

GUJARAT HIGH COURT

Hon'ble Judges:K.S.Jhaveri, J.

Prakash Ghisalal Sharma Versus Iraben Vinubhai Desai Trustee And Director Of Ankur School

FIRST APPEAL No. 2932 of 2010 ; 2933 of 2010 ; 2935 of 2010 ;
CIVIL APPLICATION No. 3965 of 2011 ; 3966 of 2011 ; 3967 of 2011 ; *J.Date :-
AUGUST 30, 2011

- [CODE OF CIVIL PROCEDURE, 1908](#) Section - [96](#), [100](#)
- [BOMBAY PUBLIC TRUSTS ACT, 1950](#) Section - [72](#), [50A](#)

Code of Civil Procedure, 1908 - S. 96, 100 - Bombay Public Trusts Act, 1950 - S. 72 - whether appeal from District Court is first appeal or second appeal before High Court - held, though by nomenclature it is a second appeal, in substance appeal to High Court should be treated as a first appeal for all purposes and not as a second appeal.

Bombay Public Trusts Act, 1950 - S. 50A - condition precedent for action to frame scheme - first and foremost requirement of provision is recording of subjective satisfaction by Charity Commissioner that he has reason to believe that in interest of proper management or administration of a public trust Scheme should be settled - words "reason to believe" in context of Scheme 50A would imply only a tentative belief by Charity Commissioner that Scheme should be settled - language of Section 50A of Act itself provides that Charity Commissioner should proceed to frame a Scheme under section 50A of Act after giving an opportunity to be heard to trustees of Trust concerned - hence, after giving hearing to trustees on facts on basis of which he has reason to believe, he will have to come to a final conclusion that Scheme is required to be settled and that he has to proceed to frame Scheme - what section requires is that Charity Commissioner should be satisfied that it is necessary or expedient to frame a Scheme - test is whether such satisfaction has been duly arrived at on basis of facts which are available on record - whether a reviewing Court would have arrived at same conclusion is not relevant - for this purpose service of notice on Managing Trustee of Trust is sufficient for framing a suo motu scheme, especially when there are no other Specific Trustees or Governing Body - even if two or more persons are considered to be Trustees, fact that an opportunity of being heard is given to Managing Trustee, no notice is required to be given to other Trustees - thus, in this case, satisfaction cannot be said to be vitiated on any count - order of Court below is quashed and set aside - order of Charity Commissioner initiating suo motu scheme under section 50A and settling same except appointment of Executive Committee is confirmed - appeals allowed.

Imp.Para: [[1](#)] [[5](#)] [[6](#)] [[7](#)] [[10](#)] [[13](#)] [[16](#)] [[17](#)] [[19](#)] [[20](#)] [[21](#)] [[22](#)]

Cases Referred to :

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1. Asst. Collector Of Customs V/s. Charan Das Malhotra, 1971 1 SCC 697
2. [Bipinchandra Purshottamdas Patel V/s. Jashwant Lalbhai Naik, 1974 15 GLR 411 : 1974 AIR Guj 129 : 1973 GLHEL HC 201875](#)
3. Budh Sen V/s. Sheel Chandra Agarwal, AIR 1978 All 88
4. Canara Bank And Others V/s. Debasis Das And Others, 2003 4 SCC 557
5. Chandra Prakash Tiwari V/s. Shakuntala Shukla, 2002 6 SCC 127
6. [Chhotubhai L. Patel V/s. State Of Gujarat, 2007 2 GLR 1716 : 2007 \(16\) GHJ 1 : 2007 JX\(Guj\) 109 : 2007 GLHEL HC 217409](#)
7. [Chunilal Jashraj Lodha And Others V/s. Munishi Mahamadhusain Shaikh And Others, 1976 0 GLR 227 : 1975 GLHEL HC 202393](#)
8. Chunilal Vithaldas V/s. Mohanlal Motilal Patel, AIR 1967 SC 226
9. Commissioner Of Central Excise, Bangalore V/s. Brindavan Beverages (P) Ltd., 2007 5 SCC 388
10. D.N. Taneja V/s. Bhajan Lal, 1988 3 SCC 26
11. Dhananjay Malik And Ors V/s. State Of Uttaranchal, 2008 4 SCC 171
12. Food Corporation Of India V/s. State Of Punjab And Others, 2001 1 SCC 291
13. [Goverdhan V/s. Charity Commissioner, AIR 1987 SC 1598 : 1987 \(2\) GLH 169 : 1987 \(2\) GLR 1295 : 1987 \(3\) SCC 273 : 1987 \(1\) Scale 1206](#)
14. H.P. Transport Corporation V/s. K.C. Rahi, 2008 11 SCC 502
15. [Hiragar V/s. Ratanlal, AIR 1973 Guj 15 : 1972 GLR 181 : 1973 AIR Guj 15 : ILR\(Guj\) 1972 Guj 313 : 1971 GLHEL HC 204931](#)
16. James Joseph V/s. State Of Kerala, 2010 9 SCC 642
17. [Jaymal Thakore V/s. Charity Commissioner Of Gujarat, 2001 3 GLR 2124 : 2002 \(1\) GCD 686 : 2001 AIR Guj 279 : 2001 \(118\) Taxman 264 : 2001 GLHEL HC 205603](#)
18. Jute Corpn. Of India Ltd. V/s. Cit, 1991 Supp2 SCC 744
19. K.A. Nagamani V/s. Indian Airlines, AIR 2009 SC 3240
20. Kanji Karsandas Thakkar V/s. Lala Ambu Patil, AIR 1968 Bom 98
21. Lal Khan V/s. Kashmiri Lal, AIR 1930 Lah 125
22. Madan Lal & Ors. V/s. State Of J & K & Ors., 1995 3 SCC 486
23. Miya Mohamed Abdulkarim Jariwala V/s. Collector Of Surat, 1976 0 GLHEL(HC) 207766
24. [Mohamed V/s. Collector Of Surat, 1977 18 GLR 488 : 1976 GLHEL HC 207766](#)
25. [Naranbhai Dayabhai Patel V/s. Suleman Isubji Dadabhai, AIR 1996 SC 1184 : 1996 \(2\) GCD 615 : 1996 \(7\) SCC 278 : 1996 \(1\) Scale 611 : JT 1996 \(1\) 626](#)
26. P.K. Mitra V/s. State Of West Bengal, AIR 1959 SC 144
27. [Parvez Rustamji Bharda V/s. Navrojji Sorabji Tamboly, 2001 2 GLR 949 : 2000 \(4\) GCD 2714 : 2001 AIR Guj 160 : 2000 GLHEL HC 209134](#)
28. [Pravez Rustomji V/s. Navrojji Sorabji, AIR 2001 Guj 160 : 2001 \(2\) GLR 949 : 2000 \(4\) GCD 2714 : 2001 AIR Guj 160 : 2000 GLHEL HC 209134](#)
29. [Ramchandra G. Pandit V/s. Charity Commissioner Of State Of Gujarat, 1987 2 GLH 169 : 1987 \(2\) GLR 1295 : 1987 \(3\) SCC 273 : 1987 \(1\) Scale 1206 : JT 1987 \(2\) 221](#)
30. [Ramchandra Goverdhan V/s. Charity Commissioner, 1987 3 SCC 273 : 1987 \(2\) GLH 169 : 1987 \(2\) GLR 1295 : 1987 \(1\) Scale 1206 : JT 1987 \(2\) 221](#)
31. S. Narayanappa And Others V/s. The Commissioner Of Income-tax, AIR 1967 SC 523
32. S.K.Jadhav V/s. State Of Maharashtra, 1969 2 SCC 793
33. Sanis, Goregaonkar V/s. B.V. Nerurkar And Others, AIR 1937 Bom 374
34. Sheikh Abdul Kanum And Others V/s. Mulla Alibhai And Others, AIR 1963 SC 309
35. Shivprasad Shankarlal Pradeshi V/s. Leelabhai Badrinarayan Kalwar, AIR 1998 Bom 131

36. [Shree Dwarka Lohana Mahajan Sada-vrut Fund V/s. Joint Charity Commissioner, AIR 2004 Guj 147 : 2004 \(2\) GCD 1210 : 2004 \(5\) GHJ 86 : 2004 AIR Guj 147 : 2003 GLHEL HC 203288](#)
37. [Shri Bipinchandra Purshottamdas Patel And Others V/s. Jashwant Lalbhai Naik And Another, AIR 1974 Guj 129 : 1974 GLR 411 : 1974 AIR Guj 129 : 1973 GLHEL HC 201875](#)
38. Taher Alimohohamad Poonawala V/s. Zuizar Shaikh Nomanbhoy And Others, AIR 1995 Bom 422

Equivalent Citation(s):

2012 (1) GLH(NOC) 3 : 2011 JX(Guj) 1037

JUDGMENT :-

1 The above appeals are directed against the judgement and order dated 17th August 2010 rendered by learned Judge, City Civil Court No.20, Ahmedabad, in Civil Misc. Appeal No.614 of 2009 whereby the said appeal came to be allowed and the order dated 10th June 2009 passed by learned Charity Commissioner in Suo Motu Scheme Proceedings No.14 of 2009 was set aside.

2 The short facts as emerging from the record of the case are as under:

2.1 Ankur Society (hereinafter referred to as "the Society") is a charitable Public Trust, registered under the provisions of Societies Registration Act, 1860 and also under the provisions of Bombay Public Trusts Act, 1950, having object of providing education in all branches. The Society established a school called "Ankur High School", which is affiliated with Gujarat Secondary Education Board. The Society has its own bye-laws. The relevant original bye-laws as existing today, providing for the management of the Society are bye-laws no.1, 2, 3, 6, 7, 8 and 9 which read as under:

"1. The society shall consist of a Board of Trustees and the Governing Body constituted by the Board of Trustees.

2. For the management of all matters connected with the society there shall be two bodies:

3. The Trustees:

(a) There shall be at least three Trustees of the society nominated by the founder Trustee and any vacancy due to the resignation or death shall be filled up by the Board of Trustees. They shall have the charge of the permanent funds and property of the society and all such funds and property shall stand in the names of the Trustees.

(b) The Director of the School shall be one of the Trustees.

* * * * *

6. The Governing Body: The Governing Body of the society shall consist of the members nominated by the Board of Trustees from among the following:

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[1] Two from prominent Educationists

[2] Two from parents of the Ankur School

[3] Two from reputed Establishments.

Ex-officio Members: Principals of institutions conducted by the society and heads of various departments including one member of the office staff, shall be Ex-officio members of the Governing Body.

7. Chairman:

[1] There shall be a chairman elected by the members of the Governing Body.

[2] The Chairman shall be elected at the end of every two years.

[3] If the office of the Chairman falls vacant in the course of biennium, a meeting of the members of the Governing Body shall be summoned within a period of two months for the election of a new Chairman.

8. The powers and duties of the Governing Body:

[a] To start, affiliate and incorporate institutions.

[b] To fix the emoluments and the salaries of the staff members of the different institutions and to sanction Provident Fund and/or pension fund.

[c] To order publication of Annual Reports.

[d] To represent the society in its correspondence with Government University, other educational organizations.

[e] There shall be at least two meetings of the Governing Body, one in each term.

[f] Any member of the Government body failing to attend consecutive sittings without the permission of the Chairman shall be deemed to have vacated his office as a member and the vacancy shall be filled up within two months.

[g] In all matter before the Governing Body, the Chairman will have the casting vote in case of a tie.

9. Hon. Treasurer:

The Governing body may nominate one of the Trustees or a member of the Governing body to act as Hon. Treasurer.

10. Hon. Secretary:

The Governing body may nominate one of its members to carry on the work as its hon. Secretary."

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2.2 The following persons were subscribers to the Memorandum of Association who had given their consent to be the members of First Governing Body of the Society:

- [1] Dr. T.S. Subramaniam - Director ATIRA
- [2] Shri Nandkishore Sakerlal Shodhan - Mill Agent
- [3] Dr. K.R. Ramnathan - Director, PRL
- [4] Shri Prabhudas Balubhai Patwari - Advocate
- [5] Shri Bernard Kohn - Architect
- [6] Smt. Ruth Kohn - Teacher
- [7] Smt. Freny Desai - Teacher
- [8] Shri Rohit C. Mehta - Mill Agent

2.3 The subscribers to the memorandum of Association were constituted as Board of Trustees as well as the Governing Body to manage and administer the Society.

