

(2010) 09 BOM CK 0102

In the Bombay High Court

Case No : Notice of Motion No. 715 of 2010 in Suit No. 806 of 2009

Vadilal Nandlal Shah and Others

APPELLANT

Vs

Ramesh Dharamdas Mehta and Others

RESPONDENT

Date of Decision : 15-09-2010

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 1(4), 50, 51, 92(1)
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 7 Rule 11, 50, 9, 92
Constitution of India, 1950 — Article 25, 25(2), 26

Citation : (2011) 3 ALLMR 369 : (2011) 1 BomCR 692

Hon'ble Judges : S.C. Dharmadhikari, J

Bench : Single Bench

Advocate : Bipin Joshi, D.V. Merchant, Rohan Cama, Sanjay Udeshi, Mahesh Londhe and Pallavi Dedhia, instructed by Sanjay Udeshi and Co., V.M. Waghela, in C/S. 581 of 2010, Ramnikbhai Parekh and Parag Shah, instructed by Mahesh Shah and Co. in C/S. 1705 of 2009 and D.B. Mistry, instructed by D. Mehta and Associates in C/S. 1808 of 2009, for the Appellant; Nitin Thakkar and Satish Shetye, instructed by R.D. Vora for Defendant Nos. 1, 2, 3 and 5, Chetan Kapadia and D.V. Deokar, instructed by P.K. Shroff and Co. for Defendant No. 6, for the Respondent

Judgement

S.C. Dharmadhikari, J.—This is a Notice of Motion by defendant Nos. 1, 3, 4 and 5 in the NMS715-10 2 suit for claiming following relief:

(a).that the plaint in above suit be rejected, the same being barred by the provisions of the Bombay Public Trust Act, 1950 and/or on the ground that the plaint does not disclose cause or action.

2. In effect this is a notice of motion invoking this Court's power under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 (for short CPC). The CPC has such a provision so that the Court can reject the plaint not only when it does not disclose a cause of action or where the relief claimed is under valued and the plaintiff on being required by the court to correct the valuation within a time frame failed to do so or when the relief claimed is properly valued but the plaint

is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the court, fails to do so. Importantly, where the suit appears from the statement in the plaint to be barred by any law.

3. It is this provision which is being invoked in the instant case by the defendants. Naturally, therefore, the statement in the plaint will have to be seen for deciding the present notice of motion.

4. It is urged in the affidavit in support of the notice of motion by one Ramesh Mehta that he is one of the Trustee of Sheth Chaturbhuj Jivandas Religious and Charitable Trust. The plaintiffs have filed the above suit against defendant Nos. 1, 3, 4 and 5 who are trustees of a public trust. In other words, the trust has been registered as a public charitable trust under Bombay Public Trust Act, 1950 (for short the Act). He further states that the suit is filed inter alia for a declaration that the consent terms and/or consent award permitting removal of deity of Navnit Priyaji from the Haveli is nullity in law or in the alternative the terms arrived at are voidable at the instance of the plaintiffs who have a vested interest of having darshan of the Shree Navnit Priyaji as per Vaishnav Sampradaya. It is stated that reading of plaint will disclose that Section 50 of the Bombay Public Trust Act, 1950 would be attracted and without compliance with the said provision, viz., obtaining consent of the Charity Commissioner, the suit would be barred by law. Therefore, this is a fit case where this Court should exercise its powers under the aforementioned provisions of the CPC and reject the plaint.

5. Mr. Thakkar, learned Senior Counsel appearing on behalf of these defendants in support of the notice of motion invited my attention to the plaint and contended that the plaintiffs claim to be Vaishnavs following Pushtimarg Sampradaya. They are following customs and tradition of Vallabh Sampradaya, according to them. These defendants are impleaded as Trustees of the Trust created by Manibhai, wife of Chatrabhuj Jivandas. The trust is created under the will of Chatrubhuj Jivandas dated 28th December 1924. Mr. Thakkar submits that defendant Nos. 6 and 7 are the Maharajshree who are Dharmacharyas and also performing Pooja/ seva. Mr. Thakkar invites my attention to para 2 of the plaint which narrates the history of Vallabh Sampradaya and its foundation and then submits that in para 3, the plaintiffs state that they have learnt that the said CJ referred to as deceased in the plaint died on 19th October 1925 leaving behind his last will and testament written in Gujarathi language. Mr. Thakkar submits that by the said will the deceased created a Trust and directed the Trustees and Executors of the will to make a Haveli in the name of the deceased by spending Rs. 30,000/- and that the Thakorji (idol of Lord Krishna) was to be installed therein so as to enable the Vaishnav community to have the darshan of Thakorji. Inviting my attention to para 3 which reproduces clauses 27 and 28 of the will, Mr. Thakkar submits that perusal of these clauses according to plaintiffs makes it clear that the intention of the deceased was to enable Vaishnav Sampradaya to

have darshan of Thakorji in perpetuity. The idol of Thakorji was to be installed in the Haveli. Mr. Thakkar submits that according to the plaintiffs, as per the wishes of the deceased, the then executors and trustees installed Thakorji being idol of Navnit Priyaji in the year 1930. Plaintiffs claim that the same is pious temple of Vaishnav community and from 1930 people following Vaishnav sampraday have been taking darshan of Shree Navnit Priyaji. Mr. Thakkar submits that the faith of regular devotees has been affirmed and in para 5 the plaint proceeds to narrate that the will came to be probated by this Court in a Civil Suit being Civil Suit No. 591 of 1930. The Court settled the scheme for administration of the Trust. Thereafter, the Trust was registered under the provisions of Bombay Public Trust Act, 1950 on 23rd October 1952. Mr. Thakkar invites my attention to the basic principles of Seva or Pooja which are set out in para 6 and thereafter to paras 7 to 11 which read as under:

7. The plaintiffs have recently learnt that the defendants without any consultation/ permission and or sanction of the Charity Commissioner and without taking Vaishnavas/ public into confidence with malafide intentions and with utter disregard to the provision of Bombay Public Trust Act, 1950 are intending to shift Shree Navneet Priyaji from this haveli to Kamvan in the State of Rajasthan or some other place and are in the process of shifting the said idol along with all shingar or shringars to Kamvan or some other place. If the defendants are allowed to shift Shree Navneet Priyaji the Vaishnav devotees will not be able to perform their puja or get their usual darshanas of Thakorji. The Vaishnavas will not be able to do/ have darshans or worship or perform their religious rights. If such transfer takes place, they would not be able to do or perform their darshan of the idol, which they have been doing for ages. Though there are many temples in the vicinity, devotees have tremendous faith and confidence in this deity and considered their deity as their own and feel a sigh of relief when they did or perform their darshan of Shree Navneet Priyaji in this haveli. This idol has been dedicated to the public and, therefore, cannot be shifted elsewhere. The plaintiffs have a vested right to perform their sevas and poojas of the said idol of Shree Navneet Priyaji at the haveli and the same cannot be taken away, shifted or removed by the defendants.

8. Under the Pushtimarg, the idol is required to be under the supervision of Mahaprabhuji. The intention of the said deceased as per the will was to have a haveli. The haveli is to be established only by Maharajshree and the said Maharajshree or his descendents only can control the working of the haveli. May be, to some extent, the trustees can take part in the management, but final word in haveli is all of the Maharajshree. Maharajshree and haveli go synonymously. The Vaishnav Sampradai cannot consider the Haveli without the Maharajshree or vis-vis.

9. The plaintiffs have learnt that there is some dispute between the trustees and the Maharajshree and the matter has been referred to arbitration and some award has been passed by consent to give the idol of Shree Navneet Priyaji to

the Maharajshree, who, in turn, intends to take it to Kamvan in the State of Rajasthan. The defendants has by consent terms as arrived at amongst themselves agreed for shifting of Thakorji from the present place at Ghatkopar to Kamvan. The plaintiffs crave leave of this Court to refer to and rely upon copy of consent terms as and when produced. The plaintiffs have also learnt that one Niraj Ved has filed a suit in the City Civil Court of Bombay against the Maharajshree for an injunction restraining the Maharajshree from taking the idol of Shree Navneet Priyaji to Kamvan in the State of Rajasthan or to any other place or from discontinuing supervision or performing sevas of Shree Navneet Priyaji in the haveli and from taking away any ornaments of gold, silver and of diamond, precious and semi precious stones; articles, artifacts, hindola, saaj palna etc., which have been received as offerings from the Vaishnava devotees. The plaintiffs have also learnt that the City Civil Court has passed an injunction order.

