petition No. 11070 of 2011 cannot be held not to have locus standi. If the trustees were to follow a transparent procedure of issuing advertisement in widely circulated newspapers inviting bids from intended developers and if after following such a transparent procedure certain developer had not submitted bid at all or had not appeared before the Charity Commissioner at all, in such a case the question of locus standi of such person who has never responded to the invitation to bid issued by the trustees can be questioned. In the present case the Respondent Nos. 1 to 8 have admittedly not issued any public advertisement. They have admittedly not invited any private offers by writing to various developers. Even in the proceedings before the Charity Commissioner, the Charity Commissioner has not directed the trustees to publish any advertisement or to invite any bids. The entire process has been completed in a hush manner behind the closed curtains. The Petitioners in Writ Petition No. 11070 of 2011 claim that they had submitted a voluntary offer on 29/10/2010. According to them, this offer was handed over to the trustees. It is true that there is no acknowledgment of this offer available on record. However, the subsequent letter of offer dated 3/11/2011, which is admittedly received by the trustees on 4/11/2011, refers to the earlier offer letter dated 29/10/2010. The trustees have not chosen to send any reply to this subsequent offer letter dated 3/11/2011. If the trustees had indeed never received earlier offer letter dated 29/10/2010, nothing prevented the trustees from immediately informing the Petitioners that they had never received the offer dated 29/10/2010. This is admittedly not done. I am conscious of the fact that in respect of the service of the letter of offer dated 29/10/2010 there is a word against word and there is no acknowledgment of that letter. However, silence of the trustees after receiving the second offer letter dated 3/11/2011 speaks volumes. I need not dilate more on this aspect for one more reason.

20. Once it is well established that the character of the trust property is like a public property, if public property is sought to be developed and alienated in a clandestine manner without giving adequate publicity and in the present case without giving any publicity whatsoever, a person who claims to be interested in undertaking the work of development of a public property or purchasing a public property will always have locus standi to challenge alienation of the public property which has been done without notice to the general public. In the present case, precisely for this reason I am of the opinion that it does not lie in the mouth of the trustees to contend that the Petitioners in Writ Petition No. 11070 of 2011 do not have locus standi to maintain petition.

21. In this regard, I wish to quote observations of the Full Bench in the case of Shailesh Developers (Supra) in paragraph29 which reads :

29. The second question referred to the Full Bench for decision is regarding locus standi of a person who appears before the Charity Commissioner and offers his bid to challenge the order passed by the Charity Commissioner. The trustees and persons having an interest in the Trust can always challenge the order. We have already held that the proceeding u/s 36 of the said Act before the learned Charity Commissioner is a judicial proceeding. The Apex Court has held that a trust property is on par with a public property so far as its sale or transfer is concerned. It is, therefore, very difficult to say that such a person who appears before the Charity Commissioner and offers his bid has no locus standi to challenge the final order passed by the Charity Commissioner. Such a person will certainly have locus standi to file the petition under Articles 226 and 227 of The Constitution of India for challenging the final order passed u/s 36 of the said Act. However, the scope of challenge will be naturally limited. Such a person will be in a position of a bidder challenging the auction or tender process of sale of a public property. The challenge by such a person to the order will be limited to the decision making process of the Charity Commissioner. In the case of A.R. Khan Construwell the Division Bench has rightly held that after the decision in the case of Arunodaya Prefab, the concept of locus standi has been expanded.

In my opinion therefore even the Petitioner in Writ Petition No. 11070 of 2011 have locus standi to file and prosecute the present Petition.

NEED FOR PUBLISHING ADVERTISEMENT AND TRANSPARANCY OF PROCEDURE FOLLOWED BY THE TRUSTEES AND THE CHARITY COMMISSIONER.

22. It is now necessary to consider whether the procedure followed by the trustees is transparent and whether the procedure inspires confidence. It is an admitted position that the trustees have not issued any advertisement and it is also not their case that they had invited bids from reputed developers involved in the work of reconstruction and development of old buildings. The property is situated in the heart of South Mumbai and is a very valuable property. Any trustee who desires to redevelop the property for the benefit of the trust will invariably have strong desire that the trust property should fetch best price.