3 In the year 2004 Change Report No.438/2004 came to be filed with Charity Commissioner proposing certain changes in the original Memorandum of Association, Rules & Regulations of the Society. However, this change report came to be rejected vide order dated 24th November 2008.

3.1 The Society from time to time passed certain Resolutions proposing to make changes in the entries recorded in the register kept under Section 17 of the Bombay Public Trusts Act, 1950 and submitted Change Report Nos.409/69, 820/83, 1458/90, 737/04, 438/04, 1140/04 and 1141/04 in the prescribed form in the office of Charity Commissioner, Gujarat State, Ahmedabad. The status of all the said change reports are stated below:

[1] Change Report No.409/69: Shri Rohitbhai C. Mehta, Chairman of the Ankur Society submitted Change Report No.409/69 giving over and donating the articles viz. Furniture, teaching aids and house keeping, total value of Rs.4045/- to one Abhinav Trust. This change report was accepted by the Deputy Charity Commissioner vide order dated 26th May 1969.

[2] Change Report No.820/83 - This was at the instance of Secretary of the Society submitted on 16th September 1983 for deletion of names of the members of the Governing Body in PTR viz. [i] Shri Nandkishor Shakaral Sodhan (resigned with effect from 19.04.1964); [ii] Dr. T.S. Subramaniam (resigned from 02.04.1968); [iii] Shri K.R. Ramnathan (resigned from 02.12.1967); [iv] Shri Bernard Kohan (permanently shifted out of country since more than 12 years); [5] Smt.Ruth Kohan (permanently shifted out of country since more than 12 years); [6] Shri Rohitbhai C. Mehta (resigned on 17.05.1971) and [vii] Shri Prabhudas B.Patwari (resigned from 15.03. 1976). This change report was accepted by order dated 30th December 1983.

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[3] Change Report No.1458/90 - The Secretary of the Society filed Change Report for nominating following persons in the Governing Body against available seven vacancies:

[i] Shri Dineshbhai M. Patel, Administrative Officer

[ii] Smt. Iraben Vinubhai Desai, Assistant Director, Ankur School, Ahmedabad.

[iii] Shri Yashwantbhai Shukla, Educationist, Ahmedabad.

[iv] Shri C.M. Mehta, Educationist, Ahmedabad.

[v] Smt. Jayshriben A. Mehta, Scientist, V.A. Sarabhai Community Centre, Ahmedabad.

[vi] Shri Ved Prakash Agarwal, Chartered Accountant, Ahmedabad.

[vii] Shri Safibhai A. Maniar, Businessman, Ahmedabad.

This proposal was made with their consent and in furtherance to Resolution No.2/1990-91 passed on 01.12.1990 by the Ankur Society. This change report was also accepted by the Charity Commissioner. It is required to be noted that they had given consent only for Governing Body and not as Trustees.

[4] Change Report No.373/04 - One Shri Dineshbhai M. Patel, purportedly acting in the capacity of Managing Trustee of the Society filed Change Report No.373/2004 for substituting names of (1) Kamlesh Ramanlal Gandhi, (2) Sanghvi Dipak Chhotalal, (3) Shivkumar R. Chauhan, (4) Rajeshbhai Shantilal Shah and (5) Bhanwarlal G. Sharma on the Public Trust registered in place of (1) Smt. Freiny Chinubhai Desai (since died), (2) Shri Yashwantbhai Shukla (since died), (3) Jayshriben C. Mehta (since resigned), (4) Shri C.M.Mehta (since resigned), (5) Shafibhai Maniar (since resigned) and (6) Shri Ved Prakash Agarwal (since resigned). This change report was approved by Deputy Charity Commissioner vide orders dated 29th May 2004.

[4.1] Thereafter Shri Ved Prakash Agarwal and others have preferred Appeal No.19 of 2004 against the order dated 29th May 2004 passed by the Deputy Charity Commissioner. The said Appeal was allowed by order dated 24th September 2004 by Charity Commissioner and the order of Deputy Charity Commissioner sanctioning Change Report No.373 of 2004 was cancelled vide order dated 29th May 2004.

[5] Change Report No.438/2004 - Shri Dineshbhai M. Patel, purportedly acting in the capacity of Managing Trustee of the Society filed the said report for making entry on PTR of new Memorandum of Association and Rules and Regulations of the Society in place of existing Memorandum of Association and Rules and Regulations of the society. The said Change Report was filed on the basis of resolution passed in the meeting of the society held on 10.04.2004. The Deputy Charity Commissioner by order dated 13th January 2006 approved the said Change Report.

[5.1] Being aggrieved by the said order, Shri Nikunj H. Mehta and another preferred appeal No.9 of 2006. The said appeal came to be allowed by order dated 30th

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September 2006 by Charity Commissioner and the matter was remanded for deciding the same by taking into consideration the observations made by the Charity Commissioner. Thereafter the Deputy Charity Commissioner considered additional evidence produced on record and again passed order on 10.09.2007 and approved the said Change Report No.438/2004

[5.2] Being aggrieved by the aforesaid order Shri Nikunj Mehta preferred Appeal No.14/2007 before the Charity Commissioner under section 70 of the Bombay Public Trust Act, 1950. The Charity Commissioner vide order dated 24th November 2008 allowed the appeal and set aside the order of the Deputy Charity Commissioner dated 10th September 2007 approving the Change Report No.438/2004. As a result of the said order the original memorandum of association and rules and regulations of the Society, which were taken with PTR in the year 1963 continued to be in force till date. The relevant part of the said rules and regulations are already quoted hereinabove.

[6] Change Report No.1140/2004. - Shri Dineshbhai M. Patel, purportedly acting in the capacity of Managing Trustee of the Society filed Change Report No.1140/2004 to add into P.T.R. the names of Trustees viz. (1) Bhanverlal G. Sharma, (2) Hinaben Bhanwarlal Sharma, (3) Jitendra Bhanwarlal Sharma, (4) Harish Keshavlal Patel and (5) Shivkumar R. Chauhan. The said Change Report was objected to by Shri Nikunj Mehta and another. The Deputy Charity Commissioner, considering the said objections rejected the said Change Report vide order dated 27th January 2009.

[7] Change Report No.1141/2004 - Mr. Dineshbhai M. Patel, purportedly acting in the capacity of Managing Trustee of the Society, filed Change Report No.1141/2004 to delete names of Yashwantbhai P. Shukla and Freniben Desai due to death of both the persons. No order was passed on this change report.

4 The Deputy Charity Commissioner forwarded a confidential report dated 14th March 2005 along with an inquiry report received from the Inspector to Charity Commissioner. The Inspector recorded various irregularities in the financial and executive administration of the Trust and recommended framing of Scheme under section 50A of the Bombay Public Trusts Act, 1950. A report was also called for from the Director of Accounts, office of the Charity Commissioner, Gujarat State, who opined several irregularities in the matter of finance of the Society. The Joint Charity Commissioner recorded his satisfaction to frame suo motu scheme on the basis of the aforementioned report. Subsequently the Joint Charity Commissioner made an order dated 23rd November 2005 to prepare a Suo Motu Scheme for the Society under section 50A of the Act. The said proceedings came to be registered as Suo Motu Scheme Proceeding No.14/2005.

4.1 The Charity Commissioner served a notice of hearing dated 25th November 2005 along with copy of the order dated 23rd November 2005 passed in Suo Motu Scheme proceeding No.14 of 2005 to Shri Dineshbhai Muljibhai Patel requiring him to attend hearing on 20th January 2006 before the Charity Commissioner, Gujarat State, Ahmedabad. The Joint Charity Commissioner also published a public notice dated 7th August 2006 in local daily "Sandesh" on 13th August 2006 notifying commencement of proceedings of suo motu scheme proceedings No.14 of 2005 and invited all persons

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interested to submit their written submissions on or before 5th September 2006. It is important to note that only the name of Dinesh Muljibhai Patel was on record as Trustee and it is only because of this precise reason that the advertisement has been issued in order to avoid any complication.

4.2 On service of notice of hearing, Shri Dineshbhai Muljibhai Patel filed appearance through his Advocate Shri Atul Mangaldas Joshi and also filed his explanation. During the pendency of the proceedings Shri Dineshbhai Patel passed away i.e. on 28th September 2008. His Advocate, however, submitted list of 7 persons along with their consent for being nominated as Trustees of the Trust as per the Suo Motu Scheme proceedings. These names were: (1) Iraben Vinubhai Desai, (2) Ghanshyamsinh Modbhai, (3) Viraj Iraben Desai, (4) Pathan Shahidkhan Murtuzakhan, (5)Aparnaben Pravinbhai Pancholi, (6) Gargiben Viraj Desai and (7) Satish J. Pandya. Thereafter Shri Atul M. Joshi, learned Advocate filed pursis at Exh.33 declaring that his client Shri Dineshbhai M. Patel has expired pending proceedings in September 2008.

4.3 On or about 16th May 2009 Shri Prakash G. Sharma submitted a list of 7 persons for being nominated in the Trust Board which was to be constituted as per the settlement to be recorded in Suo Motu Scheme Proceedings by the Charity Commissioner. These names were (1) Prakash Ghisalal Sharma, (2) Sunil Hasmukhbhai Shah, (3) Mukesh Narpatlal Shah, (4) Suryakant Hiralal Parikh, (5) Pravinkumar Hiralal Vora, (6) Javed Mehmood Desai and (7) Naresh Ghanshyambhai Bheda. Earlier it was also proposed to include the name of Shri Bhaverlal Sharma. However, he withdrew his nomination and proposed names of 7 persons as above referred for being appointed as Trustees.

5 The Charity Commissioner, after considering all relevant aspects, passed order dated 10th June 2009 in Suo Motu Scheme Proceedings No.14 of 2005 sanctioning the scheme in terms of Annexure-A to the said order. The order directed newly appointed trustees to take over management of the Society within 10 days of the order and to deposit Rs.25,000/- in the P.T.A fund in the office of the Charity Commissioner within three months from the date of the order towards the costs of the proceedings and to enter names of trustees, who are appointed on the Executive Committee of the Trust in Schedule-I of PTR on 1st July 2009. The scheme included the appellants and five others viz. (1) Prakash Ghisalal Sharma, (2) Suryakant Hiralal Parikh, (3) Pravinkumar Hiralal Vora, (4) Javed Mehmood Desai and (5) Naresh Ghanshyambhai Bheda.

6 Feeling aggrieved by the order dated 10th June 2009 passed by the Charity Commissioner, Iraben Vinubhai Desai, the respondent no.1 filed Civil Misc. Application No.614/2009 before the City Civil Court, Ahmedabad, which came to be registered as Civil Misc. Application No.614/2009. The respondent no.1 has also filed an applications at Exh. 6 and 7 to stay the operation of the order dated 10th June 2009 passed by the Charity Commissioner and to restrain the Trustees appointed under the scheme dated 10th June 2009 from functioning as such.

6.1 The Court No.22, City Civil Court, vide order dated 21st July 2009, passed below Applications Exh.6 and 7 in Civil Misc. Application No.614/2009 stayed the order dated 10th June 2009 passed by the Charity Commissioner and also restrained he

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appellants and other trustees from managing and acting as the Trustees of the Trust during the pendency of the main proceedings.

6.2 Feeling aggrieved by the aforesaid order dated 21st July 2009 the Society and Trustees filed Special Civil Application No.7687/2009 before this Court. This Court by order dated 5th April 2010 directed the parties to maintain status quo as on the date of the order and further directed the court below to decide the main application as expeditiously as possible, preferably within six months from the date of receipt of the writ of the order of this Court.

6.3 Feeling aggrieved by the order passed by this Court in Special Civil Application No.7687/2009 the Society and others filed SLP (Civil) No.14586/2010 before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court disposed of the said appeal on 18.06.2010 with certain directions. Thereafter the Court No.20, City Civil Court, Ahmedabad heard the Civil Misc. Application No.614/2009 and vide order dated 17.8.2010 allowed the same in terms of prayer 7(A) and set aside the order dated 10th June 2009 passed by the Charity Commissioner in Suo Motu Scheme Proceedings No.14/2005. The application was moved by only one person viz. Ms Iraben Desai. No cross-objection or application was moved by any of the member of Governing Council.