10. The plaintiffs say that when several Vaishnava devotees learnt about the shifting of the idol of Shree Navneet Priyaji, there was a dharna by the devotees and lot of altercations took place between the Vaishnavas and the Trustees. Upon realising the feelings and faith of Vaishnavas the Trustees realised that it is not proper as well as legal to remove Thakorji from Haveli and, therefore, made commitments before the Vaishnavas on 2nd July 2008 that they would not shift Thakorji from the Haveli and also will allow the Maharajshree to perform the seva or pooja in the Haveli. The defendant Nos. 1 to 4 gave the said commitments in writing.

11. The plaintiffs say and submit that it is the right of the plaintiffs to worship and offer their prayers of Thakorji at the Haveli at Ghatkopar which is situated at 116/123, M.G. Road, Ghatkopar (East), Mumbai 400077. The plaintiffs and their forefathers are visiting this Haveli for more than 75 years. As per the Constitution of India also it is the right of every citizen of India to perform worship in such method as he or she likes. The plaintiffs submit that by the said consent award, the plaintiffs will be deprived of their rights of worshipping Shree Navneet Priyaji i.e. Thakorji to Kamvan in the State of Rajasthan. The shifting of the deity from the Haveli amounts to closure, which is contrary to the said will of the deceased. The intention of the deceased was to have a haveli and to give darshan of the Thakorji established in perpetuity to all the Vaishnava devotees. The intention of the deceased was never to give an option to the trustees to either close the haveli or remove the Thakorji installed in the Haveli for last 75 years or to make use of the property other than the Haveli. Once a Thakorji has been established and darshan has been given to the entire community for more than 75 years, the deity becomes public property. It has got faith of the community. Removal of such deity is taking away the rights of the community to do darshan or perform pooja. The plaintiffs therefore say and submit that it may be declared by this Court that the consent terms and/or the consent award is nullity in law or in the alternative, the said consent terms are voidable at the instance of such party like the plaintiffs, who have vested interest in the darshan

and the defendants avoid the same. The plaintiffs, therefore, say and submit that the consent terms/ consent award is liable to be and should be set aside. The plaintiffs further submit that the defendants by themselves or their agents be ordered and directed by this Court to perform what they have agreed in the signed document Exh.A, in the presence of their Advocates and all the Vaishanava community. The plaintiffs further submit that it is in the interest of justice and equity that pending the hearing and final disposal of the suit, the defendants, their servants, agents and/or representatives be restrained by an order and injunction from, in any manner, dealing with, disposing of or parting with possession or creating third party rights in respect of the said Haveli or from removal of Thakorji from the said Haveli and/or asking defendant Nos. 6 and 7 from taking the Thakorji, i.e. The deity of Shree Navneet Priyaji from the haveli to Kamvan in the State of Rajasthan or any other place/s and be further directed to continue to do the pooja and give darshan of Shree Navneet Priyaji to all the devotees of Shree Navneet Priyaji as has been happening for last 75 years. Unless the aforesaid reliefs are granted to the plaintiffs, irreparable loss, harm and injury will be caused to the plaintiffs.

6. In such circumstances, according to Mr. Thakkar the suit is filed alleging breach of trust, negligence, misapplication or misconduct on the part of the Trust or Trustees and in any event, for a declaration or injunction against a Public Trust or Trustees. In this backdrop, if the prayers are perused, according to Mr. Thakkar, there is a declaration claimed that the consent terms/ award permit removal of deity from the Haveli and prayer Clause (b) wherein a direction is claimed against the Trustees who are also defendants to perform what they have agreed to in the writing which is marked as Annexure A to the plaint. Mr. Thakkar, therefore, elaborates that it is only the Charity Commissioner who can after making such enquiries as he thinks necessary or two or more persons having an interest in case the suit is under Sub-clauses (i) to (iii), or one or more such persons in case the suit is under Sub-clause (iv) of Section 50 having obtained the consent in writing of the Charity Commissioner as provided in Section 51 may institute such a suit. The decree which is sought pertains to a declaration against a public trust or trustees and injunction. Therefore, the suit being filed without complying with this provision is ex facie barred in law and the plaint is, therefore, liable to be rejected as Order VII Rule 11(d) is attracted.

7. On the other hand, Mr. Merchant, learned Senior Counsel appearing for plaintiffs submits that the plaint must be read as a whole. The plaint read as a whole asserts the private rights of the plaintiffs to worship the Deity. Mr. Merchant submits that from the history of the sampradaya and the special features, it would be apparent that worshipping deity i.e. Navnit Priyaji at the haveli, is an integral part of the rights conferred on the plaintiffs and particularly by Article 25 of the Constitution of India. It is the right to worship and perform it at the Haveli which is stated to be an integral part of the Constitutional and Private rights conferred on a citizen, which is asserted and, therefore, there is no question of complying with Section 50 of the Public Trust Act, 1950. Mr. Merchant

submits that when there is a vindication of private right, then, it is settled law that there is no necessity of approaching the Charity Commissioner and complying with Section 50 of the Bombay Public Trust Act. Mr. Merchant submits that the deity in this case without the haveli is something which cannot be imagined by the plaintiffs, who are the devotees. For the last more than 75 years the plaintiffs have been offering their prayers and worshipping the deity at the haveli. Now the consent award which is referred to in the plaint seeks to take away the deity to Kamvan in the State of Rajasthan. The shifting of deity from the Haveli at Ghatkopar, Mumbai to Kamvan in the State of Rajasthan amounts to denial of right to worship which is guaranteed under the Constitutional provisions. It is an assertion of such a right which is the foundation of plaintiff's claim. Therefore, there is no requirement in law of seeking either consent or approaching the Charity Commissioner so as to enable him to make the necessary enquiry as contemplated by the statutory provision in question.

8. The next contention of Mr. Merchant is that if para 10 of the plaint is perused, it is clear that when several Vaishnav devotees learnt about the shifting, there was a Dharna, altercation between Vaishnav community members and the Trustees. Upon realising the feelings of the Vaishnav Community, the Trustees executed a writing in Gujarati language on 2nd July 2008 thereby agreeing not to shift the Thakorji from the Haveli and also allowing Maharajshree to perform pooja in haveli. The plaintiffs are seeking a direction to the trustees to perform what they have agreed to do by the writing. Therefore, this is also a relief in furtherance of the enforcement of the private rights of the plaintiffs. Merely because prayer Clause (b-i) is inserted, does not mean that the plaintiffs are seeking any relief and particularly in the nature of interfering with the administration and management of the subject Trust. Therefore, reading something in isolation and out of context does not mean that the plaintiffs would be required to comply with Section 50 of the Public Trust Act. Mr. Merchant submits that it is settled law that enforcement of a private right is out of the purview of Section 50 and provisions which are similar in nature like Section 92 of the Code of Civil Procedure, 1908 (for short CPC).

9. For all these reasons, he submits that the notice of motion be dismissed.

10. Mr. Merchant is supported in his submission by Mr. Parekh appearing in Chamber Summons No. 1605 of 2005 and similar chamber summonses. He submits that while considering the present motion and the controversy raised on account of the same, the court cannot lose sight of Section 80 of the Public Trust Act. In his submission, the intent of the provisions like Section 50 is that no civil court shall have jurisdiction to decide or deal with any question which is by or under the Public Trust Act to be decided or dealt with by any authority under it or in respect of which the decision or order of such officer or authority has been made final and conclusive. He submits that the rights which are claimed by the plaintiffs of worshipping the deity at the haveli is something which is beyond the powers of the Charity Commissioner or the Authority under the Act and it is only

the civil court which can be approached by parties like the plaintiffs. In such circumstances, compliance with Section 50 of the Bombay Public Trust Act is not necessary. He invites my attention to the plaint and the prayers and submits that the test would be whether any authority or officer can decide this issue and if it is not capable of being adjudicated by the authority or officer under the Act, then, the suit must be held to be maintainable, without the consent or an enquiry contemplated by Section 50 of the Trust Act.

11. Mr. Joshi appearing on behalf of one of the intervenors supported the arguments of Mr. Merchant and Mr. Parekh and contended that in any event, this issue cannot be decided only on the basis of reading the plaint or affidavits but must be decided at the trial. Therefore, the motion is liable to be dismissed.

12. For properly appreciating the rival contentions a reference will be necessary to Section 50 of the Bombay Public Trust Act. Before the same is referred, it would also be necessary to note the purpose of enacting the same. As the preamble indicates it is an Act to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Bombay and because it was thought expedient to regulate and make better provisions for the same that the competent Legislature enacted it.