Mumbai is a Metropolitan city and many important and widely circulated English and Marathi newspapers are published from Mumbai. Only reason given by the trustees for not issuing any advertisement is to be found in the Application u/s 36 and the said averments make interesting reading. The averments in the Application which are relevant are quoted hereinbelow :

6) The applicants most respectfully submit that the trustees from time to time had passed resolutions for development of the aforesaid property, as all the buildings are in dilapidated conditions far away from getting it repaired. Since, there are about 122 tenants residing in the trust property who are most the community people. The trustees are duty bound to see their welfare. The applicants further submit that the trustees had expressed their intention of redeveloping the property to the tenants and in several meetings held between the tenants the trustees, the tenants had expressed their apprehension that non Maharashtrian developers may cheat them and therefore they requested the trustees to have some Maharashtrian developers who will keep their promises and shall not make breach of the permissions which shall be granted for development of the trust property by adding additional construction etc. The tenants also apprehended that as per the current position, the developers are constructing the buildings in breach of various conditions mentioned in the development permissions, and therefore, they had unanimously informed the trustees and requested the trustees to have Maharashtrian developers so that they will cooperate with the trust in the development work which shall be undertaken by the trust.......The applicants submit that considering the wishes of the tenants in the trust property, the trustees since year 1995 were considering the proposal of development, as the time progressed the conditions of buildings were going from bad to worse. The trustees had also asked the tenants who are the beneficiaries being the community members of Kudal Deshasta Gaud Brahmin community, as per the objects of the present trust. The applicants submit that the trustees also made great efforts to search for suitable developer for development cum sale of the trust property by knocking the doors of various developers. After prolong search, the trustees were successful in getting offers from following Maharashtrian developers having very sound and strong footing in the field of redevelopment work. The trustees were successful in receiving four offers which are as under :"

7) The applicants submit that the aforesaid offers received by the trust were opened by the trustees in their meeting held on 26.4.2011. After perusing the offers received from the above developers, the trustees found the offer received from M/s. Raunak Corporation as more higher than the other offers received by them. The applicants submit that since the tenants had requested to have Maharashtrian developers, the trustees had already made their investigation by personally meeting the developers, not only that but visiting the sites which are under construction by such offerers and after looking at their strong financial position, the trustees were of the opinion that the offer received from M/s. Raunak Corporation is more beneficial to the interest of their trust, as M/s.

Raunak Corporation has offered monetary consideration of Rs. 6 crores and also have offered to give 4000 sq. ft. area fully developed to their trust which can be utilized for carrying out various objects of their trust. The applicants further submit that the trustees also found that the tenants who are also prima facie happy and comfortable with the offerer viz. M/s. Raunak Construction, who has offered a minimum area of 460 sq. ft. carpet to the tenants and further promised to pay such corpus fund to their tenant society after the development of the property for meeting the additional taxes which shall be levied by the Brahun Mumbai Mahanagarpalika on them. The trustees considering all the above factors were of the opinion that the offer received from M/s. Raunak Corporation is in the best interest of the trust and therefore unanimously decided to accept the offer received from M/s. Raunak Corporation in their meeting held on 26.4.2011 and further decided to enter into Memorandum of Understanding which they have entered with the developer viz. M/s. Raunak Corporation vide Memorandum of Understanding dt. 23.5.2011.