7 It is against the aforesaid order dated 17th August 2010 passed by the City Civil Court, Ahmedabad in Civil Misc. Application No.614/2009 that the present appeals have been filed.

7.1 Initially this Court, while admitting the matter interim relief was granted against which an appeal was filed before the Hon'ble Supreme Court. The Hon'ble Supreme Court while disposing of the said appeal directed the High Court to dispose of the appeal as early as possible and preferably within a period of six months.

8 Mr. Mihir Thakore, Mr. S.N. Soparkar and Mr. N.D. Nanavati, learned Senior Counsels appearing for the respondents initially raised the following preliminary objection in respect of the maintainability of the First Appeal.

8.1 The preliminary objection is that the appeal under section 72(4) of the Act should be registered as a Second Appeal and not as First Appeal and its scope would be limited as a Second Appeal under section 100 of Civil Procedure Code, 1908.

8.2 Learned Senior Counsels appearing for the respondents in these appeals raised a preliminary contention with regard to the maintainability of the appeal on the following grounds:

8.3 The impugned order of the City Civil Court under Section 72(1) is an order of the City Civil Court in exercise of Appellate jurisdiction as held in various decisions interpreting section 72 of the Bombay Public Trusts Act and not the provisions of Clause 15 of the Letters Patent. Consequently, Civil Misc. Application filed before the City Civil Court is a First Appeal against the order of the Charity Commissioner.

8.4 In this regard the counsels relied upon a decision in the case of Hiragar V/s. Ratanlal, reported in AIR 1973 Gujarat 15, wherein it is held that an application under Section 72 of Bombay Public Trusts Act (29 of 1950), to the District Court is

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essentially an appeal against the order of Charity Commissioner and therefore an order of a Single Judge of the High Court in appeal against the order of the District Court can be reconsidered under Letters Patent only after that judge's certificate of worthiness.

8.5 They have also relied upon a decision in the case of Ramchandra G. Pandit V/s. Charity Commissioner of State of Gujarat, reported in 1987(2) GLH 169 wherein it is held that the proceedings before the District Court under section 72(1) are in the nature of an appeal and that District Court exercises appellate jurisdiction while disposing of a matter under section 72(1) of the Act and that the single Judge of the High Court while deciding the appeal from the order of the District Court under section 72(1) of Bombay Public Trusts Act deals with a matter wherein the order was made by the District Judge in the exercise of an appellate jurisdiction by a court subject to the superintendence of the High Court and hence Clause 15 of the Letters Patent is directly attracted.

8.6 They have also relied upon a decision in the case of Naranbhai Dayabhai Patel V/s. Suleman Isubji Dadabhai, reported in AIR 1996 SC 1184 wherein it is held that in case of appeal before single Judge of High Court by virtue of statutory conferment of supervisory jurisdiction, Letters Patent Appeal before the Division Bench of High Court would not lie unless certificate of single Judge has been granted for leave to appeal.

8.7 Learned Counsels submitted that application under Section 72(1) challenging the order of the Charity Commissioner is a First Appeal, when the order of the City Civil Court is being challenged under section 72(4) before the High Court, the Appeal to the High Court under Section 72(4) is an appeal from a judgement passed in Appeal by a Court subordinate to the High Court and the judgement of the High Court under section 72(4) would be passed in exercise of Appellate jurisdiction in respect of a decree or order made in exercise of Appellate jurisdiction by a Court subject to superintendence of the said High Court.

8.8 They also submitted that in the case of Parvez Rustamji Bharda V/s. Navrojji Sorabji Tamboly, reported in 2001(2) GLR 949 a Division Bench of this Court has observed that the power exercised by the High Court is in the nature of a second appellate court.

8.9 According to them, the High Court exercises jurisdiction under section 72(4) as a second Appellate Court and when the CPC applies to proceedings before the Charity Commissioner when exercising jurisdiction under section 50A of the Bombay Public Trusts Act as well as to proceedings before the City Civil Court under section 72(1) in view of the Section 76 of the Bombay Public Trusts Act and the provisions of Bombay Public Trusts Act do not categorically and specifically expand the jurisdiction of the High Court as a second Appellate Court, the limitations of Section 100 would apply to the appeal before the High Court under section 72(4).

8.10 In this regard they have placed reliance upon a decision in the case of Chunilal Vitaldas V/s. Mohanlal Motilal Patel, reported in AIR 1967 SC 226, wherein it is held that in a second appeal the appellate court is bound by same restrictions as are laid down in section 100 of Civil Procedure Code.

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8.11 In the case of Shivprasad Shankarlal Pradeshi V/s. Leelabhai Badrinarayan Kalwar reported in AIR 1998 Bombay 131 it is held that appeal under section 72(4) is subject to restrictions and limitations imposed under section 100 of Civil procedure Code while entertaining second appeal.

8.12 In the case of James Joseph V/s. State of Kerala, reported in (2010) 9 SCC 642, while considering the Scheme of Saurashtra Act, it is held that there was no special jurisdiction conferred upon the Courts and consequently the limitations of Section 100 would apply to the appeal from appeal although it was appeal under Special Act. The Apex Court observed that the essential character of the Second Appeal under the Code was not altered and the procedure in trial of suit applications and proceedings under the Act was the procedure prescribed by the Code of Civil Procedure and therefore it was held that the Legislature intended to confer a right of Second Appeal subject to the restrictions imposed by Section 100 of the Code. It is submitted that even under the Bombay Public Trusts Act, in proceedings before the Charity Commissioner under section 50A, the Charity Commissioner is required to follow the Code of Civil Procedure and even the City Civil Court is required to follow the Code of Civil Procedure while exercising jurisdiction under Section 72(1) in view of section 76 of the Bombay Public Trusts Act.

8.13 Learned Counsels lastly submitted that the preliminary issue is a jurisdictional issue as the nature of exercise by the Single Judge of this Court in a First Appeal and in a Second Appeal are completely distinct inasmuch as in First Appeal the High Court has jurisdiction to reconsider facts, while in Second Appeal if limitations of Section 100 have to be read into the Second Appeal the High Court can determine only on a substantial question of law arising in the matter and for the said purpose, it shall have to formulate the question of law before proceeding to hear the appeal. He therefore submitted that unless this preliminary issue is determined at the outset, the Court cannot proceed to hear the matter.

9 As against the above, Mr. S.B. Vakil, Mr. K.S. Nanavati, and Mr. Mihir Joshi, learned Senior Counsels appearing for appellants submitted that section 72(1) provides that any person aggrieved by the decision of the Charity Commissioner under section 50A inter alia shall apply to the court to set aside the said decision. The heading of the section also calls it "application". There is no invariable rule that a decision of an authority in the first instance can be set aside only in an appeal or that a proceeding to set aside the decision of the forum in the first instance in law is necessarily an appeal. Section 72(1) expressly mentions it as application. Therefore, whether it is in the nature of an appeal or not may be a question, but the proceeding is not an appeal proper, but is statutorily an application. Section 72(4) clearly shows that the legislature knew the distinction between an application and an appeal and has consciously described the proceedings under section 72(1) as an "application" and not an appeal.

9.1 According to the learned counsels, an appeal is a statutory remedy and the scope of the appeal is co-extensive with the scope of the proceedings from which the appeal arises, unless the statute providing for the appeal imposes limitation on the jurisdiction of the appellate court.

9.2 In support of the contentions the learned counsels have relied upon the following decisions:

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[1] In the case of P.K. Mitra V/s. State of West Bengal, reported in AIR 1959 SC 144 it is held that the right of appeal is a statutory right which has got to be recognized by the courts and when one exists the same cannot be denied in exercise of the discretionary powers of the court.

[2] In the case of S.K.Jadhav V/s. State of Maharashtra, reported in 1969 (2) SCC 793: AIR 1971 SC 840, it is held that an appeal is a creature of statute and the powers and jurisdiction of appellate court must be circumscribed and at the same time a court of appeal is a court of error and its normal function is to correct the decision appealed from and its jurisdiction should be co-extensive with that of the trial court.

[3] In the case of Mohamed V/s. Collector of Surat, reported in 1977[18] GLR 488 it is held that appeal under section 72(4) of the Act can lie on questions of facts against the decision of the District Court and limitations provided under section 100 on jurisdiction of court cannot be read in section 72[4].

[4] In the case of D.N. Taneja V/s. Bhajan Lal, reported in [1988]3 SCC 26 it is held that the right of appeal is a creature of statute and the question whether there is a right of appeal or not will have to be considered on an interpretation of the provision of statute.

[5] In the case of Jute Corpn. Of India Ltd. V/s. CIT reported in [1991] Suppl.[2] SCC 744: AIR 1991 SC 241, wherein it is held that in absence of statutory provision to the contrary, power of the appellate authority is co-terminus with all plenary power of the subordinate authority.

[6] In the case of James Joseph V/s. State of Kerala, reported in [2010] 9 SCC 642, it is held that in a second appeal under section 12A of Kerala Forest Act, 1961 limitations of section 100 of CPC were held not to be applicable. Unlike section 100 of CPC section 12-A(1) provides that an appeal against the order of the appellate authority under section 11 of the Act would lie, without specifying any limitation or restriction. The width, extent and limitation of appellate jurisdiction depends on legislative intent and statutory language employed by the statute concerned. Limitations of section 100 of CPC cannot be read to an appeal provision, if it is not expressly or impliedly provided for in a statute concerned.

[7] In the case of Ramchandra G. Pandit V/s. Charity Commissioner, reported in [1987]3 SCC 273: 1987[2] GLH 169 it is held that the proceedings under section 72(1) are in the nature of an appeal in the District Court in the exercise of appellate jurisdiction is subject to superintendence of the High Court. Therefore in filing a Letters Patent Appeal against the order of the Single Judge certificate was required. The judgement considers several decisions of the Gujarat as well as the Bombay High Court under section 72 of the Act. This judgement is per incurium being in ignorance of several decisions of the Supreme Court including judgements by Three Judges of Supreme Court laying the principle that the appeal being the statutory right is subject to the limitations provided in the statute creating the right of appeal. The only consideration in this decision of the Supreme Court is one decision of this Court reported 13 GLR 181: AIR 1973 (Guj) 15 and two decisions of the Bombay High Court reported in 1958 (BLR) 894 and 75 (BLR 523: AIR 1974 Bom.40.).

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[8] Learned counsels for the appellants submitted that it is not the claim of the contesting respondents that no appeal lies. Their objection is only to the scope and width of the appeal. Even if the appeal under section 72(4) is limited to questions raisable in an appeal under section 100 of CPC, the grounds submitted in the appeal fall within the scope of section 100.

[9] It is submitted that as the appeal is competent the appeal is required to be registered under Rule 217 of the Gujarat High Court Rules as First Appeal. Under Rule 2(2) appeals under special or local acts where the value of the subject matter before the trial court or Tribunal or other authority does not exceed Rs.1 lakh or is capable of valuation a Single Judge can dispose of the same. The claim in this appeal is stated as not capable of monetary evaluation.

9.3 In view of the above submissions learned counsels for the appellants submitted that the first appeal would lie to the High Court against the decree passed by the District Court.

10 Before proceeding further, this Court may examine the provisions of section 96 of Civil Procedure Code which reads as under:

"96. Appeal from original decree -

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties."

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed ten thousand rupees."

10.1 Thus, section 96 expressly confers a right of appeal from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decision of such court.

10.2 It is well established that a first appeal can be filed under section 96 of the Code against a decree passed by a court exercising original jurisdiction. Such appeal is maintainable on a question of fact or on a question of law or on a mixed question of fact and law. It is also a fact that the right to appeal is available against a decree passed by a court and not against an order passed by an authority. Thus, under the provisions of CPC, the requirement to file an appeal before the District Court is that there should be a decree passed by a court exercising original jurisdiction. It does not refer to an "order".