13. The object is to regulate and make provisions for administration of public religious and charitable trusts in the State. The important feature is that the Act applies to all communities unlike previous legislations on the subject. It also applies to all public trusts irrespective of their income and whether any schemes have been framed by the Court or not. The object is not to interfere with the religious practices of various faiths but to ensure that the funds are properly administered, controlled and utilised for the object of the Trust. The Act requires every public trust irrespective of its income to be registered and the implementation is entrusted to the Charity Commissioner and other officers appointed by the State.

14. Since the arguments project religious practices and rights, it would be advantageous to refer to Articles 25 and 26 of the Constitution. A bare perusal thereof would indicate that what the Constitution guarantees to every citizen is right to freedom of religion. Article 25 speaks of freedom of conscience and free profession, practice and propagation of religion. Even that is subject to public order, morality and health and to the other provisions of part III of the Constitution of India. Subject to all this, what the Constitution guarantees to all persons is freedom of conscience and right to freely profess, practice and propagate any religion. The sub-Article 2 of Article 25 states that nothing in Article 25 shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice and providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

15. Article 26 guarantees freedom to manage religious affairs, but once again, this is subject to public morality and health.

16. In a decision reported in *A.S. Narayana Deekshitulu Vs. State of Andhra Pradesh and Others*, the Supreme Court discussed the ambit and scope of these Articles and held thus:

88. Articles 25 and 26 deal with and protect religious freedom. Religion as used in these Articles must be construed in its strict and etymological sense. Religion is that which binds a man with his Cosmos, his creator or super force. It is difficult and rather impossible to define or delimit the expressions "religion" or "matters of religion" used in Articles 25 and 26. Essentially, religion is a matter of personal faith and belief of personal relations of an individual with what he regards as Cosmos, his Maker or his Creator which, he believes, regulates the existence of insentient beings and the forces of the universe. Religion is not necessarily theistic and in fact there are well-known religions in India itself like Buddhism and Jainism which do not believe in the existence of God. In India, Muslims believe in Allah and have faith in Islam; Christians in Christ and Christianity; Parsis in Zoroastrianism; Sikhs in Gurugranth Sahib and teachings of Gurunanak Devji, its founder, which is a facet of Hinduism like Brahmos, Aryasamaj etc.

89. A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. A religion is not merely an opinion, doctrine or belief. It has outward expression in acts as well. It is not every aspect of religion that has been safeguarded by Articles 25 and 26 nor has the Constitution provided that every religious activity cannot be interfered with. Religion, therefore, be construed in the context of Article 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principle regulate the lives of men believing in that theistic, conscience or religious belief that alone can constitute religion as understood in the Constitution which fosters feeling of brotherhood, amenity, fraternity and equality of all persons which find their foothold in secular aspect of the Constitution. Secular activities and aspects do not constitute religion which brings under its own cloak every human activity. There is nothing which a man can do, whether in the way of wearing clothes or food or drink, which is not considered a religious activity. Every mundane or human activity was not intended to be protected by the Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practice.

90. In pluralistic society like India, as stated earlier, there are numerous religious

groups who practise diverse forms of worship or practise religions, rituals, rites etc, even among Hindus, different denominants and sects residing within the country or abroad profess different religious faiths, beliefs, practices. They seek to identify religion with what may in substance be mere facets of religion. It would, therefore, be difficult to devise a definition of religion which would be regarded as applicable to all religions or matters of religious practices. To one class of persons a mere dogma or precept or a doctrine may be pre-dominant in the matter of religion; to others, rituals or ceremonies may be predominant facets of religion; and to yet another class of persons a code of conduct or a mode of life may constitute religion. Even to different persons professing the same religious faith some of the facets of religion may have varying significance. It may not be possible, therefore, to devise a precise definition of universal application as to what is religion and what are matters of religious belief or religious practice. That is far from saying that it is not possible to State with reasonable certainty the limits within which the Constitution conferred a right to profess religion. Therefore, the right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right to propagating religion which is subject to legislation by the State limiting or regulating any activity - economic, financial, political or secular which are associated with religious belief, faith, practice or custom. They are subject to reform on social welfare by appropriate legislation by the State. Though religious practices and performances of acts pursuance of religious belief are as much a part of religion as faith or belief in a particular doctrine, that by itself is not conclusive or decisive. What are essential parts of religion or religious belief or matters of religion and religious practice is essentially a question of fact to be considered in the context --- factual or legislative or historic --- presented in that context is required to be considered and a decision reached.

91. The Court, therefore, while interpreting Articles 25 and 26 strikes a careful balance between the

93. The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to a community - life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order. Articles 25 and 26, therefore, strike a balance between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and guaranteed freedom of conscience to commune with his Cosmos, Creator and realise his spiritual self. Sometimes, practices religious or secular, are intricably mixed up. This is more particularly so in regard to Hindu religion because under the provisions of ancient Samrity human actions from birth to death and most of the individual actions from day to day are regarded as religious in character in one facet or the other. They sometimes claim the religious system or sanctuary and seek the cloak of constitutional protection guaranteed by Articles 25 and 26. One, hinges upon constitutional religious model and another diametrically more on traditional point of view. The legitimacy of the true categories is required to be adjudged strictly

within the parameters of the right of the individual and the legitimacy of the State for social progress, well being and reforms, social intensification and national unity. Law is a social engineering and an instrument of social change evolved by a gradual and continuous process. As Benjamin Cardozo has put it in his "Judicial Process", life is not a logic but experience. History and customs and utility and the accepted standards of right conduct are the forms which singly or in combination shall be the progress of law. Which of these forces shall dominate in any case depends largely upon the comparative importance or value of the social interest that will be thereby impaired. There shall be symmetrical development with history or custom when history or custom has been the motive force or the chief one in giving shape to the existing rules and with logic or philosophy when the motive power has been theirs. One must get the knowledge just as the Legislature gets it from experience and study and reflection in proof from life itself. All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State Regulations but what constitutes the essential part of religion may be ascertained primarily from the Doctrines of that religion itself according to its tenets, historical background and change in evolved process etc. The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or beliefs are an integral part of the religion. It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the court finds upon evidence adduced before it that it is integral or essential part of the religion, Article 25 accords protection to it. Though the performance of certain duties is part of religion and the person performing the duties is also part of the religion or religious faith or matters of religion, it is required to be carefully examined and considered to decide whether it is a matter of religion or secular management by the State. Whether the traditional practices are matters of religion or integral and essential part of the religion and religious practice protected by Articles 25 and 26 is the question. Whether hereditary archaka is an essential and integral part of the Hindu religion is the crucial question.?

17. Therefore, it is clear that freedom of religion is granted to all Citizens of India. However, at the same time, the Constitution of India in its preamble specifically states that the people of India have solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic Republic. Therefore, the Constitution itself makes it clear that a person has freedom of conscience and a right to freely profess, practice and propagate religion. That is subject to public order, morality and health and to other provisions of Part III of the Constitution of India. However, as far as the State's role is concerned it can make a law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. It is well settled that

administration and management of the institutions and associations/bodies carrying on religious work or charitable activities so also professing, practicing and propagating religion can be regulated by the State. Such regulatory measures do not affect the religious practices but deal with the secular activities. True religion is not just visiting temples and Churches. As they say "Churchanity" and "Christianity" is not one and the same.

18. It is in this context that when the plaintiffs do not dispute that what they are concerned with is a Haveli or a building/structure which under the will of deceased and particularly Clause 27 thereof is constructed in his name and the will states that an image of Thakorji shall be installed in the same. By the will the deceased created a Trust and directed Trustees, executors of the will to make a Haveli by spending a fixed amount. Later on, the Trust was registered as public trust on 23rd October 1952. Therefore, the plaintiffs are not disputing that the haveli belongs to a public trust governed by the Bombay Public Trust Act 1950. However, their case is that in the Haveli, there is an idol of Thakorji and which from the date of installation is open for Darshan. That has acquired a status of a Temple for Vaishnav community and there are regular visitors to the Haveli who have tremendous faith in the deity. It is stated that sometimes 6, 7 or 8 darshans are performed in a day depending upon the season. The vaishnav devotees residing in the nearby vicinity perform these darshans in the Haveli. It is stated that as per the Pushtimarg and Vaishnav sampraday, darshan in a day is important. Therefore, it is the submission of the plaintiffs that what they are asserting is a private right to visit haveli, take darshan of the deity Navnit Priyaji and the reliefs claimed, according to them, concern that aspect alone.