8) The applicants further submit that in order to determine what is the market value of the property, they have obtained valuation report from M/s. Shah Consultants and Govt. approved valuer Government approved valuer who have assessed the property to the tune of Rs. 5,10,23,000/. The trustees keeping the market price of the property had absolutely no hesitation in accepting the offer received from M/s. Raunak Corporation as bonafide offer received by the trust. The trustees also found that the tenants have shown their faith in M/s. Raunak Corporation who had also visited the site developed by M/s. Raunak Corporation. The trustees have also verified the capability of the developer who also was willing to offer bank guarantee to the tenants who were very keen to see that the development of the trust property is successfully handled by such developer. Considering all the above factors, the trustees are of strong opinion that the offer received from M/s. Raunak Corporation is in the best interest of the trust and comparatively about the prevailing market value. The applicants further submit that since the structure in which the trust activities were conducted had collapsed and the trust activities are practically in standstill position which can be restarted if the proposed development is carried out and trust will get a built up area of 4000 sq. ft. which is offered by the developer to the trust free of cost. The trustees feel that by getting developed area of 4000 sq. ft., the trustees can implement many objects of the trust, originally mentioned in the scheme framed by the Hon''ble High Court, Bombay. Keeping all such factors in mind, the trustees are of unanimous opinion that the above transaction is in the best interest of the trust.

10) The applicants further submit that since the tenants who are 122 in number had shown their strong wishes in number of meetings held between the tenants and the trustees. They had requested the trustees to have Maharashtrian developers and shown their apprehension they should not get cheated in the hands of nonMaharashtrian developers. The trustees had to personally make efforts by knocking the doors of various Maharashtrian developers who can earn

the confidence of the tenants. After long search the trustees have received competitive offers from the developers. It was not possible for the trustees to issue public notice in newspapers for calling maximum offers due to the conditions imposed by the tenants as the development of the trust property is not possible, as the trust property is fully tenanted trust property and tenants wishes are required to be considered. The applicants submit that they had to personally visit the developers and request them to see the property have tentative meetings with the tenants and therefore give their best possible offers to the trust. It was therefore not possible for the trust to give advertisements in the newspapers. However, the trustees have taken abundant precautions by knocking the doors of various Maharashtrian developers who have very strong financial conditions for development of the trust property. The trustees also keeping in mind to get the best suitable price have obtained valuation report of the trust property from the Government approved valuer. After considering the valuation given by the valuer, the trustees absolutely had no hesitation in considering the aforesaid highest offer received from M/s. Raunak Corporation. The applicants therefore submit that it was not possible for them to give public notice calling for offers in the present case. The trustees therefore have prayed to dispense with the public notice for development cum sale of the aforesaid property in light of the situation mentioned by them in the present application.

23. None of the aforesaid reasons given by the trustees for not issuing advertisement do not appear to be genuine. There is absolutely no material placed on record indicating as to when the meeting of the tenants and the trustees took place. No material was placed on record before the Charity Commissioner to prove as to what was the basis of the contention that the tenants wanted only a Marathi developer to be given the work of development. Even if one assumes that the submission of Sr. Advocate Mr. Thorat that this concept of having a Marathi Developer is abhorant to public law, even in a city like Mumbai there are several reputed firms or developers which are sole proprietary concerns or partnership firms which have persons of Maharashtrian origin as proprietors/partners/directors. The trustees have not explained as to why they approached only the four developers named in the Application. The timing of the bids received from these developers is also interesting. All the 4 bids are stated to have been received within a span of 5 days. There is nothing on record to show that the trustees had invited written bids from these developers within a particular time. In view of this, timing of the bids being received within 5 days, is a matter which cannot be lightly brushed aside. There is nothing to indicate that any transparent procedure of receiving the bids in sealed covers or opening bids in presence of all bidders was followed. There is also nothing to indicate that the bidders were permitted to improve their bids or submit revised bids.

24. From the averments in the Application it is clear that the trustees have dealt with the property as if it was their private property and have not followed any transparent procedure.

25. In the case of Committee of Management of Pachaiyappa''s Trust v/s. Official Trustee of Madras and anr. (1994) I SCC 475, the Supreme Court has observed thus :

20. In this regard it may be mentioned that in view of Section 9 of the Act when the Official Trustee has been appointed trustee under a will he holds the property vested him upon the trust expressed in the will. u/s 7 of the Act, the Official Trustee acts as an ordinary trustee and has the same powers, duties and liabilities and is entitled to the same rights and privileges and is subject to the same control and orders of the Court as any other trustee acting in the same capacity. According to the Indian Trust Act, 1882 a trustee is bound to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own (Section 15) and a trustee can be do all acts which are reasonable and proper for the realisation, protection or benefit of the trust property (Section 36). Describing the standard for fiduciary conduct expected from a trustee, Cardozo, J. has said:

A trustee is held to something stricter than the morals of the market place. Not honesty alone but the punctilio of an honor the most sensitive, is then the standard of behaviour.... Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd." (See Meinharal v. Salman.