10.3 Now it is necessary to look into Section 100 of CPC which reads as under:

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"100. Second Appeal -

(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

10.4 The first appeal lies from a decree passed by a court exercising original jurisdiction, and a second appeal lies from a decree passed by a court exercising appellate jurisdiction. The grounds of first appeal and second appeal are different. Whereas first appeal can be filed on a question of fact, or of law, or of fact and law, second appeal can lie only on a substantial question of law. In the first appeal, an appellate court has power to decide issues of fact, but in second appeal, High Court can decide issues of fact only in certain cases. Letters Patent appeal is maintainable against a 'judgement' of a Single Judge of a High Court to a Division Bench of the same Court, but no such appeal is maintainable against a decision of the Single Judge in Second Appeal.

10.5 It is well settled that where the subject matter of appeal is not a decree, no second appeal will lie (Kanjil Karsandas Thakkar V/s. Lala Ambu Patil, AIR 1968 Bom 98; Budh Sen V/s. Sheel Chandra Agarwal, AIR 1978 All 88, Lal Khan V/s. Kashmiri Lal AIR 1930 Lah 125).

10.6 Coming to section 72 of the Act, it reads as under:

"72. Application from Charity Commissioner's decision under section 40, 41, 41C and 43(2)(a) and (c), 50A, 70 or 70A, etc.

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

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[1A] No party to such application shall be entitled to produce additional evidence, whether oral or documentary, before the Court unless the Deputy or Assistant Charity Commissioner or the Charity Commissioner has refused to admit evidence which ought to have been admitted or the Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause the Court thinks it necessary to allow such additional evidence.

Provided that, whenever additional evidence is allowed to be produced by the Court, the Court shall record the reason for its admission.

[2] The Court after taking evidence if any, may confirm, revoke or modify the decision or remit the amount of the surcharge and make such orders as to costs as it thinks proper in the circumstances.

[3] Pending the disposal of an application under sub-section (2) all proceedings for surcharge shall be stayed if the person aggrieved makes out a prima facie case for a stay order.

[4] An appeal shall lie to the High Court against the decision of the Court under sub-section (2) as if such decision was a decree from which an appeal ordinarily lies.

Explanation: In this section, the expression, "decision" shall include a scheme framed or modified under section 50A."

10.7 Before proceeding further it is required to be noted that the word used in this section is "decision". It stipulates that "Any person aggrieved by the decision of the Charity Commissioner under section.....". The legislature has not used the word "decree" obviously because of the fact that the Charity Commissioner is not subordinate to the District Court in the sense that the District Court has no power of superintendence over the Charity Commissioner. Further, this section also does not stipulate that it is an appeal.

10.8 On the contrary the section itself stipulates that "Application from Charity Commissioner's decision under section 40, 41, 41C and 43(2)(a) and (c), 50A, 70 or 70A, etc." If it was the intention that it should be an appeal, the nomenclature would have been "Appeal" and not "Application". This is further evident from the fact that application filed before the District Court is called as "Civil Misc. Application" and not "Civil Misc. Appeal". In the case of Civil Procedure Code, against a decree of the lower court, a "Civil Misc. Appeal" would lie to the District Court and not "Civil Misc. Application".

10.9 It is important to note that under the provisions of CPC, the requirement to file an appeal before the District Court is that there should be a decree passed by a court exercising original jurisdiction. It does not refer to an "order". In the present case there is no "decree" of the Charity Commissioner, Charity Commissioner is not subordinate to the District Court (AIR 1973 Guj.15) and the Section itself stipulates that only an "application" would lie to the District Court and even the nomenclature is "Civil Misc. application". In the entire section there is no word "appeal", but it is an "application". Therefore there is a clear and distinct stipulation that only an "application" would lie to the District court.

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10.10 The above aspect is further strengthened by subsection (4) of section 72 which stipulates that "An appeal shall lie to the High Court against the decision of the Court under sub-section (2) as if such decision was a decree from which an appeal ordinarily lies". Here the Legislature has thought it fit to use the word "decree" which would mean that the decree comes at the level of District Court only and not at the level of Charity Commissioner. Therefore once again section 96 is required to be seen. Section 96 expressly confers a right of appeal from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decision of such court.

10.11 It is also required to be noted that if the Legislative intent is to treat the challenge to the "decision" of the Charity Commissioner as an appeal, the wording should have been "appeal" and not "application". The clear intention of the Legislature was to treat the decision of the District Court as a decree in the first instance and therefore subsection (4) says that an appeal shall lie to the High Court against the decision of the Court under sub-section (2) as if such decision was a decree from which an appeal ordinarily lies. "An appeal ordinarily lies" would mean a "First Appeal" and it can never be treated to be a "Second Appeal". The very fact that the word "decision" as mentioned in subsections (1), (2) and (4) indicates that the decision of the Charity Commissioner is an "order". If the intent of the Legislature to treat the application as an appeal, it would have stated as "decree" in the very subsection also, in which case sub-section (4) cannot say that it would be an "appeal".

10.12 Therefore even if provisions of CPC is applicable, the provisions of subsection (4) of Section 72 clearly indicate that it is an appeal against a decree in the first instance as the District Court entertains only a decision in an application to the District Court.

10.13 In the case of Ramchandra Goverdhan V/s. Charity Commissioner, (1987)3 SCC 273: AIR 1987 SC 1598, a similar question arose before the Supreme Court. Under the Bombay Public Trusts Act, 1950, an order was passed by the Charity Commissioner. An application under section 72 of the Act was dismissed by the City Civil Court and first appeal against that order was dismissed by a learned Single Judge of the High Court. A Letters Patent Appeal was then filed by the appellant without seeking leave of the learned Single Judge (Goverdhan V/s. Charity Commissioner (1987)3 SCC 273: AIR 1987 SC 1598. Thereafter the appellant approached the Supreme Court.

10.14 The question before the Supreme Court was whether an appeal before the Single Judge of the High Court was in the nature of First Appeal or Second Appeal which depended on the power exercised by the City Civil Court. The Single Judge heard and disposed of the appeal in the exercise of appellate jurisdiction by a court subject to the superintendence of the High Court. The Supreme Court held that the Charity Commissioner exercised appellate power. The absence of the word "appeal" in Section 72 was not decisive. Virtually, therefore, it was a Second Appeal before a Single Judge of the High Court and hence, no Letters Patent Appeal was maintainable without a certificate of fitness by the Single Judge. This view is reiterated in the case of Naranbhai Dayabhai V/s. Suleman Isubji, reported in AIR 1996 SC 1184, and in the case of Pravez Rustomji V/s. Navrojji Sorabji, reported in AIR 2001 Guj 160.

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10.15 In view of the aforesaid decision even if it is to be considered that the appeal before the High Court is a Second Appeal, even then if a certificate is issued a Letters Patent Appeal would lie against the decision of the Single Judge. It is therefore very clear that it is only for the convenience and nomenclature that the appeal is called "Second Appeal" and if such appeal is to be treated as Second Appeal similar to Second Appeal under the provisions of CPC, then no Letters Patent Appeal would lie against the decision of the Single Judge. Therefore even according to the aforesaid decision, in fact and substance the appeal in High Court is a First Appeal, and if a certificate is issued, a letters patent appeal would lie to consider the substantial question of law which is similar to the provisions of Second Appeal. It is required to be noted that if it is a Second Appeal, no Letters Patent Appeal would lie even if certificate is issued.

10.16 At this stage it would be advantageous to refer to a Full Bench decision of this Court in the case of Prabhaskar Shankarlal Joshi and others, reported in 1984 GLH 662 wherein it is held that if a provision of one statute is incorporated in another, any subsequent amendment in the former statute would not affect the provision as incorporated in the latter statute. On the facts of the case it was held that the Code of Civil Procedure, 1908 mentioned in the Rent Act and the Rules made thereunder, would be that Code as it stood in 1953 when it came to be incorporated in the Rent Act and not as mentioned in 1976. An appeal would, therefore, lie against the determination of any question under Section 47 of the Code of Civil Procedure in execution proceedings under the Bombay Rent Act and the Rules made thereunder on the principle of incorporation. Therefore even if the contention of preliminary objection is upheld, Second Appeal as of 1950 only will lie.

10.17 At this stage it may also be relevant to refer to a decision in the case of Miya Mohamed Abdulkarim Jariwala V/s. Collector of Surat, reported in 1976(0) GLHEL-HC-207766 wherein it is held that the government land cannot become wakf property by long user, an appeal is provided to High Court against the decision of the District Court, the appeal can lie on questions of fact against decision of District Court, and limitations provided under section 100 on jurisdiction of court cannot be read in section 72(4) of the Act.

10.18 For the forgoing reasons I am of the opinion that though by nomenclature it is a second appeal, in substance the appeal to the High Court should be treated as a First Appeal for all purposes and not as a Second Appeal and therefore I hold accordingly.

CONTENTIONS ON MERITS

11 Mr. S.B. Vakil, Mr. K.S. Nanavati and Mr. Mihir Joshi, learned Senior Counsels appearing for the appellant raised the following contentions:

11.1 The lower court has held that the Charity Commissioner did not give notice under section 50A(1) of the Act, which requires that the Charity Commissioner may frame a scheme "after giving the trustees of such trust due opportunity to be heard". The requirement of the Act is not to issue any notice under section 50(A) and therefore the point required to be considered was not whether the Charity Commissioner has issued any notice, but was whether the trustees, if any, were

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required to be given due opportunity to be heard. It is submitted that for giving due opportunity of being heard no notice as such may be necessary.

11.2 The Court below in paragraph 24 of the judgement accepted the contention that in 1994 Law Suit (Bom) No.291) (AIR 1994 Bom. 422) decided on 22.07.1994 the Bombay High Court held that notice must be given before initiating the inquiry and that in the instant case no notice was given to the trust and trustees. However, the trial court has not recorded any finding in terms of section 50A(1) that due opportunity to be heard was not given to the trustees of such trust.

11.3 The decision of the Bombay High Court was a case of amalgamation of trusts by framing a common scheme for two or more public trusts governed by section 50(A)(2) of the Act, Clause (a) whereof requires publication of a notice in the Official Gazette and therefore the said decision is not applicable to framing a scheme under section 50(A)(1) of the Act.

11.4 When the Charity Commissioner initiated inquiry there was only one trustee viz. Dinesh M. Patel, who was served with a notice and he appeared and filed objections dated 11.08.2008. The members of the Governing Body were not trustees. The rules and regulations of the society framed on 20.4.1963 show that the management vested in trustees and governing body. Clause 9(1) deals with trustees and clause 9(2) deals with the Governing Body. The Director of Schools is not a trustee. The attempt made to amend the rules and regulations were not successful. Iraben who is Assistant Director of the school has given consent on 8.3.2009 to act as trustee in her capacity as a Director of the school has no meaning.

11.5 After referring to definitions of "Manager" and "Trustee" it is contended that in the definition of "Trustee" the words "includes the manager" go with a person in whom the trust property is vested. Therefore a manager in whom the trust property is not vested is not a trustee within the meaning of section 2(18) of the Act. Clause (9)(1) of the Rules and Regulations provides that trustee shall have the charge of permanent funds and property of the society and property shall stand on the names of the trustees. Clause 11 of the Rules and Regulations provides for the powers and duties of the Governing Body. It is submitted that there is no provision in the Rules and Regulations providing for vesting the trust property in the Governing Body.

11.6 The contesting respondents have relied upon entry in the Public Trust Register of the names of the members of the Governing Body. It is submitted that the same shows that the concerned persons are trustees. Under section 18(5)(a)(i) the application for registration of a public trust is required to mention the names and addresses of the trustees and the manager. Under section 19 of the Act in an inquiry for registration of the trust, the names and addresses of the trustees and manager of such trust are required to be ascertained. Therefore, the names of the manager/s would also be entered in the P.T. Register.

11.7 The Court below has erred in relying upon the proposed amendment to the Rules and Regulations (Memorandum of Association) of the Society, Rule 3(b) whereof provides that the director of the school shall be one of the trustees. This amendment does not make all members of the Governing Body also the Trustees. Further, the

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Charity Commissioner by his order dated 24.11.2008 set aside the Deputy Charity Commissioner's order approving the Change Report.