19. To appreciate this submission, it would be necessary to notice the allegations in the plaint. After, there is a reference to the will and the relevant clauses, registration of the public trust and the basic principles of seva or pooja, what has been urged in para 7 is that the defendants and particularly defendant Nos. 1 to 5, without any consultation/ permission and/or sanction of the Charity Commissioner and without taking Vaishnav community in confidence, with malafide intentions and with utter disregard to the Bombay Public Trust Act, 1950 are intending to shift the idol/ deity Shree Navnit Priyaji to Kamvan in the State of Rajasthan or to some other place. It is their case that if the defendants are allowed to shift Navnit Priyaji, Vaishnav devotees will not be able to perform their pooja and get Darshan of Thakorji, they will not be able to worship or perform their religious activities and, therefore, all Vaishnav devotees will be put to grave and irreparable loss, harm and injury. They state that though there are many temples in the vicinity devotees have tremendous faith and confidence in this Temple of the deity.

20. In para 7 it is stated that the idol has been dedicated to the public and, therefore, cannot be shifted elsewhere. The plaintiffs assert in the same para that they have a vested right to perform pooja of the said idol in the haveli and same cannot be taken away, shifted or removed by the defendants. Similarly,

they, in para 8 states that the idol is required to be under the supervision of Mahaprabhuji. The haveli is to be established only by Maharajshree and the said Maharajshree or his descendents only can control the working of the haveli. Importantly, they state that may be to some extent the Trustees can take part in the management but final word in haveli is of Maharajshree. The Maharajshree and Haveli go synonymously or vice versa.

21. In para 9 of the plaint, it is stated that the plaintiffs have learnt that there is some dispute between Trustees and Maharajshree and matter has been referred to arbitration and some award has been passed by consent. That award enables giving of the idol of Navnit Priyaji to Maharajshree who in turn intends to take it to Kamvan in the state of Rajasthan. By these terms the defendants have agreed that the deity will be shifted from the Haveli at Ghatkopar to Kamvan. Plaintiffs crave leave to refer to a copy of the consent terms. Further, they refer to a suit filed by one Niraj Ved in the City Civil Court for injunction restraining Maharajshree from taking the idol of Shree Navnit Priyaji to Kamvan in the State of Rajasthan so also taking away ornaments, silver, gold diamond etc., which have been offered as offering from Vaishnav devotees. A reference is also made to the injunction order.

22. In para 10 there is reference to some Dharna by devotees and a writing dated 2nd July 2008 of the Trustees wherein they committed not to shift Thakorji from haveli and allowing Maharajshree to perform seva, pooja in the haveli. Defendant Nos. 1 to 4 gave commitment in writing and a copy thereof is at Annexure A to the plaint. In para 11 right of plaintiffs to worship and offer prayers is being asserted.

23. It is in this backdrop that the Bombay Public Trust Act and particularly Section 50 thereof has been referred to by me. Section 50 reads thus:

50. Suit by or against or relating to public trusts or trustees or others:

In any case, --(i) Where it is alleged that there is a breach of a public trust, negligence, misapplication or misconduct on the part of a trustee or trustees;

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

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

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

The Charity Commissioner after making such enquiry as he thinks necessary, or two or more persons having an interest in case the suit is under Sub-clauses (i)

to (iii), or one or more such persons in case the suit is under subclause (iv) having obtained the consent in writing of the Charity Commissioner as provided in Section 51 may institute a suit whether contentious or not in the Court within the local limits of whose jurisdiction the whole or part of the subject matter of the trust jurisdiction the whole or part of the subject matter of the trust is situate, to obtain a decree for any of the following reliefs:

- (a) an order for the recovery of the possession of such property or proceeds thereof;
- (b) the removal of any trustee or manager;
- (c) the appointment of a new trustee or manager;
- (d) vesting any property in a trustee;
- (e) a direction for taking accounts and making certain enquiries;
- (f) an order directing the trustees or others to pay to the trust the loss caused to the same by their breach of trust, negligence, misapplication, misconduct or wilful default;
- (g) A declaration as to what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
- (h) a direction to apply the trust property or its income cy pres on the line of Section 56 if this relief is claimed along with any other relief mentioned in this section;
- (i) a direction authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged or in any manner alienated on such terms and conditions as the court may deem necessary;
- (j) the settlement of a scheme, or variations or alterations in a scheme already settled;
- (k) an order for amalgamation of two or more trusts by framing a common scheme for the same;
- (l) an order for winding up of any trust and applying the funds for other charitable purposes;
- (m) an order for handing over of one trust to the trustees of some other trust and deregistering such trust;
- (n) an order exonerating the trustees from technical breaches, etc.
- (o) an order varying, altering, amending or superseding any instrument of trust;
- (p) declaring or denying any right in favour of or against a public trust or trustee or trustees or beneficiary thereof and issuing injunctions in appropriate cases; or
- (q) granting any other relief as the nature of the case may require which would

be a condition precedent to or consequential to any of the aforesaid reliefs or is necessary in the interest of the trust;

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

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

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

24. A bare perusal of this section would indicate that the same finds place in a chapter entitled "Control". There is Chapter VII entitled "Other Functions and powers of Charity Commissioner". Section 42 appears in this chapter and it provides that each Charity Commissioner shall be a corporation sole and shall have perpetual succession and a common seal and may sue and be sued in his corporate name. Section 43 as applicable to the State of Maharashtra makes the Charity Commissioner the Treasurer of the charitable endowments under Act VI of 1890. Section 47 gives power to Charity Commissioner to appoint, suspend, remove or discharge trustees and to vest property in new trustees. Then comes Section 50, which states that in any case where it is alleged that there is a breach of public trust, negligence, misapplication or misconduct on the part of a trustee or trustees or where a direction or decree is required to recover the possession of or to follow a property belonging or alleged to be belonging to a public trust or the proceeds thereof or for an account of such property or proceeds from a trustee, ex-trustee, alienee, trespasser or any other person including a person holding adversely to the public trust but not a tenant or licensee, where a direction of the Court is deemed necessary for the administration of any public trust or for any declaration or injunction in favour of or against a public trust or trustee or trustees or beneficiary thereof, the Charity Commissioner after making such enquiry as he thinks necessary or two or more persons having an interest in case the suit is under Sub-clauses (i) to (iii) or one or more such persons in case the suit is under Sub-clause (iv) having obtained the consent in writing of the Charity Commissioner as provided in Section 51 may institute a suit whether contentious or not in the Court within the local limits of whose jurisdiction the whole or part of the subject matter is situated to obtain a decree for the reliefs that are set out in Clauses (a) to (q). The first proviso to this section states that no suit claiming any of the reliefs specified in this section shall be instituted in respect of any public trust except in conformity with the provisions thereof. Second proviso states that the Charity Commissioner may instead of instituting the suit make an application to the Court for variation or alteration of a scheme already settled and third proviso states that provisions of this section and other consequential provisions shall apply to all public trusts,

whether registered or not or exempted from this provision of Act under Sub-Section 4 of Section 1.

25. The object and purpose for inserting such a provision in the Bombay Public Trust Act is obvious. If the Charity Commissioner was to be conferred with wide powers as are enumerated in the Act and the various Chapters preceding Chapter VII, then, obviously, the Legislature was of the view that if any suit claiming reliefs or directions of the nature set out in this provision, it should be only after the Charity Commissioner makes such enquiry as he thinks necessary or if two or more persons having an interest in case the suit is under Sub-clause (i) to (iii) having obtained consent in writing of the Commissioner as provided in Section 51 may institute it whether it is contentious or not. Therefore, the Charity Commissioner should be empowered to make the enquiry and then take a decision to institute the suit or give consent for its institution. This provision must be seen with Section 50A and Section 51 of the Act.