21. In Muniswami Naidu v. Official Trustee (supra), while referring to the duties of Official Trustee, it has been held: So long as the property is vested in the Official Trustee it will be the duty of the Official Trustee to take such steps and conduct himself in such a manner as to make the trust get the maximum advantage of any transaction without prejudice to the security and safety of the trust property itself.

22. In the said case, it has been further held that if the Official Trustee him self wants to lease out the property the normal procedure to be adopted is by public auction. The said view is in consonance with the law laid down by this Court in the Context of alienation of public property.

23. In K.N. Guruswamy Vs. The State of Mysore and Others, the Court was dealing with the sale of a liquor contract. It was observed that matters of "consequence to the State revenue cannot be dealt with arbitrarily and in the secrecy of an office." The Court has emphasized the need for publicity so that people at large have notice. It was held that "the furtive method adopted of settling a matter of this moment behind the backs of those interested and anxious to compete is unjustified." (p.312)

24. In Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others, it is has been observed (Chandrachud, C.J.):

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

25. Relying on the said observations this Court in State of Uttar Pradesh Vs. Shiv Charan Sharma and Others, has held that "public auction with open participation and a reserved price guarantees public interest being fully observed".

26. In Ram and Shyam Company Vs. State of Haryana and Others, it has been laid down:

On the other hand, disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the offers of the State administration would serve public purpose viz. the welfare State may be able to expand it s beneficient activities by the availability of larger funds.... But where disposal is for augmentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market economy. An owner of private property need not auction it nor is he bound to dispose it of at a current market price. Factors such as personal attachment, of affinity, kinship, empathy, religious sentiment or limiting the choice to whom may be willing to sell, may permit him to sell the property at a song and without demur. A welfare State as the owner of the public property has no such freedom while disposing of the public property.(p.277)

26. In the case of Chenchu Rami Reddy (supra), the Supreme Court has laid down that the property of the trust is like a public property. Paragraph7 of the said Judgment lays down the law in this regard which reads thus :

7. We cannot conclude without observing that property of such institutions or endowments must be jealously protected. It must be protected, for, a large segment of the community has beneficial interest in it (that is the raison d''etre of the Act itself). The authorities exercising the powers under the Act must not only be most alert and vigilant in such matters but also show awareness of the ways of the present day world as also the ugly realities of the world of today. They cannot afford to take things at their face value or make a less than the close stand best attention approach to guard against all pitfalls. The approving authority must be aware that in such matters the trustees, or persons authorised to sell by private negotiations, can, in a given case, enter into a secret or invisible underhand deal or understanding with the purchasers at the cost of the concerned institution. Those who are willing to purchase by private negotiations can also bid at a public auction. Why would they feel shy or be deterred from bidding at a public auction? Why then permit sale by private negotiations which will not be visible to the public eye and may even give rise to public suspicion unless there are special reasons to justify doing so? And care must be taken to fix a reserve price after ascertaining the market value for the sake of safeguarding the interest of the endowment. With these words of caution we close the matter.