11.8 The trial court has erred in holding that notice ought to have been issued even prior to initiating proceedings for framing the Scheme under section 50A of the Act and that in the absence of such notice the initiation of proceedings was vitiated by breach of principles of natural justice. This finding is contrary to the finding of the Court in view of the documentary evidence on record, irregularities were found in the accounts and there was mismanagement of the Trust and therefore the Charity Commissioner had requisite reason to believe that it was in the interest and proper management of the trust to settle the Scheme. It is required to be noted that before issuing notice Inquiry Officer has recorded statement of Shri Dinesh Patel where all irregularities were admitted and thereafter the report was submitted.

11.9 In any case the proceedings for framing the Scheme can be initiated by the Charity Commissioner upon "reason to believe" that it would be in the interest of and the proper management or administration of the trust which therefore depends upon his opinion to be founded on relevant facts and held in good faith, and does not contemplate any inquiry and hearing of the concerned parties at that stage. In this connection reliance was placed in the case of Asst. Collector of Customs V/s. Charan Das Malhotra, reported in 1971(1) SCC 697, and in the case of S. Narayanappa and others V/s. The Commissioner of Income-tax, reported in 1967 SC 523.

11.10 The Court below has erred in holding that the order of the Charity Commissioner regarding framing a Scheme in respect of the Trust was vitiated on account of breach of principles of natural justice since no notice was issued to the other Trustees whose names appeared in the PTR. The PTR did not contain the names of any Trustees of the Society right from inception i.e. 1.8.1963 and the persons whose names were shown in column 3 of the PTR were members of the Governing Body and not Trustees and the two could not have been equated.

11.11 The Change Report 1458/1990 on the basis of which the Court has held that the names of Trustees were added in the PTR, did not relate to Trustees at all but to members of the Governing Body which is evident from the Change Report and the consent letters of the concerned persons itself.

11.12 Iraben Desai and others had notice of the pending proceedings and could have availed the opportunity of being heard on account of (1) public notice being issued in the newspaper regarding the proceedings on 7.8.2006, (2) reference to pendency of Scheme proceedings under suo motu Application No.14/2005 was made in the order of the Charity Commissioner in Appeal No.14/2007 dated 24.11.2008 wherein Iraben Desai was a party, (3) application dated 9.3.2009 and lists of documents dated 18.3.2009 submitted by advocate Atul Joshi claiming to represent Iraben Desai and others in the proceedings as is clear from the title of the said documents and accepted by Iraben Desai herself in her rejoinder in CMA 614/2009 and (4) application dated 18.6.2009 filed by Atul Joshi on behalf of Iraben for staying the operation of the order of the Charity Commissioner dated 10.6.2009. Having notice of the proceedings and having chosen not to appear or participate in the proceedings, Iraben Desai and others are now estopped from raising any objection regarding want of notice and must be

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deemed to have waived their rights in respect of issuance of notice and opportunity of being heard.

11.13 When the PTR did not reflect the correct state of affairs and there was obvious ambiguity about the status of the name contained in column 3 of the PTR and when the Charity Commissioner had reason to believe that change in the Governing Body and Memorandum/Rules were not being reported, the issuance of a public notice regarding the proceedings for framing a Scheme in respect of the Trust, would amount to substantial compliance with the provisions of law.

11.14 The Court has fundamentally erred in considering the issue of breach of principles of natural justice on the premise that Iraben Desai and others were Trustees of the Trust and that they were sought to be removed by the Charity Commissioner by framing the Scheme. Iraben Desai and others were at no point of time Trustees of the trust and no Change Report seeks to add their names as Trustees and Iraben cannot claim to be a Trustee as Director of the institution since the provisions regarding the Director automatically becoming a Trustee was in the amended Memorandum/Rules which change has not been approved by the authorities. Additionally she was only the Assistant Director and there is no evidence to establish her due appointment as Director.

11.15 The trial court has committed an error in overlooking the fact that Iraben Desai and others having submitted their consent letters in the proceedings of Suo Motu Scheme Application No.14/2005 for being appointed as Trustees of the Ankur Society Trust, they have acquiesced in the validity of the proceedings, requirement/necessity of framing a Scheme for the Trust and the necessity of appointing Trustees and are therefore, estopped from questioning the legality of the proceedings only after their names were not accepted for appointment as Trustees by the Charity Commissioner. Reliance was placed upon a decision in the case of Dhananjay Malik and Ors V/s. State of Uttaranchal, reported in 2008(4) SCC 171.

12 Mr. Mihir Thakore, Mr. S.N. Soparkar and Mr. N.D. Nanavati, learned Senior Counsels appearing for the respondents raised the following contentions:

12.1 No notice of framing of the scheme was never served upon respondents no.1 and 10 to 13. Before proceeding to frame the Scheme all the trustees whose names appear in the PTR of the Trust are required to be served with the notice of framing of the scheme under section 50A of the Bombay Public Trust Act. All the Trustees would not get the due opportunity of hearing if they are not served with the notice. In the instant case admittedly no notice has been served upon respondents no.1 and 10 to 13. In this connection reliance is placed on decisions in the case of Canara Bank and others V/s. Debasis Das and others, reported in 2003(4) SCC 557, Commissioner of Central Excise, Bangalore V/s. Brindavan Beverages (P) Ltd, reported in 2007(5) SCC 388 and Food Corporation of India V/s. State of Punjab and others, reported in 2001(1) SCC 291.

12.2 The first and foremost requirement of the provisions under section 50A of the Act is recording of a subjective satisfaction by the Charity Commissioner that he has reason to believe that in the interest of proper management or administration of a public trust, the Scheme should be settled. The words "reason to believe" in the

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context of Scheme 50A would imply only a tentative belief by the Charity Commissioner that the Scheme should be settled. After giving hearing to the trustees on the facts on the basis of which he has reason to believe, he will have to come to a final conclusion that the Scheme is required to be settled and that he has to proceed to frame the Scheme. The language of Section 50A of the Act itself provides that the Charity Commissioner should proceed to frame a Scheme under section 50A of the Act after giving an opportunity to be heard to the trustees of the Trust concerned.

12.3 The show cause notice which has been issued in the public advertisement dated 13.8.2006 in the newspaper merely recites the statutory language of section 50A of the Bombay Public Trust Act and it is well settled law that mere reproduction of words of section in the show cause notice for commencement of suo-motu inquiry can never amount to sufficient compliance of law and at least some factual data and material sought to be relied upon must find place in the show cause notice issued to the trustees. Therefore there is violation of principles of natural justice.

12.4 The Charity Commissioner before initiating the scheme under section 50-A requires to issue summons and requires to follow all the procedures as envisaged under the Code of Civil Procedure. The Charity Commissioner has to follow the procedure applicable to a Civil Court in trial of suits. Gujarat High Court, in the case of Jaymal Thakore V/s. Charity Commissioner of Gujarat, reported in 2001 (3) GLR 2124 has clearly held that proceedings before the Charity Commissioner have all the trappings of a regular court and provisions of the Code of Civil Procedure are applicable in the proceedings before the Charity Commissioner.

12.5 In framing the scheme, modifying it and in taking decision in that regard, the Charity Commissioner has to hear the parties, record the evidence and take a formal decision which is subject to scrutiny by a Civil Court under section 72(1) of the Act.

12.6 In course of framing of a scheme, there is likelihood of dispute being raised as to the nature of the trust and trust properties and the Charity Commissioner has to record formal decision on the basis of evidence and the material led before him. However, in the instant case the Charity Commissioner has not followed the procedure as envisaged under Order V of the Code of Civil Procedure and without issuing any summons/notice, the Scheme has been framed without giving any opportunity of hearing to respondents no.1, 10 to 13. Therefore the City Civil Court has rightly set aside the scheme framed by the Charity Commissioner and therefore the said order of the City Civil Court is not required to be interfered with and the appeal is required to be dismissed.

12.7 That the learned Charity Commissioner had served notice of Change Reports No. 1140 of 2004 and 438 of 2004 to the present respondents No. 1 and 10 to 13 on 09.11.2006 as trustees. i.e. much after initiating the suo-motu proceedings under Section 50-A of the Act. However, considering the fact that notice of the Change Report is required to be served upon all the trustees, at the stage of initiation of the scheme under Section 50-A of the Act, no notice has been served by the Joint Charity Commissioner and this would clearly show that there is total non-application of mind on the part of the Charity Commissioner and the Charity Commissioner has acted with oblique motive, in initiating the scheme, as he himself has issued notice much

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after the other change reports to the present respondent No.5 after initiating the scheme.

12.8 The Charity Commissioner has acted not only illegally but also malafide, as two unknown persons one Mr. Prakash Gheesalal Sharma who is petitioner NO. 2 herein one Mr. Vijay Mehta as well as his lawyer Mr. Vijay Desai, had been issued notice by the Charity Commissioner on 18.05.2009 indicating to them that the next date for hearing to frame a scheme is kept on 21.05.2009, even though the above persons are absolute strangers to the Ankur Trust. However, malafide, they have been issued notice by the Charity Commissioner and though the respondents No. 1 and 10 to 13 herein are trustees and whose names appear in the PTR, have not been issued notice.

12.9 The Charity Commissioner before appointing the trustees has not checked the credentials of the persons who sought to be appointed in place of the existing trustees. The Bombay High Court in the decision reported in 2006(2) BCR 294 has held that it is needless to state that while appointing the Members of the First Managing Committee, the paramount consideration that should weigh with the learned Assistant Charity Commissioner is safeguarding the interest of the Trust and for that it was necessary to appoint fit persons with honesty and integrity and for that it was necessary for the Charity Commissioner to have first obtained bio-data and consents and after examining the credentials of such persons to have appointed the Members of the First Managing Committee. However, in the instant case the Charity Commissioner has appointed the new Managing Committee/Trustees without examining the credential of the persons who are to be so appointed in place of existing trustees. Therefore, the City Civil Court has rightly set aside the order framing the scheme by the Charity Commissioner and therefore the said order of the City Civil Court is not required to be interfered with and the appeals are required to be dismissed.

12.10 It is submitted that the Charity Commissioner has without applying his mind and only on the basis of affidavit of one Bhavarlal Sharma (i.e. who is having history of criminal antecedents), who had claimed himself to be the Chairman of the Ankur Trust, appointed seven persons without examining their credentials, as suggested by Bhavarlal Sharma in his affidavit, for the reason that Bhavarlal Sharma is managing the affairs of the trust as a Chairman since 2004. Therefore, the Charity Commissioner without arriving at his own subjective satisfaction, has appointed seven persons as trustees, as suggested by Bhavarlal Sharma, which cannot be said to be the correct application of mind on the part of the Charity Commissioner and there is no subjective satisfaction on the part of the Charity Commissioner in appointing the seven persons as suggested by Bhavarlal Sharma in place of existing trustees. Therefore, the City Civil Court has rightly set aside the scheme framed by the Charity Commissioner and therefore the said order of the learned City Civil Court is not required to be interfered with and the appeal is required to be dismissed.

12.11 Bhavarlal Sharma has claimed himself to be the Chairman of the Ankur Trust. However, the Change Report which has been submitted by late Dineshbhai Patel being Change Report No.373 of 2004 through which Bhavarlal Sharma and four other trustees have been appointed as Trustees in the Ankur Trust has actually been tampered with.

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12.12 It is submitted that late Dinesh Patel had filed Change Report No.373 of 2004 before the Dy.Charity Commissioner praying for deletion of the trustees and in their place, inclusion of 5 trustees of the trust. Not only that but late Shri Dinesh Patel in connivance with other accused Vijay Mehta and advocate Atul Joshi, also produced forged resignation letters bearing signature of four trustees i.e. Respondents no 10 to 13 herein. It is submitted that all these documents had been forged by five persons whose names are sought to be included in the PTR of the said trust. 5 Trustees who are going to be benefited by way of present Change reports are Kamleshkumar Ramanlal Gandhi, Sanghvi Dipakbhai Chhotalal, Shivkumar R.Chauhan, Rajesh Kantilal Shah and Bhanvarlal G.Sharma.