26. The object and purpose of insertion of such a provision, which is held to be somewhat akin to Section 92 of the CPC, is to prevent harassment of public trust by unnecessary and frivolous litigation and at the same time conferring powers, on the Charity Commissioner who is the main Authority under the Act, to himself conduct enquiry. I need not enter into any larger controversy as to whether Section 50 is wider in scope and, therefore, would override Section 92 of the CPC or not but the common thread behind Section 92 and Section 50 is the one noted above. In a decision reported in AIR 1966 S.C. 878, this is what is held by the Supreme Court:

10. Let us now see if there is anything in Section 92(1), Clause (f) which prohibits the giving of such directions even if there is a provision to that effect in the scheme. Section 92(1) provides for two classes of cases, viz., (i) where there is a breach of trust in a trust created for public purposes of a charitable or religious nature and (ii) where the direction of the Court is deemed necessary for the administration of any such trust. The main purpose of Section 92(1) is to give protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them. That is why it provides that suits under that section can only be filed either by the Advocate General, or two or more persons having an interest in the trust with the consent in writing of the Advocate-General. The object clearly is that before the Advocate General files a suit or gives his consent for filing a suit u/s 92, he would satisfy himself that there is a prima facie case either of breach of trust or of the necessity for obtaining directions of the Court. The reliefs to be sought in a suit u/s 92(1) are indicated in that section and include removal of any trustee, appointment of a new trustee, vesting of any property in a trustee, directing a removed trustee or person who has ceased to be a trustee to deliver possession of trust property in his possession to the person entitled to the possession of such property, directing accounts and enquiries, declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object

of the trust, authorisation of the whole or any part of the trust property to be let, sold, mortgaged or exchanged, or settlement of a scheme. The nature of these reliefs will show that a suit u/s 92 may be filed when there is a breach of trust or when the administration of the trust generally requires improvement. One of the reliefs which can be sought in such a suit is to obtain the authority of the Court for letting, selling, mortgaging or exchanging the whole or any part of the property of the trust, as provided in Clause (f) of the reliefs.

11. We are, however, of opinion that prayer for such a relief though permissible in a suit u/s 92 does not in any way circumscribe or take away from trustees or managers of public trusts the right of ordinary administration of trust property which would include letting, selling, mortgaging or exchanging such property for the benefit of the trust. We cannot infer from the presence of such a relief being provided in a suit u/s 92(1) that the right of trustees or managers of the trust to carry on the ordinary administration of trust property is in any way affected thereby. If this were so, it would make administration of trust property by trustees or managers next to impossible. This will be clear from a few examples which we may give. Suppose there is a lot of odds and ends accumulated and the trustees or managers of a public trust want to dispose of those odds and ends if they are of no use to the trust. If the interpretation suggested on behalf of the applicant is accepted, the trustees or managers could not sell even such odds and ends without filing a suit for authorising them to sell such movable property. Obviously this could not have been the intention behind Clause (f) in Section 92(1). Take another case where the public trust has a good deal of land and arranges to cultivate it itself and gets crops every half year. If the produce is not all required for the trust and has to be sold, the presence of Clause (f) in Section 92(1) does not require that every half year a suit should be filed by trustees or managers with the permission of the Advocate General to sell such crop. The absurdity of the argument on behalf of the appellant based on Clause (f) of Section 92(1) is, therefore, obvious and that clause does not in our opinion have the effect of circumscribing the powers of trustees or managers to carry on ordinary administration of trust property and to deal with it in such a manner as they think best for the benefit of the trust and if necessary even to let, sell, mortgage or exchange it. It seems that Clause (f) was put in inter alia to give power to Court to permit lease, sale, mortgage or exchange of property where, for example there may be a prohibition in this regard in the trust deed relating to a public trust. There may be other situations where it may be necessary to alienate trust property which might require court's sanction and that is why there is such a provision in Clause (f) in Section 92(1). But that clause in our opinion was not meant to limit in any way the power of trustees or managers to manage the trust property to the best advantage of the trust and in its interest, and if necessary, even to let, sell, mortgage or exchange such property. Further if Clause (f) cannot be read to limit the powers of trustees or managers to manage the trust property in the interest of the trust and to deal with it in such manner as would be to the best advantage of the trust, there can be no bar to a

provision being made in a scheme for directions by the Court in that behalf. If anything, such a provision would be in the interest of the trust, for the Court would not give directions to let, sell, mortgage or exchange the trust property or any part thereof unless it was clearly in the interest of the trust. Such a direction can certainly be sought by the trustees or managers or even by one manager out of two if they cannot agree, and there is nothing in Clause (f) in our opinion which militates against the provision in the scheme for obtaining such direction. We may add that we say nothing about obtaining of such directions by persons other than managers or trustees, for this is not a case where the direction was sought by a person other than a co-manager.

Whether such a direction can be sought by persons other than trustees or managers or one of two managers as provided in paragraphs (11) and (12) of the scheme is a matter which does not arise for consideration in the present case and we express no opinion thereon. We are dealing with a case where the prayer is made by one trustee and the other passed thereon relates to matters which are incidental to acts of management of the trust property and we have no doubt that Clause (f) in Section 92(1) cannot be read in such a way as to hamper the ordinary administration of trust properties by trustees or managers thereof; and if that is so, there can be no invalidity in a provision in the scheme which directs the trustees or managers or even one out of two co-managers when they cannot agree to obtain directions of the Court with respect to the disposal or alienation of the property belonging to the trust. We are, therefore, of opinion that Clause (f) does not apply to the circumstances of this case and no suit u/s 92 was necessary in consequence. The Additional District Judge had jurisdiction to give directions which he did under paras (11) and (12) of the scheme as these directions are of the nature of ordinary administration of trust property and do not fall within Clause (f) in Section 92(1) of the Code of Civil Procedure.

27. The very same object is achieved by insertion of Section 50.

28. Having noted the object and purpose of Section 50, what now remains for consideration is the argument of Mr. Merchant that the consent contemplated therein, is not required or need not be obtained if parties like plaintiffs are asserting their private rights. The private right that is claimed is right of worship of the deity Navnit Priyaji. Having worshiped the deity and taken Darshan thereof for more than seven decades, a vested right is claimed by the plaintiffs. Mr. Merchant submits that the right to freedom of religion guaranteed by the Constitution of India takes within its import all such practices which are religious and essential so also integral to the particular religion. According to Mr. Merchant once the right to worship, perform pooja and take Darshan of deity is an essential and integral part of the religion in question, then, the assertion and vindication of such a right is purely a private right. Such a right can be enforced by filing a suit and provisions of Section 9 of CPC, enable the plaintiffs to do so. I do not wish to go into the controversy as to whether instant civil suit is maintainable or not. I need not enter into this controversy in the view that I will

be taking and as it is not necessary to do so at this stage. Several decisions that have been brought to my notice by Mr. Merchant deal with what could be said to be an essential and integral part of the religion. My attention is also invited by Mr. Merchant and Mr. Thakkar, in all fairness to a decision of the Constitution Bench of the Supreme Court reported in *Dr M. Ismail Fraughi and Others Vs. Union of India (UOI) and Others*, and the decision of the Supreme Court in *S.R. Bommai and others Vs. Union of India and others etc. etc.*, in support of their rival contentions. While it is asserted that right to perform puja and worship a deity or God is essential and integral part of religion, it is urged that the right to perform puja and worship a idol at a particular temple and at a particular place is not part of the right to freedom of religion and, therefore, necessarily it is not covered by the same. In other words, the Constitutional provision does not guarantee such a right. As clarified this aspect need not be gone into for the present proceedings. Suffice it to note that by keeping it open, but on the assumption that the instant civil suit is maintainable and falls within the ambit of Section 9 of the CPC, what I have to consider is whether it is barred by non compliance with Section 50 of the Bombay Public Trust Act, 1950.

29. Reliance is placed by Mr. Merchant in support of his submissions on a decision of this Court reported in 103 (2001) BLR 482 (*Naresh Amritlal Shah and Ors. v. Kantilal Chunilal Shah and Ors.*). A careful perusal and scrutiny of this decision would indicate that the Court recorded that permission of Charity Commissioner was not required as the suit in question did not relate to the Trust property but to the rights of the plaintiffs to worship the Deity or Idol in question. Mr. Merchant would urge that this decision is applicable to the instant case and the controversy is completely covered by the same.

30. In that case, the Court was concerned with a suit filed by the plaintiffs therein, who were Jains by faith. They are members of the Matunga Jain Swetambar Murti Poojan Tapa Gaccha Sangh and Charities which is a public trust registered under Bombay Public Trust Act. Defendant to that suit were the Trustees of the Trust. The Trust was administered and managed in accordance with the scheme formulated and settled by this Court in Suit No. 2217 of 1948 by its order by its order dated 29th September 1948.