27. It is in this context that atleast the Charity Commissioner should have been more vigilant and in my opinion, it was the duty of the Charity Commissioner to direct the trustees to publish advertisement in reputed English and Marathi newspapers inviting bids from prospective developers/purchasers. Unfortunately in the present case, the Charity Commissioner has not exercised the care and caution which was required to be exercised by the Charity Commissioner. In case of Mr. A.R. Khan Construwell and Co. Vs. Youth Education and Welfare Society and Others, the Division Bench has observed thus in paragraph 49 :

49. We have considered the submissions of rival counsel. As far as the legal submissions are concerned, there is great merit in the submissions of Mr. Apte. It is quite clear that the principle of locus standi has been expanded and any such parties, who want to give their offers in the interest of the Trust, cannot be restrained from participating in the proceedings before the Charity Commissioner or later on by challenging his decision. The proposition in Girdhar Nichani (supra) by a Single Judge cannot be said to be a good one in the light of the approach adopted by the Apex Court in Mehrwan Homi Irani. Similarly, the proposals of uninvited offerers cannot be restricted only to ascertain the market price as held in Arunodaya earlier. It is clear from the judgment in Mehrwan Homi Irani that the Charity Commissioner can explore the possibility of having agreements with other parties on better terms. That was also the view of a Division Bench of this Court in Madhukar v. S.K. Laul (supra) when the Division Bench observed that the terms of agreement of sale are liable to be examined by the Charity Commissioner at the time when he grants the sanction. To that limited extent, the role of the Charity Commissioner, while scrutinising the proposal before him, cannot be compared to the role of a writ court examining the terms of a Government tender. In that sense, the reliance by the learned Single Judge on the judgment in Director of Education (supra) for interpreting the role of the Charity Commissioner u/s 36 of the BPT Act was not apt. Section 36 of the BPT Act gave wide powers to the Charity Commissioner which are obviously given in the interest, benefit or protection of the Trust. The section itself provides that while according the sanction to the proposed lease or sale, the Charity Commissioner may impose such conditions as he may think fit to impose for this purpose. He can undoubtedly refuse to accord sanction. He may as well formulate and impose just and proper conditions which may serve the interest of the Trust as held in Mehrwan Homi Irani (supra).

28. The Full Bench in Shailesh Developers (supra) has expressly approved the Judgment of Division Bench in M/s. A.R. Khan Construwell (supra). The Full Bench Judgment in the case of Shailesh Developers (supra) has observed thus :

26. The submission of Shri. Tulzapurkar, learned senior counsel was that the decision of the Apex Court in the case of Mehrwan (supra) does not lay down any proposition of law and the said case is decided on its peculiar facts. This submission is not correct. The Apex Court does hold that the Charity Commissioner while exercising the power u/s 36(1) must explore possibility of

having a deal of the Trust property on better terms as the object of the Trust should be accomplished in the best of its interest.

Shri Tulzapurkar relied upon the decision of the Supreme Court in the case of Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel and Ors. AIR Supreme Court 372. He relied upon the observations of the Court to the effect that Section 36 imposes only a fetter upon the power of the trustee. The relevant portion of the decision of the Apex Court relied upon by Shri Tulzapurkar reads thus:

For the purpose of te present case, we do not deem it necessary to express any opinion on the question whether a sale in exercise of authority derived from the trustees, e.g. a covenant for sale under an English mortgage executed by the trustees or a sale in terms of a consent decree attracts the application of Section 36 of Act. We have no doubt, however, that the Legislature did not intend to put any restriction upon the power of the Civil Court executing a decree for recovery of money due from the trust, by sale of the property of the trust. The section imposes a fetter upon the power of the trustees: it is not intended hereby to confer upon the Charity Commissioner an overriding authority upon actions of the Civil Court in execution of decrees."

The question before the Apex Court was whether expression sale in Clause (a) of Section 36 would only mean transfer of property by the trustees for a price or will include a sale of the property of a public trust in execution of a decree of a Civil Court for recovery of debt due by the trust. The said decision cannot be read as laying down a ratio that powers of the Charity Commissioner u/s 36 are limited either to grant of sanction or to reject sanction. The said decision is not helpful in deciding the scope of powers of Charity Commissioner u/s 36.

27. While exercising powers u/s 36 of the said Act of 1950, the Charity Commissioner has to safeguard the interests of the trust as well as the interests of beneficiaries. The learned Single Judge in the case of Arunodaya Prefab (supra) has held thus:

It may not be open for the Charity Commissioner to consider the offers of third parties except only to the extent that they might disclose to him what might be the market value of the land only for the limited purposes of ascertaining the market value of the land.