12.13 It is submitted that names of all those 5 Trustees are sought to be included in the PTR in spite of knowing fully well that none of the four existing trustees had ever given their resignation as trustees from the Trust, by creating their forged signature, their resignation letters have been submitted before the Dy. Charity Commissioner so as to see that 5 names which have been given above can be included in the PTR of the said trust. By forging the order of the Dy. Charity Commissioner Bhavarlal Sharma and five other persons had become trustees of the trust and even the said change report has been tampered with by Bhavarlal Sharma and five other persons and since forged resignation letter of the present respondent No.1 has been created, the respondent herein had preferred an appeal before the Charity Commissioner being Appeal No.19 of 2004 and the said appeal came to be allowed by the Charity Commissioner and the Charity Commissioner had quashed the Change Report No.373 of 2004 and therefore, even otherwise Bhavarlal Sharma was not a Chairman of the Ankur Trust and though knowing this fully well the Charity Commissioner had not only accepted the affidavit of Bhavarlal Sharma in toto but relying only on the said affidavit, the scheme has been framed and seven persons have been appointed as trustees in place of existing trustees and therefore, the order framing the scheme has been rightly set aside by the learned City Civil Court and therefore, the impugned order is not required to be interfered with.

12.14 For aforesaid tampering i.e. of the order of the Dy. Charity Commissioner and for forging the of resignation letters of four trustees of the Ankur Trust, a Criminal Complaint being I-CR No.149 of 2005 was lodged with the Ellisbridge Police Station on 8/3/2005. Therefore, the Charity Commissioner without examining the record of he case, malafide framed the scheme and that too within a period of 24 days after the production of the affidavit of Bhavarlal Sharma dtd.16/5/2009. Therefore, the City Civil Court has rightly set aside the scheme framed by the Charity Commissioner and therefore the said order of the learned City Civil Court is not required to be interfered with and the appeal is required to be dismissed.

12.15 Even if the allegations against the trustees about mismanagement of the trust are to be considered, then, trustees against whom allegations have been made with regard to mismanagement of the fund, enquiries are required to be made and those trustees are required to be made after making proper enquiries and the Charity Commissioner is empowered to do so of removing the said trustees against whom there are allegations of mismanagement of fund. However, for that new scheme cannot be framed nor suo-motu inquiry can be initiated to frame a scheme u/s 50A of the Act. Therefore, the Charity Commissioner has miserably failed to understand the difference between the same of removing the trustees and framing of the scheme.

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Therefore, the City Civil Court has rightly set aside order framing the scheme by the Charity Commissioner and therefore the said order of the learned City Civil Court is not required to be interfered with.

12.16 It is the contention that one Atul Joshi had appeared on behalf of Iraben Desai and other persons. It could be seen from the record that when the affidavit of Bhavarlal Sharma was produced by one Mr. Prakash Sharma, endorsement was made by Mr. Atul Joshi with regard to objection of producing the said document on 16/5/2009. However, from the record it can be seen that the very same advocate Atul Joshi had filed Purshis on 21/5/2009 withdrawing his objection which he had raised on the earlier occasion. This would clearly show that the said Atul Joshi, Advocate had been won over by the present Appellants. Even otherwise, the said Atul Joshi was never advocate of respondents No. 1 and 10 to 13 herein who had represented before the Charity Commissioner and the said advocate had only represented late Dineshbhai M. Patel before the Charity Commissioner. Therefore, by no stretch of imagination it can be said that the present respondents No. 1 and 10 to 13 were aware about the proceedings which had been initiated by the Charity Commissioner. Therefore, the City Civil Court has rightly set aside the order framing the scheme by the Charity Commissioner and therefore the said order of the learned City Civil Court is not required to be interfered with.

12.17 Recourse to section 50A is misconceived. The section 50A applied where the charity commissioner has reason to believe that in the interest of proper management or the administration of public trust a scheme should be settled for it. Where in place of a trust there is no deficiency or lacuna in the trust deed but the problem remained with its management by the trustees, the Charity Commissioner cannot invoke section 50 A and replace the scheme when what he has to do is to replace the trustees unless there is a finding that the existing trust deed is not conducive to benefit the charity, the charity commissioner can not change the trust deed which is the document by which the settler has created the trust. In the present case though there is no finding much less any decision to that effect by the charity commissioner in the order. The allegations and disputes leveled or made in the order of the charity commissioner are therefore outside the purview of section 50A. The said order passed by the Charity Commissioner is therefore without any jurisdiction.

12.18 It would be evident from the definition of 'Manager' that the manager must be such who for the time being either along with or in association with some other person or persons administers the trust property. Therefore, unless the Governing Body administers the trust property it cannot be treated as a manager. A mere perusal of the definition of 'trustee' would clearly establish that every manager as defined under section 2(8) would be a Trustee. Therefore one who administers the trust property is manager and such manager is a trustee. The manager whose name appears in the PTR is the manager as defined under section 2(8) and consequently a "trustee". As the names of the Governing Body appear in the PTR from day one and there is no separate list of trustee from day one the Governing Body members are Trustees and the entries in the PTR are final and conclusive.

12.19 If the Governing Body was not Manager and Trustee as defined under section 2(8) and 2(18) there would have been no scope for their name to appear in the PTR.

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12.20 Recourse to section 50A is misconceived. The section 50A applied where the Charity Commissioner has reason to believe that in the interest of proper management or the administration of public trust a scheme should be settled for it. Where in place of a trust there is no deficiency or lacuna in the trust deed but the problem lay with its management by the trustees, the Charity Commissioner cannot invoke section 50A and replace the scheme when what he has to do is to replace the trustees unless there is a finding that the existing trust deed is not conducive to benefit the charity, the Charity Commissioner cannot change the trust deed which is the document by which the settler has created the trust. In the present case there is no finding much less any decision to that effect by the Charity Commissioner in the order. The allegations and disputes levelled or made in the order of the Charity Commissioner are, therefore, outside the purview of section 50A. The said order passed by the Charity Commissioner, therefore, is without any jurisdiction.

12.21 Brief analysis of section 50A (1) shows that it is in two parts and both lay down conditions which are condition precedent before action to frame the scheme can be taken. The first condition precedent is that the charity commissioner should form a reason to believe that in the interest of proper management and administration of public trust, a scheme should be settled for it and, therefore, on that basis and information the charity commissioner may receive such reasons to believe must be formed. The second condition precedent is that before taking any further action he must give notice of proposed action to the trustees of such trust and give them opportunity to be heard. The fact that notice must be given before commencing action and not during the course of such action becomes clear when the words "after giving the trustees of such trust due opportunities to be heard" appears before the words "it is satisfied that it is necessary or expedient so to do...." Satisfaction must follow the notice and not vice versa. If the legislature intends otherwise the words " after giving the trustees of such trust due opportunities to be heard" would have appeared in the latter part of the section after the words necessary or expedient so to do" and before the words frame a scheme". In the present case no notice is given much less notice of proposed action.

12.22 No notice of framing of the scheme was ever served upon Respondents no. 1 and 10 to 13. Before proceeding to frame the Scheme all the trustees whose names appear in the PTR of the Trust are required to be served with the notice of framing of the scheme U/s 50A of the Act.

12.23 No subjective satisfaction was recorded by the Charity Commissioner that he has reason to believe that in the interest of proper management or administration of a public trust Scheme should be settled.

12.24 It is contended that the show cause notice which has been issued in the public advertisement datd.13/8/2006 in the news paper named "Sandesh" merely recites the statutory language of sec. 50A of the Bombay Public Trust Act ("The Act" for short). He submitted that this Court in its decision reported in AIR 2004 (Gujarat) 147, relying upon the earlier decision of the Hon'ble Bombay High Court in the case of Tahir Ali M. Punewala V/s. Kwaizer Sheikh Nomanbhai and others, reported in AIR 1995 Bombay 422, has clearly held that mere reproduction of words of section in the show cause notice for commencement of suo-motu inquiry can never amount to sufficient compliance of law and at least some factual data and material sought to be

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relied on must find place in the show cause notice issued to the trustees. He has also relied upon the following decisions.

1. AIR 2004 Gujarat 147 (Shree Dwarka Lohana Mahajan Sada-Vrut Fund V/s. Joint Charity Commissioner.
2. AIR 1974 Gujarat 129 (Shri Bipinchandra Purshottamdas Patel and others V/s. Jashwant Lalbhai Naik and another.
3. AIR 1995 Bombay 422 (Taher Alimohohamad Poonawala V/s. Zuizar Shaikh Nomanbhoy and others
4. 2007(2) GLR 1716 (Chhotubhai L. Patel V/s. State of Gujarat)

13 In response to the contentions raised by the learned Senior Advocates for the respondents, learned Senior Advocates appearing for appellant submitted as under:

13.1 As regards the contention that there were no Trustees of Ankur Society Trust from the beginning is concerned, there was a Governing Body of the Society and under section 5 of the Societies Registration Act, the property vested in such Governing Body and they were therefore Trustees of the Trust under section 2(18) of the Act and entitled to be heard in the Scheme proceedings. According to the counsel, the application for registration of the Trust, consents submitted to the Charity Commissioner for appointment as Trustees and the mode of succession recorded in the PTR indicates that the 8 persons named in the PTR at the time of registration claimed to be Trustees of the Trust. Their names were not entered in the PTR as members of the Governing Body at all as claimed by the respondents.

13.2 In so far as the respondents are concerned, their names have been entered in the PTR specifically as members of the Governing Body which is evident from Change Report No.1458/1990 and the consent letters of the persons agreeing to be members of the Governing Body. There is no resolution passed by the Trust, nor any change report filed or any consent given by the Respondents regarding their appointment as Trustees and even the procedure prescribed in the Memorandum for appointment of Trustees has not been adopted. Therefore, irrespective of the status of the first 8 persons in the PTR, it is beyond dispute that the respondents were and are not Trustees of the Trust and do not have any right per se to be heard in the Scheme proceedings.

13.3 The law recognizes a concept that a Trustee in the legal and technical sense who alone is entitled to claim a right of an opportunity of hearing in the Scheme proceedings. The law also recognizes the concept of a Trustee de-son-tort i.e. a Trustee on account of his own wrong of intermeddling with the Trust property. However, such a Trustee does not have a right in respect of the property of the Trust but an obligation to account for his conduct and he cannot thereby claim a right akin to a legally appointed Trustee of being heard in the Scheme proceedings. In this connection reliance is placed on the decision in the case of Sheikh Abdul Kanum and Others V/s. Mulla Alibhai and others, reported in AIR 1963 SC 309 and in the case of Sanis, Goregaonkar V/s. B.V. Nerurkar and others, reported in AIR 1937 Bombay 374.

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13.4. The respondents were never and are not the Trustees of the Trust and therefore cannot claim a right to be heard in the Scheme proceedings. According to learned counsel, in light of the findings that the management and administration of the Trust was not being done in a manner required under its unamended Memorandum and Rules and Regulations, and the fact that the PTR did not reflect true state of affairs and the Society was itself claiming contrary to the PTR, issuance of a public notice regarding initiation of Scheme proceedings is adequate compliance with principles of natural justice in the facts of the case.

13.5 The nature of the proceedings as contemplated under the Act are explained in the case of Bipinchandra Purshottamdas Patel V/s. Jashwant Lalbhai Naik, reported in XV (1974) GLR 411. It is held that under Section 50A there is no procedure prescribed nor any mandate to hold enquiry but only that an opportunity of hearing has to be given to the Trustees. The section also requires "satisfaction" of the Charity Commissioner that it is necessary or expedient to frame a Scheme for the management and administration of the Trust. Therefore the proceedings are neither equivalent to suit proceedings nor do the provisions of the Civil Procedure Code apply.

13.6 As regards the contention that the proceedings before the Charity Commissioner were vitiated, it is submitted that as is evident from the Rojkam, the Scheme proceedings had not proceeded from 11.6.2008 when Dineshbhai Patel had filed his affidavit. After almost one year the matter appears to have been taken on board and various documents received have been exhibited. In the absence of any dispute that Iraben and others had consented for being appointed as Trustees under the Scheme being framed by the Charity Commissioner and authorizing the Advocate to take up the matter on board and submit consent letters it is obvious that they have acquiesced in the proceedings. There is no interpolation of dates and the correct dates of all applications are mentioned and the Rojkam also indicates as to when the same were taken on board. The conduct of the Advocate as on 18th May 2009 has not been complained of in any manner and he was obviously acting in the interest of the respondents. He therefore submitted that there is no merit in the contention that the proceedings before the Charity Commissioner were vitiated.