31. The trustees in their general body meeting held on 1st July 1998 passed two resolutions which are referred to in para 3 of the Judgment and the suit was filed challenging the legality and validity of these resolutions. The prayers in the suit are referred to in para 4 of the plaint. Thereafter, in para 5, the learned Judge refers to the events leading to the filing of the Appeal from Order (A.O. for short) with which he was really concerned. The suit in question was filed in City Civil Court at Mumbai and a Notice of Motion for interim reliefs was moved, on which an order came to be made in favour of the plaintiffs and, therefore, the original defendants preferred the A.O. One of the argument before this Court was whether the suit was maintainable, because, Section 50 and 51 of the Bombay Public Trust Act 1950 was not complied with. The contention of the defendant's

Counsel have been referred to in para 6 and the learned Judge observed in the subsequent paras that as far as not obtaining consent of the Charity Commissioner is concerned that issue has already been dealt with by the City Civil Court by a reasoned and exhaustive order, which came to be confirmed by a learned Single Judge of this Court. Thereafter, the matter was carried in appeal and even the appeal to the Supreme Court failed and the Supreme Court dismissed the appeal/ special leave petition. Therefore, the learned Judge observed that the said issue has reached finality. Yet, thereafter, he expressed his views and held that Section 50 and 51 are enabling and not disabling in nature.

32. In that case, it was held that the consent was not necessary because what was in issue was the power of the trust as a whole to alter or modify the manner or mode of religious practice of a individual or a group amongst the Jains. What was asserted therein is the right to use the property of the Trust for performing the pooja or worshipping the idol or Guru in accordance with the Jain Religious Principles enshrined and accepted as universally established in the Jain Shastras or Scriptures. It was held that the Trust can make such rules and regulations by passing resolutions or otherwise only to the extent of management and administration of the trust properties and charities within the frame work of the Jain Scriptures but cannot allow any Jain member to perform Guru Pooja only in a particular manner and not in any other manner. Such Guru Pooja or Guru Vandana would wholly depend on the devotee and the Guru. The impugned resolutions were held to be beyond the powers conferred by the scheme of that Trust. The scheme can only permit regulation of pooja by prescribed hours or timings. The trustees can make proper sitting or other arrangements during the course of various religious ceremonies but beyond that the trustees cannot restrict, curb, curtail the manner and practice followed by the members within four corners of the Jain religion. Therefore, the court came to the conclusion that what was being asserted was a purely private right of the worshipper plaintiffs and that too to perform Pooja or worship in a particular manner and the power of the trust or the trustees to regulate it, was in question. When such is the nature of the controversy and although the trust was a public trust registered under the Bombay Public Trust Act, since the suit did not fall in either of the sub-clauses of Section 50 but raises the issue of a worshipper to assert his constitutional rights guaranteed under Article 25, that the learned Judge concluded that the consent of charity commissioner is not necessary.

33. During the course of dealing with several Judgments brought to his notice, the learned Judge referred to a Judgment of the Supreme Court reported in Kanbi Manji Abji and others Vs. Kanbi Vaghji Mavji and others, I invited the attention of both Senior Counsel to this decision of the Supreme Court. In this decision what the Supreme Court was concerned with was the correctness of the view taken by the Gujarat High Court that the Civil suit from which the appeal arose was maintainable and not barred by Section 50 of the Bombay Public Trust Act. Pertinently, the Bombay Public Trust Act applies in both States viz.,

Maharashtra & Goa. Insofar as applicability of Section 50 is concerned, there is no deviation in the wording thereof. Therefore, the decision of the Supreme Court considers identical provisions. As far as the facts in the Supreme Court decision are concerned, therein the appellants before the Supreme Court were the original defendants and the respondents were original plaintiffs. Plaintiffs brought a suit in their capacity as followers of the Swami Narayana Sampraday by urging that one Abji Bapa was a strong follower of Swami Narayan. During his life time the said Abji Bapa enunciated his own views which were respected by number of his followers who came to be known as Bapa Panthis. The respondents - plaintiffs were followers of Nar Narayan Sect presided over by Acharya Shri of Mota Mandir. At village Baladia Taluka Bhuj, there is a temple called "Chhatedi". In the said temple there is dharamshala hall. The idols of Shriji Maharaj, Abji Bapa and Ishwarcharandasji were installed in the said hall. The Bapa Panthis were also using the hall for reading religious books. The temple was registered as public trust and defendants were in possession and management of the Trust. The allegations in the plaint were that the defendants are interfering with the rights of worship and they were not allowing the Bapa Panthis to read holy books of Abji Bapa in the dharmashala hall of temple. It was also alleged that the defendants removed the idols of Abji Bapa and others which were installed in the hall. It is on such allegations that the suit was instituted in representative capacity and the reliefs are set out by the Supreme Court in para 3 of its Judgment.

34. The trial court dismissed the suit primarily on the ground that the court had no jurisdiction to entertain it in view of Section 50 of the Bombay Public Trust Act. The trial court also held that the suit being not of civil nature, it was barred by Section 9 of CPC. With that part, none is concerned, because the Supreme Court Judgment rests on the applicability of Section 50 of the Bombay Trust Act. The matter was carried in appeal to the High Court of Gujarat where it reversed the findings of the trial court and held that the suit was maintainable on both counts i.e. u/s 9 and also held that it was not barred u/s 50 of the said Act. The appellants - defendants before the Supreme Court urged that the view taken is wrong and erroneous.

35. It is in this context that the Supreme Court in para 6 held thus:

6. We have examined the contents of the plaint and also the reliefs claimed therein. By claiming a right to have the idols and portraits in the Dhramshala hall and also the right to read the books propounded by the followers of Abji Bapa, the respondents - plaintiffs in pith and substance are asking for alterations in the scheme of the trust already settled. In any case, the right of trustees to decide the place where devotees would recite the scriptures and also the place where the idols and portraits are to be installed has been questioned in the suit. The respondents - plaintiffs are indirectly trying to interfere with the management of the temple. The main purpose of the suit filed by the followers of Abji Bapa is to establish the superiority of their sect and impose their way of thinking and

worship in the management of the temple and as a consequence in the administration of the Trust. In this view of the matter, there is no escape from the finding that the suit falls within the purview of Section 50 of the Act, and as such the trial court rightly dismissed the same.

36. On such conclusion, the Supreme Court allowed the appeal and set aside the Judgment of the Gujarat High Court and restored that of the trial court. Resultantly, the suit came to be dismissed.

37. In the instant case as well, the suit was initially filed by the plaintiffs individually but later on they applied for leave to file the same in a representative character. An application was made under Order I Rule 8 of CPC by Judge's Order being J.O. No. 320 of 2009. On that J.O. Dr. Mr. Justice Chandrachud granted leave to file the instant suit in representative character. On the strength of that order, the notice was published by the plaintiffs in Daily "Mumbai Samachar" and "Janmabhoomi". The suit, therefore, became a suit filed in a representative capacity.

38. In the Judgment of the learned Single Judge of this Court, relied upon by Mr. Merchant (Naresh Shah - supra), the Supreme Court Judgment referred to by me was distinguished by the learned single Judge by holding that the plaintiffs have tried to establish their right to perform Navangi Guru Pooja. They have merely sought a declaration that as the members of the Trust and as Jains they have an equal right to follow their own manner of performing Guru Pooja. Challenging the majority resolutions, what the plaintiffs in that suit were urging was that they have a right to perform Navangi Pooja in their own manner. Naturally, therefore, the learned Judge distinguished this Judgment of the Supreme Court.

39. Before me, however, the controversy is not limited as Mr. Merchant would like me to hold. The plaint allegations which alone are relevant at this stage, read as a whole, would indicate that the plaintiffs have sought a declaration that the consent terms/ consent award permitting removal of the deity from the haveli is nullity or in the alternative the same is voidable at the instance of interested party like plaintiffs, who have a vested right in the darshan of Navnit Priyaji as per Vaishnav Sampraday. Further, the defendants be ordered and directed by this Court to perform what they have agreed in the signed document at Annexure "A".

40. Annexure A to the plaint is a document in Gujarathi language, translation of which is at page 25. The translation reads thus:

We, all the following Trustees of - Shri Navnitprabhu Haveli (Temple) has come to the Temple at 5.00 pm when approx 2000 to 2500 Vaishnavs were present in the Haveli premises.

On seeing the pains and heart touching feelings of Vaishnavs, we could feel the deep feelings and we i.e. Trustees of Sheth Chatrabhuj Jivandas Religious & Charitable Trust, through Shree Navnit Prabhu Haveli Mandir, hearts were moved with their noble religious feelings. Then we could realise the feelings and love of

Vaishnavas towards Shri Raghunath Maharaj for dedicating his services offered for the last 75 years as per traditional pancham grahastha, and having felt the feelings of respect. We do hereby accord our absolute consent and No Objection to allow the continue to offer his services to Shri Navnit Prabhu, placed established herein Evam Shri Pancham Grahasth Shri Raghunathji Maharaj Shri Evam their heirs and children of Panchamghar to offer services as per Taditional Pushti marg to their (Sevyas Swarup Shree i.e. (Navnit Prabhu) permanently and irrevocably to allow them to continue to stay/ reside in their present place of residence in the Temple premises.