The said view was rightly criticised before us by pointing out that if Charity Commissioner was to invite offers only for the purpose of ascertaining the market value of the property, no genuine buyer or purchaser will come forward and offer a genuine competitive price. It was submitted that no genuine buyer would be interested in coming forward with the offer if his offer is to be considered only for a limited purpose of finding out as to what was the market value on the relevant date. If offers are invited only for this purpose, there is every possibility that the offers will not be bonafide and genuine.

28. While exercising power either under Clause (b) or Clause (c), the Charity Commissioner can impose conditions having regard to the interest, benefit or protection of the trust. Before passing an order of sanction or authorisation, the Charity Commissioner has to be satisfied that the trust property is required to be alienated. Once the Charity Commissioner is satisfied that the alienation of the trust property is necessary in the interest of the trust or for the benefit of the trust or for the protection of the trust, it is very difficult to accept the submission that the power of the Charity Commissioner is restricted either to grant sanction to a particular proposal of the trustees or to reject it. It is the duty of the Charity Commissioner to ensure that the transaction of alienation is beneficial to the trust and its beneficiaries. He has to ensure that the property is alienated to a purchaser or buyer whose offer is the best in all respects. It is not necessary in every case that the Charity Commissioner has to ensure that property is sold by the trustees to the person offering highest price or consideration. What is the best offer in the interest of the trust will again depend on facts and circumstances of each case. In a given case, while alienating the trust property, the trustees may provide that as a part of consideration for alienation, the purchaser should construct a building on a part of the trust property for the use by the trustees for the objects of the trust. In such a case, it may be necessary to ascertain the reputation and capacity of the purchaser apart from the consideration offered. When the Charity Commissioner is satisfied that trust property needs to be alienated and when he finds that the offer received by the trustees may not be the best offer, he can always direct that bids be invited by a public notice. When a better offer is received in public bidding or auction, it is very difficult to say that the power of the Charity Commissioner is restricted and he cannot enjoin the trustees to sell or transfer the trust property to a third party who has given an offer which is the best in the interest of the trust. The Trustees approach the Charity Commissioner only when they are satisfied that there is a necessity to alienate the trust property. The trustees hold the property for the benefit of the beneficiaries and therefore once they express desire to alienate the property, it is obvious that Charity Commissioner can always impose condition while granting sanction that the property shall be sold or transferred to a person who has come with an offer which is the best offer in the interests of the trust. The Section gives a power to the Charity Commissioner to impose conditions and the said conditions will include a requirement of selling or transferring or alienating the trust property to a purchaser who has offered the best deal having regard to the interest and benefit of the beneficiaries and the protection of the trust. The power to impose conditions cannot be a limited power when the law requires the Charity Commissioner to exercise the said power having regard to the interest, benefit and protection of the trust. Once the Charity Commissioner accepts the necessity of alienating the trust property, the trustees cannot insist that the property should be sold only to a person of their choice though the offer given by the person may not be the best offer. The property may be vesting in the trustees but the vesting is for the benefit of the beneficiaries. The Charity Commissioner has jurisdiction to ensure that the property is sold or transferred

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

Thus narrow interpretation sought to be given to the power of Charity Commissioner under Clauses (a) and (b) of Sub section 1 of Section 36 cannot be accepted. Thus the view taken in the case of A.R. Khan Construwell and Co. (supra) is the correct view. The case of Arunodaya Prefab is not correctly decided.