13.7 As regards the contention that the respondents can support the decree on grounds which have been held against them in the judgement and do not need to file cross-objections in the Appeal, such contention overlooks the fact that the order of the Charity Commissioner was challenged only by Iraben and the respondents herein were the respondents in the said CMA. They did not file appeal against the order of the Charity Commissioner and the question of cross-objection would not arise since Iraben herself was challenging the order and the respondents did not have any averse interest to her. Since they have not filed any appeal, they must be deemed to have acquiesced in the order of the Charity Commissioner. He submitted that in an appeal against the order passed in CMA, except Iraben, the other respondents do not have any right to raise any contention supporting the order since they have acquiesced in and accepted the order of the Charity Commissioner. He further submitted that if the contention of the Appellants that Iraben had acquiesced in the Scheme proceedings by submitting her consent to be appointed as Trustee and had also waived her right to be heard is accepted, it would be unjust, inequitable and illegal to permit other respondents who had not challenged the order of the Charity Commissioner, to

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support the order of CMA setting aside the order of the Charity Commissioner at this stage.

13.8 He submitted that the question in this appeal is whether an employee of the Trust can be a Trustee or not. According to him the remuneration contemplated under the Act is akin to honorarium for working as Trustee and not for employment under the trust. The question whether an employee who has intermeddled with the Trust property and taken benefit of the Trust funds can claim a right to be appointed as Trustee would still have to be answered on facts.

13.9 That what the section requires is that the Charity Commissioner should be satisfied that it is necessary or expedient to frame a Scheme. The test is whether such satisfaction has been duly arrived at on the basis of facts which are available on record. Whether a reviewing Court would have arrived at the same conclusion is not relevant. In this case, the satisfaction cannot be said to be vitiated on any count. The Charity Commissioner has noted that there were discrepancies in accounts, non-maintenance of statutory records, non-compliance with reporting procedures and in fact the administration and management of the Trust was being done de hors its Memorandum and Rules and Regulations.

13.10 In case of argument that reason to believe, the same must be recorded prior to issuance of the Notice. The authority must have a reason to believe which must precede the issuance of notice. In the present case such reasons have been recorded in the Notice itself and the facts establish that a preliminary enquiry was also undertaken by the authority and therefore there is no flaw in the issuance of the Notice.

13.11 As regards the argument that even at the stage prior to issuance of Notice, the Trustees ought to have been heard as held in the case of Shri Bipinchandra Purshottamdas Patel V/s. Jashwant Lalbhai Naik, reported in AIR 1974 Guj.129, this judgement does not support the proposition. He submitted that a preliminary inquiry was conducted by the authority.

13.12 What the section mandates is that the Charity Commissioner should be satisfied that it is necessary or expedient to frame a Scheme. The test is whether such satisfaction has been duly arrived at on the basis of facts which are available on record. Whether a reviewing Court would have arrived at the same conclusion is not relevant. In this case, the satisfaction cannot be said to be vitiated on any count. This is clearly admitted by the respondents on their own contentions. He therefore submitted that the satisfaction is not vitiated. He further submitted that in so far as the scheme and Trustees appointed thereunder are concerned, the same by itself cannot be the subject matter of review in the present appeal. He has further submitted that in fact the mismanagement and mal-administration of the Trust being a matter of record as also the fact that the same was being done de hors the Memorandum/Rules, the necessity of framing a Scheme is writ large and even the claim of the breach of natural justice must fail on the test of pre-judice.

14 After hearing the parties the first question now to be decided is whether there was sufficient reason to initiate suo motu proceedings by the Charity Commissioner or not. Before proceeding further, it would be advantageous to look into the duties and responsibilities of the Trustees of the Trust.

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14.1 When a person agrees to take on a position as trustee, or member of Governing Council (hereinafter referred to as Trustee) he or she must be aware of the duties that are imposed on him by virtue of his office and also by statute law. The trustee should comply with the terms of the trust and with any laws that are attached to the administration of the trust. A trustee must not breach any duty he has towards the trust. He shall not put at risk trust property and in carrying out his duties as trustee he must put his own interests aside. In relation to trust property a trustee has all the responsibilities that an outright owner would have i.e. a duty to insure the property, to ensure that the title to the property is in order as well as any other documents which may affect the property in any way. Trustee has ongoing duty to investigate the condition of the trust property. A trustee shall recover or make an attempt to recover trust property or any debts or funds due to the trust. A trustee also has a duty to defend any action brought against him in his capacity as trustee. Trust property must be accurately accounted for and a trustee should always be prepared to make available the accounts. These are all some of the duties and responsibilities of a trust. In short a trustee should act strictly in accordance with the byelaws. In case of negligence, the loss to individual can be ignored, but in case of trust property, the loss should be recovered from the individual who is negligent as trustee.

14.2 In the present case certain aspects are not in dispute and not controverted. Based on various reports on record it is found that from the year 2005 there was no appointment of Governing Body. No change report was filed with regard to appointment of Board of Trustees nor Governing Body or properties of the Trust. Resolution Book was not maintained from the year 1993 to 2000 and from the year 2000 it was maintained in the form of loose separate paper. The balance sheet produced on record shows that loan was extended to one Avise Enterprise in the sum of Rs.66,73,274/- and to Shri P.R. Shah for Rs.17,23,072/- and audit report shows that there is an outstanding of Rs.83,75,650/- which is interest free amount. Trust money was utilized for interest free loan to private firm and there is no recovery of the said amount till date.

14.3 The Trust had engaged Avise Enterprise running in the name of Ankur Computer Centre to impart computer education, training and to conduct courses pertaining to different classes of the school. The premises, furniture and computers have been provided by the Trust apart from free electricity, water, etc. The fees collected from the students for computer training have been fully paid to Avise Enterprise since the year 1995-96.

14.4 It is also found that the loan raised for outsiders is used for Avise Enterprise. The letter dated 24th March 2005 issued by Trustee Shri Dinesh Patel to the Assistant Charity Commissioner mentioned the irregularities and illegalities of the Trust on the basis of the documentary evidence like audit report and other documents. The irregularities are gross and the Trust has not explained these irregularities.

14.5 From the evidence on record it is crystal clear that there are various irregularities and the Trust is not properly managed or administered. I have gone through the evidence on record and found that the reasons assigned by the Joint Charity Commissioner for holding that there are proper reasons to believe to frame a suo motu scheme for the proper management of the Trust are just and proper. In paragraph 15 of the order the court below has also elaborately discussed the reasons for coming to

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the conclusion that there are sufficient reasons to frame suo motu scheme under section 50A of the Act. I am in complete agreement with the reasonings adopted and findings arrived at by the court below in this regard. Therefore no interference is warranted in such finding.

15 Before proceeding further, certain aspects of by-laws of the Society and the relevant part of Trustees and Governing Body are required to be noted.

15.1 At the time of registration of the Society, original memorandum of association and rules and regulations were registered which were taken with PTR in the year 1963. In the year 2004 a Change Report came to be filed by Shri Dineshbhai M. Patel, acting in the capacity of Managing Trustee of the Society, being Change Report No.438 of 2004 for making entry on PTR of new Memorandum of Association and Rules and Regulations of the Society. The said Change Report was filed on the basis of the resolution passed in the meeting of the society held on 10th April 2004. The Deputy Charity Commissioner, by order dated 13th January 2006 approved the said Change Report.

15.2 Against the said order Shri Nikunj H. Mehta and another preferred Appeal No.9 of 2006, which came to be allowed by order dated 30th September 2006 of the Charity Commissioner and the case was remanded for deciding the same by taking into consideration the observations made by the Charity Commissioner.

15.3 Thereafter the Deputy Charity Commissioner considered additional evidence produced on record and passed an order on 10th September 2007 approving the Change Report No.438 of 2004.

15.4 Again Shri Nikunj Mehta and another filed Appeal No.14 of 2007 before the Charity Commissioner under section 70 of the Bombay Public Trust Act, 1950. The Charity Commissioner, after considering the materials on record, allowed the appeal and set aside the order of Deputy Charity Commissioner by order dated 24th November 2008. Thus, the original Memorandum of Association and Rules and Regulations of the Society, which were taken with PTR in the year 1963 continued to be in force till this date.

15.5 The relevant existing bye-laws have already been quoted in the foregoing paragraphs.

15.6 As per byelaw no.2 existing as on the date of the notice, for the management of all matters connected with the society there shall be two bodies, namely, Trustees and Governing Body. Byelaw No.3 provides that there shall be at least three Trustees of the society nominated by the Founder Trustee and any vacancy due to the resignation or death shall be filled up by the Board of Trustees. They shall have the charge of the permanent funds and property of the society and all such funds and property shall stand in the names of the Trustees. The Director of the School shall be one of the Trustees.

15.7 Byelaw no.6 provides for the Governing Body. This byelaw stipulates that the Governing Body of the society shall consist of the members nominated by the Board of Trustees from among (1) two from prominent Educationists, (2) two from parents

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of the Ankur School and (3) two from reputed establishments. It is also provided that Principals of institutions conducted by the society and heads of various departments including one member of the office staff, shall be Ex-officio members of the Governing Body.

15.8 Byelaw no.7 pertains to Chairman. As per this byelaw there shall be a chairman elected by the members of the Governing Body; the Chairman shall be elected at the end of every two years and if the office of the Chairman falls vacant in the course of biennium, a meeting of the members of the Governing Body shall be summoned within a period of two months for the election of a new Chairman.

15.9 The duties and responsibilities of Trustees and Governing Council are also set out.

15.10 It is therefore crystal clear that there are only three Trustees and there is a Governing Council having various members from different fields and also a Chairman to look after the day today affairs of the Society.

16 Having considered the relevant byelaw, I may now advert to the constitution of the Trust.

16.1 Initially the following persons were the subscribers to the memorandum of Association and they had consented to be the members of the Governing Body of the Society:

Dr. T.S. Subramaniam - Director, ATIRA

Shri Nandkishore Sakerlal Shodhan - Mill Agent

Dr.K.R. Ramnathan - Director, PRL

Shri Prabhudas Balubhai Patwari - Advocate

Shri Bernard Kohn - Architect

Smt. Ruth Kohn - Teacher

Smt. Freny Desai - Teacher

Shri Rohit C. Mehta - Mill Agent

16.2 By Change Report No.820 of 1983 the names of following persons were deleted:

Nandkishor Shakarlal Sodhan as he resigned from 19.4.1964.

Dr. T.S. Subramaniam as he resigned from 2.12.1968.

Shri K.R. Ramanathan as he resigned from 2.12.1967.

Shri Bernard Kohan as he had permanently shifted out of country.

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Smt. Ruth Kohan as she had permanently shifted out of country.

Shri Rohitbhai C. Mehta as he resigned from 17.5.1971.

Shri Prabhudas B.Patwari as he resigned from 15.3.1976

16.3 By Change Report No.1458 of 1990 the following persons were substituted with the approval of Charity Commissioner on 1st December 1990:

Shri Dineshbhai M. Patel, Administrative Officer.

Smt. Iraben Vinubhai Desai, Assistant Director, Ankur School.

Shri Yashwantbhai Shukla, Educationist.

Shri C.M.Mehta, Educationist.

Smt. Jayshirben A. Mehta, Scientist.

Shri Ved Prakash Agarwal, Businessman.

Shri Safibhai A. Maniar, Businessman.