We, all the Trustees agree to implement the abovementioned alteration in the Arbitration Award and undertake to complete/ perform the required procedures in respect thereof and to extend full cooperation in favour of Maharaj Shree and shall not cause or caused harrass yourself by indulging and legal dispute and drag you in any court of law of the nation.

We all the Trustees, hereby agree and confirm the permanent and irrevocable rights of pancham grahasth Shri Vallabhathji Maharaj Shree Shree Raghunath Maharajshree and their heirs for offering services to Shri Navnit Prabhu and to reside in the Temple (Haveli) premises.

We have made and signed on this writings by our full whole hearted willingness without any kind of pressure, force or influence of anybody, and the same is made and signed the same in token of our highest respect and honour for religious feelings and trust in Lord Navnit Prabhu of Vaishnavas of Ghatkopar.

41. As far as the consent award goes, the plaintiffs challenge the same in the plaint. The declaration claimed is that the consent award which is between the trustees and defendant Nos. 6 and 7 to this suit is null and void. The consent terms, copy of which has been annexed to the affidavit in reply filed in a notice of motion bearing No. 1262 of 2009 for Interim reliefs would show that the defendant Nos. 6 and 7 were asserting their hereditary rights to carry on seva of Navnit Priyaji (Thakorji). The trustees have denied the contentions and contended that the defendant Nos. 6 and 7 cannot be allowed to do seva and/or use and occupy any part of the Ghatkopar Haveli. Parties in order to resolve the dispute explored the possibility and arrived at terms and the said terms were presented to the learned Arbitrator Hon'ble Mrs. Justice Sujata Manohar (Retired Judge of the Hon'ble Supreme Court of India) and she made a consent award. Recording the agreement that the defendant Nos. 6 and 7 to the present suit have no right, title or interest in the residential premises of the Haveli, they would hand over vacant and peaceful possession of residential premises in their occupation to the Trustees - claimants, she also recorded that it is agreed between parties that seva of Navnit Priyaji at Ghatkopar will be discontinued by respondent Nos. 1 and 2 (defendant Nos. 6 and 7).

42. Plaintiffs in the present suit refer to these terms in extenso and urged that by the consent award, the intention of the defendants appears to be taking away

the deity to Kamvan in the State of Rajasthan and shifting the deity from Haveli amounts to closure of Haveli which is contrary to the will of the deceased. There are various assertions with regard to the intent of the deceased. It is based on these averments and also para 13 that the final reliefs are claimed.

43. Section 50 of the Act deals with cases of breach of trust, negligence, misapplication or misconduct on the part of Trustee or trustees or where a direction is required to recover possession of a property belonging to a public trust or the proceeds thereof or for an account of such property or proceeds from any person including a person holding adversely to the public trust or where any direction of the Court is deemed necessary for administration of any public trust or for any declaration and/or injunction in favour of or against public trust or trustees or beneficiaries thereof. As has been held in the decision of the Supreme Court in *Kambi (supra)*, if the reliefs together with the allegations and averments in the plaint are considered, it is clear that the same relate not only to the private right of darshan but in pith and substance what is put in issue is the right of the trustees to decide the place where the Idol or Deity should be located and where devotees would be taking darshan of the same. They challenge the decision of the Trustees to shift and/or install the deity. As has been held by the Supreme Court, this would be indirectly interfering with the management of the temple. The reliefs claimed, therefore, fall clearly within Sub-clause (i) and (iv) of Section 50 and ultimately if a suit is to be instituted, it would be for declaration or denying any right in favour of or against the public trust or trustees. The declaration in this case is clearly relating to the administration and management of the temple, which is a public trust. In these circumstances, it is not possible to agree with Mr. Merchant that Section 50 of the Public Trust Act would not be attracted to the facts and circumstances of the present case.

44. The decisions which are relied upon by Mr. Merchant of two other learned Single Judges of this Court and particularly of Mrs. Justice Mhatre in CRA 526 of 2008 decided on 4th February 2010 (*Maharashtra Shetkari Sevan Mandal v. Bhaurao Bayaji Garud*) are clearly distinguishable.

45. In the first case, the suit was filed by the respondent before this Court not for perpetual injunction and declaration but purely for his right in the suit property. He was not a person interested in the trust. His rights and particularly civil rights against the trust were held rightly not to be covered by Section 50 of the Bombay Public Trust Act.

46. In that decision Her Ladyship placed reliance upon another Judgment of a learned Single Judge of this Court reported in 2003 (4) Mh.L.J. 187 (*Sainath Mandir Trust v. Vijaya w/o. Vithalrao Mandale*). In that decision, the learned Single Judge was considering a case of the original plaintiff who had filed suit for possession and damages against the first defendant trust. It was his case that plot No. 57 owned by defendant No. 2 in the suit was carved out of S. No. 33 and converted into the plot as above. He intended to purchase this plot and, therefore, he published a notice in daily *Matrubhoomi* inviting objection in

respect of the plot and since no objections were received, he purchased it from defendant No. 2 by registered sale deed. On execution of the deed he was put in possession and he wanted to put fence around the plot and started fencing work. He found that there was a board put up on the plot and it was mentioned that defendant No. 2 had given the suit plot to first defendant trust. It is in such circumstances, he issued notice to trust to remove the board and fencing but the trust insisted that it was owner of the property and, therefore, he filed a suit. It was in such circumstances and in the above facts that the learned Single Judge analysed Section 50 and after applying the ratio in a previous Judgment of this Court reported in 1986 Mh.L.J. 773 (Vidharbha Kshtriya Mali Shikshan Sanstha v. Mahatma Fuley Shikshan Samiti, Amravati) held that the claim is not covered by Section 50 because the suit is to recover possession of the property which he claimed as belonging to him. Thus, his personal right as a owner of immovable property sold to him by another private party under the registered sale deed was the principal issue in the suit. Such a suit shall fall outside the purview of Section 50. Once again this decision is distinguishable on facts and the ratio therein, therefore must be seen in the backdrop of the abovenoted peculiar factual situation.

47. The Judgment of another learned Single Judge of this Court reported in Mahomed Hassan Samru Vs. Peer Hazarath Diwanshah Dargah Trust and Others, once again must be seen in the factual backdrop before the learned single Judge. There, the suit was filed for a declaration that lease deed executed by plaintiff No. 2 in favour of defendant is void, bad in law and/or voidable and/or inequitable, inoperative and is not binding on the plaintiffs. There the respondent Nos. 1 of 3 had filed suit against the petitioner before this Court for the said relief. All that was urged before the learned Judge was that the relief claimed would fall in Sub-clause (q) of Section 50(i) of the Bombay Public Trust Act. The learned Judge rightly held that the facts would disclose that the relief in the suit for declaration that by itself would not attract the requirement of obtaining prior sanction of the Charity Commissioner. That requirement will be applicable only when the suit is for any of the reliefs specified in Clause (a) to (q). However, Clause (q) by itself cannot be read in isolation is the conclusion. How this decision is of any assistance in the present controversy is not clear to me at all. Therefore, this decision also would be of no assistance.

48. The other Judgment that has been relied upon is of the same learned Single Judge (Hon''ble Mr. Justice A.M. Khanwilkar). There, the learned Single Judge, whose decision is reported in 2002 (3) BCR 145 (Sidramappa Nagappa Abdulpurkar and Anr. v. Guru Mahashivsharani Basavambikadevi and Ors.), held that the suit was filed for a declaration that the purported will under which the trust is sought to have been created was obtained by fraud and, therefore, was of no effect and plaintiff would become entitled to the property by devolution. Firstly, the assertion of the plaintiff was that the will itself was vitiated by fraud and that, therefore, the trust would not partake the character of a public trust but a private trust. Naturally, he was not claiming interest in the property of a

public trust but challenging the very will under which the public trust has been created. To such a suit, Section 50 would have no application and there is no quarrel with this proposition at all. However, the factual position before me is different and, therefore, this decision is also of no assistance.

49. The other decisions are about maintainability of a civil suit and would apply if Section 9 of the CPC was to be interpreted or its ambit and scope considered. As has been clarified above, that aspect has not been dealt with by me. I have proceeded on the basis that a civil suit would be competent but its maintainability without complying with Section 50 of the Bombay Public Trust Act is the question before me. Therefore, all decisions that have been brought to my notice on interpretation of Section 9 of CPC would have no application.