29. Sr. Advocate Mr. Thorat has rightly relied upon the aforesaid Judgment of the Full Bench and has also relied upon the recent Judgment of the Division Bench (P.B. Majmudar and R.M. Savant, JJ) in the case of M/s. N.D. Construction & ors. v/s. State of Maharashtra & ors. What is observed in paragraph20 of the said Judgment is as under :

20. The Charity Commissioner, while considering application u/s 36 (1) of the Act is required to apply his mind and is required to make discreet enquiry to find out whether it is in the interest of the trust to sanction the transaction in question. Without previous sanction of the Charity Commissioner, no life can be given to any transaction entered into by any Trust and such transaction will have no legal or binding effect. The Charity Commissioner is assigned an important duty and is required to act in the financial interest of the Trust in connection with the transaction in question for which sanction is sought for. While deciding an application u/s 36 (1) of the Act, it is the duty of the Charity Commissioner to hold an appropriate inquiry and from the material on record to find out as to whether the transaction which the Trust wants to enter into is required to be approved or not and any sanction is required to be given or not. At the time of

deciding such application, the Charity Commissioner is also required to consider as to whether the price which the Trust is likely to receive is appropriate price and whether the transaction in question is genuine or not. In view of the decision of the Full Bench (supra), it is clear that while considering the question about granting sanction, the Charity Commissioner is not required to give sanction only in connection with the particular transaction with any party, for which sanction is sought for, but he is required to see that various bidders can put their own bids before him and ultimately, if in the opinion of the Charity Commissioner, the highest bid is required to be accepted and sanction may accordingly be accorded to the highest bidder. The Charity Commissioner is required to invite various bids and to find out the best bid. In a given case, the Charity Commissioner is also required to find out as to whether the highest bid given by a person is genuine or not and also to find out the credentials of such bidder. The Charity Commissioner while deciding the best offer, is required to take into consideration various factors. Considering the scheme of the Act, the Charity Commissioner while accepting the bid of a particular bidder is also required to see whether the said bid is beneficial to the trust. As held by the Full Bench, the Charity Commissioner is required to consider the interest of the Trust by inviting bids and the scope of Section 36 cannot be said to be confined only to give approval to a particular transaction which the Trust might have entered into and seeking sanction from the Charity Commissioner qua the said transaction. The Full Bench in the case of Sailesh Developers (supra) has held that the power vested in Charity Commissioner u/s 36 of the Act is not only confined merely to grant or refusal of sanction to particular sale transaction in respect of which sanction is sought but also extends to inviting offers from members of public and directing trustees to sell or transfer trust property to a person whose bid or quotation is best having regard to interest, benefit or protection of Trust. It has also been held that a party who comes forward to submit his offer directly before the Charity Commissioner and complies with requirements as may be laid down by the Charity Commissioner in a pending application u/s 36 of the Act has locus standi to challenge the final order passed in proceedings u/s 36 of the Act.

30. In the recent Judgment delivered by me on 7/12/2011 in the case of Ms. Yafa Jacob Simon & Anr. v/s. The Joint Charity Commissioner & ors. in Writ Petition No. 7233 of 2011 the trustees had issued advertisements in English, Hindi and Marathi newspapers which were little known and were not having wide circulation. They had invited bids and in response to such advertisement several bids were stated to have been received. The Joint Charity Commissioner overlooked the fact that advertisements were not published in the reputed newspapers and did not direct to publish advertisement in reputed newspapers but granted sanction. The bidders were not given notice to appear before the Charity Commissioner nor the bidders were given chance to improve upon their bids. Even in such a situation where the trustees had published advertisement and invited bids, this Court has observed thus :

38. In the absence of the proper advertisement in the reputed newspapers, the

process which has been followed by the trustees cannot be held to be a very transparent process. The said process does not inspire confidence about the claim of the trustees that a very transparent process was followed.

43. The Supreme Court has thus clearly laid down that the property of the trusts and endowments must be jealously protected and that it must be protected because large segment of the community has beneficial interest in it. In the present case, noticing the choice of the newspapers in which advertisement was published, the Joint Charity Commissioner ought to have been put on an immediate guard and first question which the Joint Charity Commissioner ought to have asked and answered itself is whether this is a proper publication which would fetch the best possible choice. Unfortunately the Joint Charity Commissioner has not adverted to this factor at all. The Joint Charity Commissioner should have and ought to have directed the trustees to publish a fresh notice in reputed English and Marathi newspapers which are having wide circulation in Mumbai like Maharashtra Times, Loksatta, Indian Express, Times of India etc. and ought to have invited bids for the disposal of the trust property. Such a process would alone have resulted in finding out a correct price of the property of the trust. Unfortunately, this exercise, which ought to have been done by the Joint Charity Commissioner, particularly when the trustees had not published the advertisement in reputed newspaper, has not been done by the Joint Charity Commissioner. In this regard, useful reliance can be placed on the following observations of the Supreme Court in paragraph no. 9 in the case of Mehrwan Homi Irani and Anr v Charity Commissioner, Bombay and Orsn which reads thus:

The counsel for the appellants also pointed out that it is likely that there would be better offers from other parties. The offer made by the appellants themselves is not very encouraging and the respondents were right in not accepting the same. However, we are told that there were some other offers also from some will known charitable institutions. In the best interests of the Trust and its objects, we feel it appropriate that respondent nos. 2 to 4 should explore the further possibility of having agreements with better terms. The objects of the Trust should be accomplished in the best of its interests. Leading out of major portion of the land n (2001) 5 SCC 305 for other purposes may not be in the best interests of the Trust. The Charity Commissioner while granting permission u/s 36 of the Bombay Public Trusts Act could have explored these possibilities. Therefore, we are constrained to remit the matter to the Charity Commissioner to take a fresh decision in the matter. There could be fresh advertisements inviting fresh proposals and the proposal of the 5th respondent could also be considered. The Charity Commissioner may himself formulate and impose just and proper conditions so that it may serve the best interests of the Trust. We direct that the Charity Commissioner shall take a decision at the earliest. We allow the appeal as indicated above and remit the matter to the Charity Commissioner in modification of the orders of the High Court in Writ Petition and that of Charity Commissioner.

31. As an outcome of the aforesaid discussion it is clear that the impugned order of the Charity Commissioner is clearly unsustainable and the Charity Commissioner has not duly exercised the functions and performed duty imposed on the Charity Commissioner u/s 36 of the Act. I have therefore no hesitation in coming to the conclusion that the said order deserves to be quashed and set aside.

MOULDING OF RELIEFS :

32. The need for alienation by redevelopment and ultimate sale of the properties of the trust is established. I am therefore inclined to set aside the impugned order partly to the extent it grants sanction to alienate the property in favour of the Respondent No. 9 and remand the application back. The Charity Commissioner shall thereafter direct the trustees to publish an advertisement in reputed newspapers like Times of India, Maharashtra Times, Indian Express and Loksatta and invite bids from the developers for the redevelopment and sale of the property of the trust. The bid submitted by the Respondent No. 9 which has been accepted by the Charity Commissioner should form the reserve price. Thus, the advertisement will indicate that any bidder who desires to bid must fulfill the following minimum criteria :

(a) Monetary consideration of Rs. 6 Crores to the trust;

(b) Developed area of 4000 sq. ft built up (3418 sq. ft. carpet area) to be given free of costs to the trust;

(c) usable carpet area of 460 sq. ft. to individual tenants including flower bed, niches and service ducts.

(d) Corpus fund for the tenant society of such sum, as may be determined by the Charity Commissioner.

(e) 20 Bank Guarantee of Rs. 50 Lakhs each as offered by Respondent No. 9.

(f) Additional consideration of Rs. One Crore to the trust in case FSI is enhanced from 2.5. to 3.

33. After the bids are received by the trustees in sealed envelopes, the same shall be opened before the Charity Commissioner and thereafter notices should be sent to all the bidders to take part in bidding before the Charity Commissioner so as to enable individual bidders to improve upon their bids.

34. Highest bidder who is fulfilling all the aforesaid criteria will thereafter be chosen and a sanction for alienation of the trust property shall be granted in favour of such highest bidder.

35. Rule made absolute in the aforesaid terms with no order as to costs. In view of disposal of the Writ Petition, nothing survives for consideration in both the Civil Applications. The same are disposed of accordingly.