50. Finally, reliance is placed upon a decision of another learned Single Judge (Hon'ble Mrs. Justice K.K. Baam) The view taken by her has found favour with another learned Single Judge [Justice R.J. Kochar, as he then was when he decided Naresh's case (supra)]. That was an unreported Judgment/ order in W.P. No. 5238 of 1998 decided on April 19, 1999 by her ladyship Mrs. Justice K.K. Baam. As the facts would indicate that it was a case involving the manner of performing pooja/ Navangi Darshan. The manner in which such pooja is performed is purely a personal and private right of the plaintiff and, therefore, consent of the Charity Commissioner is unnecessary, is the conclusion. The conclusion is based on the fact situation but with great respect to the learned Single Judge, her attention was not invited to the Supreme Court decision in Kanbi Manji Abji and others Vs. Kanbi Vaghji Mavji and others, to which a detailed reference has been made by me. Since the Judgment of the learned single Judge is distinguishable on facts I need not go into further details.

51. Mr. Merchant then invites my attention to the Places of Worship (Special Provisions) Act, 1991. He submits that this Act was brought into force from 18th September 1991 and it is to prohibit conversion of any place of worship and to provide for the maintenance of the religious character of any place of worship, as it existed on the 15th day of August, 1947 and for matters connected therewith and incidental thereto. He invites my attention to the definition of the term "conversion" and "place of worship" as appearing in Section 2. I do not see how this enactment has any application in this case. I am considering the question whether present suit is barred by Section 50 of the Public Trust Act. Whether consent of Charity Commissioner is necessary and in absence thereof, the suit is maintainable or not is the only question arising for my determination. This enactment bars conversion of places of worship and issues a declaration as to the religious character of certain places of worship. This enactment would not be of any assistance to the plaintiffs.

52. The decisions that are relied upon by Mr. Parekh who supported the submissions of the plaintiffs and more or less adopted them are also of no assistance. If one considers the decision reported in Datta Devasthan Trust Vs. Milind Govind Kshirsagar and Others, then, I have applied same test as laid down

therein. I have considered the allegations in the plaint, the averments disclosing the cause of action and reliefs sought for in their entirety. I have not gone by merely the form but looked at substance of plaintiff's claim. The Learned Single Judge's Judgment far from supporting Mr. Parekh would go against the contentions raised by him. There, the learned Judge of this Court has not approved of the reasoning of the trial court and particularly that Section 50 would not be attracted. The learned Judge remanded the matter back to the trial court for adjudication of the application under Order VII Rule 11, after expressly disapproving the reasoning in the order impugned before the learned Single Judge. The two decisions of the Supreme Court, one of which has been referred to by Mr. Parekh and other by Mr. Merchant once again need to be seen in the backdrop of the fact situation. The Supreme Court in the decision reported in *Narmadabai and Anr. v. Trust Shri Panchvati Balaji Mandir and Ors.* refers to the suit which was filed for a declaration that Balaji Temple is not a public trust and the appellants were claiming the temple to be their private property and therefore, the perpetual/ temporary injunction restraining the respondent Trust not to disturb their possession and enjoyment of property was sought. It was to such a suit that the Supreme Court held that Section 50 and particularly Sub-clause (iv) thereof will not be attracted. Para 7 of the Supreme Court's decision would indicate that the Supreme Court's conclusion is based on the nature of the suit and the conclusion that the suit is filed to seek enforcement of the scheme as settled by the Joint Charity Commissioner. Therefore, the suit being filed not for a declaration or injunction against or in favour of the Trust, that the Supreme Court upheld the order of this Court, impugned before it. Similarly, in 2005 (6) SCC 641 (*Vinayaka Dev Idagunji v. Shivaram and Ors*) the suit was for a declaration for the hereditary rights by plaintiffs as Archaks of Temple. The right was claimed in their personal capacity as family of Archaks who have been performing functions as Archaks. The Supreme Court concluded that ultimately plaintiff's contention may be accepted by the Court or not, but they cannot be non-suited at the threshold. While noting the object of Section 92 of CPC what the Supreme Court held is that the suits covered therein are suits in representative capacity and pertaining to matters of public interest. The suit before the Supreme Court was a suit to establish an individual right. The plaintiffs were asserting that they are hereditary Archaks of the temple since time immemorial and are entitled to exercise this right which cannot be taken away from them. No public interest was involved. The only interest is that of the plaintiffs and their families. Right of archakship is claimed on the basis of inheritance and, therefore, it is a hereditary personal right which they want to establish. It is in that context that the observations of the Supreme Court need to be seen. The right to perform puja or seva is something which cannot be defeated by Section 50 of the Bombay Public Trust Act, 1950. The Supreme Courts observations in paras 9 and 12 on which reliance is placed by Mr. Merchant so also the ultimate conclusion in para 30 cannot be seen de hors the nature of reliefs claimed in the suit from which the appeal arose and was dealt with by the Supreme Court. Therefore, once again this decision is of no

assistance.

53. Finally it was urged by Mr. Joshi appearing for the intervenors that the applicability of Section 50 of the Bombay Public Trust Act is a question which must be dealt with and decided only by permitting parties to lead evidence. I find no force in this contention. Order VII Rule 11 and Sub-clause (d) thereof is clear. In Prem Lala Nahata and Another Vs. Chandi Prasad Sikaria, & Kamala and Others Vs. K.T. Eshwara Sa and Others, the Supreme Court held that if there is a condition precedent to the maintainability of action such as seeking leave and while giving illustration the Supreme Court also referred to Section 80 of the CPC, then, such a controversy must be decided on the basis of the allegations in the plaint (See para 14 of Premlata Nahata's case). It is on that basis alone that the Court can consider applicability of Order VII Rule 11(d) of CPC (See paras 15 & 16 of judgment in Kamla's case (supra)). Therefore, when there is a bar to the suit, then, that must be considered by looking at the allegations of the plaint itself. Order VII Rule 11(d) itself uses the phraseology "where the suit appears from the statement in plaint, to be barred by any law". Therefore, it is only on this basis that the applicability of Order VII Rule 11(d) and whether there is any bar to the instant suit must be considered. How such an issue or question can be considered after parties are permitted to lead evidence is not clear to me at all. Such a course would defeat the very purpose for which Order VII Rule 11 and particularly Clause (d) has been inserted in the CPC. That is to avoid trying an action or a suit which is ex facie not maintainable or would be barred by law. The court need not waste its precious judicial time when the facts disclosed in a plaint make it clear that the suit is barred by law. Applying this test to the present controversy, I have considered the submissions of parties. I have no hesitation, therefore, in rejecting the arguments of Mr. Joshi.

54. As a result of the above discussion, the Notice of Motion succeeds. It is made absolute in terms of prayer Clause (a) to the extent that it is held that the present suit is barred by Section 50 of the Bombay Public Trust Act, 1950. No costs.

55. At this stage Mr. Cama learned Counsel appearing on behalf of plaintiffs seeks stay of this order. Since, I have upheld the objection to the maintainability of the suit and held that it is barred by law, such a Judgment and conclusion cannot be stayed. Alternatively, Mr. Cama prays for continuation of the order of status quo dated 3rd March 2009 for a period of twelve weeks to enable the plaintiffs to challenge this Judgment in Appeal or to take appropriate steps in accordance with law.

56. Mr. Thakkar, learned Senior Counsel appearing for defendant Nos. 1 to 5 submits that one of the intervenors / devotees i.e. Plaintiff No. 1's brother has already approached the Charity Commissioner whereas one Mr. Niraj Ved has already filed suit in the Civil Court.

Therefore, this is not a fit case for continuation of status quo and it be vacated

forthwith.

57. Taking into account the totality of the facts and considering that the order of status quo has been passed on 3rd March 2009 interest of justice would be served if the said order is continued for ten weeks from today.

58. In the light of this order Notice of Motion Nos. 1262 of 2009 and 1684 so also 1705 of 2009 do not survive and the same are disposed of save and except to the extent that the order of status quo made thereon is continued. However, in the light of the fact that the suit itself is held to be barred by law and not maintainable, the notice of motion claiming interim reliefs will not survive. Similarly in the view that I have taken, the chamber summons by intervenors would also not survive and stand disposed of accordingly.

59. However, Chamber Summons No. 581 of 2010 is tagged with these matters. It is adjourned by consent for (10) ten weeks because it is in execution proceedings which arise from the consent award made by the Sole Arbitrator Mrs. Justice Sujata Manohar.