16.4 Thereafter Shri Dineshbhai M. Patel, purportedly acting in the capacity of Managing Trustee of the Society, filed Change Report no.373 of 2004 for substituting the names of (1) Shri Kamlesh Ramanlal Gandhi, (2) Sanghvi Dipak Chhotalal, (3) Shivkumar R. Chauhan, (4) Rajeshbhai Shantilal Shah and (5) Bhanvarlal G. Sharma, in place of (1) Smt. Freiny Chunibhai Desai (since died), (2) Shri Yashwantbhai Shukla (since died), (3) Smt. Jayshirben C.Mehta (since resigned), (4) Shri C.M.Mehta (since resigned), (5) Shri Shafibhai Maniar (since resigned) and (6) Shri Ved Prakash Agarwal (since resigned). This Change Report was approved by order dated 29th May 2004 passed by Deputy Charity Commissioner. However, Shri Ved Prakash Agarwal and others have filed Appeal No.19 of 2004 against the aforesaid order dated 29th May 2004 passed by the Deputy Charity Commissioner. The said appeal came to be allowed by order dated 24th September 2004 by Charity Commissioner and the order of the Deputy Charity Commissioner sanctioning the Change Report No.373 of 2004 was cancelled.

16.5 Thereafter Shri Dineshbhai M. Patel, purportedly acting in the capacity of Managing Trustee of the Society filed Change Report No.1140 of 2004 to add names of five trustees which came to be rejected vide order dated 27th January 2009. Subsequently Change Report No.1141 of 2004 came to be filed to delete names of Yashwantbhai P. Shukla and Freniben Desai due to death of both the said persons. No decision was taken on this Change Report.

16.6 Therefore, as per the record, the names of Shri Dineshbhai M. Patel, Shri Iraben Vinubhai Desai, Shri Yashwantbhai Shukla, Shri C.M.Mehta, Smt. Jayshirben A. Mehta, Shri Ved Prakash Agarwal and Shri Safibhai A. Maniar are on record of the Society. It appears that out of these persons, Yashwantbhai P. Shukla and Freniben

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Desai died for which Change Report No.1141 of 2004 was filed along with the relevant death certificates.

16.7 However, the fact remains that there can be only three Trustees on the Board of Trustees of the Society as per the byelaw of the Society. From the record it appears that Shri Dinesh M.Patel was acting as Managing Trustee. Though seven names were entered in the record, there is not an iota of evidence to show that all of them are Trustees or members of the Governing Body. The report of the Charity Commissioner reveals that Shri Dinesh M. Patel alone is the trustee of the Trust since the year 1970 (actually it should be 1990). This finding is based on the materials on record before the Charity Commissioner who is in possession of the entire record of the Society.

16.8 The Trustees and the Governing Body were not appointed since many years. There is no resolution book for the period from 1993 to 2000. There is nothing on record to show as to who are Trustees and who are the members of Governing Body.

16.9 There is a letter on record addressed to Bench Clerk of the office of Charity Commissioner and letter issued by Charity Commissioner intimating that there were eight trustees in the Society and at present only one Trustee managing the Trust. Smt. V.R. Dave, Deputy Charity Commissioner has prepared an investigation report under section 37 of the Act on 4th December 2003 wherein also it is found that Shri Dinesh M. Patel is the only trustee since the year 1970 (actually 1990). Shri Dinesh M. Patel has filed his explanation on 30th September 2003 wherein he admitted that he alone is the trustee since the year 1990. He admitted that governing body was not appointed and he was managing the affairs of the trust. This aspect has been accepted by the court below while coming to the conclusion that there was sufficient reason to believe to frame a suo motu scheme for the proper management of the Trust. It is also required to be noted that during the inquiry detailed statement of Shri Dinesh Patel was recorded and he could not deny the rampant irregularities committed by the members.

16.10 It is also important to note that no cross-objections were filed by the respondents.

16.11 The finding of the court below is that names of the appellant therein and opponent nos.10 to 13 were enrolled in the PTR record. It was recorded that names of Dinesh M.Patel, Smt.Iraben Desai, Yashwantbhai Shukla, C.M. Mehta and Smt. Jayshreeben A. Mehta were enrolled as trustees in the PTR record vide Change Report No.1458 of 1990 and they continue till today. Therefore the court below observed that before deleting the names from PTR record, an opportunity of hearing should have been given to them.

16.12 In common legal systems, a trust is a relationship between three parties whereby property (real or personal, tangible or intangible) is transferred by one party to be held by another party for the benefit of a third party. A trust is created by a settler, who transfers some or all of his property to a trustee, who holds that trust property (or trust corpus) for the benefit of the beneficiaries. The trustee has legal title to the trust property, but the beneficiaries have equitable title to the trust property. Thus, a Settler is an individual or institution who creates or settles the trust and entrusts the trust and the trust property to a trustee or trustees.

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16.13 In the present case initially there were 7 settlers. It appears that the Trust continued to appoint 7 persons as per the initial settlement. In fact the settlers ought to have appointed trustees and governing body. This was not done in the present case. In short, the trust was not at all functioning as per the byelaws.

16.14 However, what the court below failed to consider is that though names of seven persons were on record, out of whom two have died, it cannot be said that they were the trustees of the Society. They, except Shri Dinesh M. Patel, at the most, can be considered to be the persons managing the day today affairs of the Society and cannot be considered to be Trustees of the Society. There is no Governing Body as per the byelaws.

16.15 As per the rules and regulations of the Society in force, there should be three trustees of the society and there is nothing on record to show that other persons were appointed as new trustees as per the byelaw. The Society never functioned as per the rules and regulations and therefore there is no Governing Body or Trustees as per the provisions of the Byelaw. However, various records, including that of the office of Charity Commissioner indicate that Shri Dinesh M. Patel is the Managing Trustee.

16.16 In absence of definite record showing that others are Trustees, they cannot be considered to be Trustees inasmuch as there are only three posts of Trustees. Managing Trustee represents the trustees. As regards the Trust is concerned, Managing Committee has the authority to act on behalf of other trustees and to take decision on behalf of the trust. The Managing Trustee has authority to correspond on behalf of the Trust and also to represent the Trust in any proceedings. The court below has clearly committed an error in considering and proceeding on the basis that there are more than three Trustees on the Board of Trustees.

16.17 The court below ought to have considered the matter as per the byelaws of the Society wherein there is provision for only three trustees. In the present case there is nothing on record to show as to who are the other two trustees along with Shri Dinesh M. Patel. The order of the Charity Commissioner was disturbed only on the basis that "no opportunity of being heard is given to the petitioner Iraben Desai and other trustees - respondent no.10 to 13 before cancelling their names as trustees and before entering new names of trustees."

16.18 The Court below obviously proceeded on the basis that there are more than three trustees on the board of trustees which reasoning cannot be accepted on the ground that the byelaw itself does not provide for more than three trustees. There is no specific evidence on record as to who are the other two trustees apart from Shri Dinesh M. Patel. In any case, even the court below cannot bypass the byelaws of the Society while considering the order of the Charity Commissioner. Therefore there is no question of giving opportunity of hearing to other so-called trustees.

16.19 This Court is, therefore, of the view that service of notice on Managing Trustee for the Trust is sufficient notice for framing a suo motu scheme, especially when there are no other specific trustees nor Governing Body. The Managing Trustee has represented the Trust and he has also filed reply before the Charity Commissioner. In fact the scheme was initiated due to mismanagement or non-appointment of trustees and governing body and also for various other irregularities. Under these

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circumstances no other person can be treated to be Trustees of the Trust and therefore no notice is required to be issued to any other person except the Managing Trustee. It is important to note that since the required trustees were not there, the public advertisement was issued.

16.20 Furthermore, even if other two more persons are considered to be the trustees, in view of the fact that an opportunity of being heard is given to Managing Trustee, no notice is required to be given to the other trustees. In the present case opportunity, including to lead evidence, has been afforded to the Managing Trustee and he has even filed reply before the Charity Commissioner. I am therefore of the view that the court below has clearly committed an error in holding that notice is required to be given to all the trustees on the basis of PTR. For the very reason that there are no specific trustees or members of governing body, the ratio laid down in the authorities cited by the learned Advocate for the respondents are not applicable to the facts of the present case. Since they are not trustees they are not required to be issued notice.

16.21 It is further required to be noted that once a notice is given to the Managing Trustee and he has submitted his reply and when the scheme has started, even if the Managing Trustee has expired no further notice is required to be given. The procedural requirement contemplated under section 50A of the Act is of giving opportunity of hearing to the trustees of such trust before framing a scheme for management or administration of such trust and therefore there is no requirement of giving personal notice to the members of the governing body in the event of death of Managing Trustee. Therefore there is no question of giving personal notice to the members of the governing body in the event of death of Shri Dineshbhai M.Patel. Apart from that in the present case, as per the record there is no governing body as per the byelaws and mere enrollment of certain persons on record cannot be treated to be Governing Body. The Governing Body should consists of the persons as described in byelaw no.6.

17 Now the question remains to be considered is whether a show cause notice is required to be issued before starting suo motu inquiry under section 50-A or not. In this connection section 50-A is required to be noted which reads as under:

"(1) Notwithstanding anything contained in Section 50, where the Charity commissioner has reason to believe that, in the interest of the proper management of administration of a public trust, a scheme should be settled of it, or where two or more persons having interest in a public trust make an application to him in writing in the prescribed manner that, in the interest of the proper management or administration of a public trust, a scheme should be settled for it, the Charity Commissioner may, if, after giving the trustees of such trust due opportunity to be heard, he is satisfied that it is necessary or expedient so to do, frame a scheme for the management or administration of such public trust.

17.1 Section 50A infuses the Charity Commissioner with power in addition to Section 50 to frame, amalgamate or modify any scheme in the interest of proper management of a Public Trust. This is exercised either suo motu when he has reason to believe that it is necessary to do so or when two or more persons having interest in a public trust make an application to him in writing in the prescribed manner. This merely enables the Charity Commissioner to initiate proceedings for settling a scheme for the proper

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management or administration of a public trust of public trust eroding the very object of the Act.

17.2 What the Act stipulates is that "... a scheme should be settled for its, the Charity Commissioner may, if, after giving the trustees of such trust due opportunity to be heard, he is satisfied that it is necessary or expedient so to do, frame a scheme for the management or administration of such public trust". Therefore, the requirement is hearing the trustees before framing a scheme. Section 50A of the Act requires the Charity Commissioner to give due opportunity of hearing to the trustees before framing a scheme for management and administration of such trust. There is no provision or obligation on the Charity Commissioner to give notice to the trust and the trustees before initiating inquiry under the said section.

17.3 In the present case the Charity Commissioner before passing the order dated 23rd November 2005, in view of the report of Director of Accounts, Office of the Charity Commissioner through the Deputy Charity Commissioner, called for clarification from the Society with regard to the financial irregularities in administration and management of the trust property through Shri Dineshbhai Patel, purportedly acting as Managing Trustee of the Trust. He has given explanation by his communication to the Charity Commissioner. There is no provision for issuing a notice or giving hearing before initiating the inquiry under section 50A of the Act.

17.4 It appears that the court below has attempted to read the requirement in the statutory provision de-hors the legislative intent which is not permissible in law. If the legislative intent is to give a notice before initiating the inquiry, the provision would have specifically stated so. Therefore the court below has clearly committed an error in interpreting section 50A and holding that personal notice was required to be issued to respondent no.1 before framing of suo motu scheme under section 50A of the Act.

17.5 From the record it is evident that Iraben Desai had given consent for appointment under the scheme. This would mean that she is aware about the scheme and she has participated in the proceedings. Therefore it cannot be said that she had no notice at all. In so far as others are concerned, they are parties in the appeal before the Charity Commissioner and therefore they are also aware about the scheme in question. While reversing the order of the Assistant Charity Commissioner the Charity Commissioner in his order dated 24.11.2008 specifically made a reference to the scheme and appeal was allowed only on that ground. All the concerned persons were party to the said proceedings and therefore all were aware about the scheme.

17.6 The persons who were in charge of management were the so-called members of Governing Council and they were never trustees. Even if the definition of governing council is being interpreted as members of Board of Trustees, they are given power only to act as trustees and a vacuum is created in the trust as they are not in fact Trustees as envisaged under the Act. In such circumstances if notice is given to them, it would amount to giving management to persons who are not legally authorised. I am therefore of the opinion that there was no necessity of issuing notice to the so-called members of Governing Council. Even then they had knowledge of the proceedings.

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17.7 Apart from the above, there is nothing on record to show that Iraben-respondent no.1 and others were trustees of the Society. As stated hereinabove, as per the provisions there can be only three trustees. The PTR produced on record does not in any manner suggest that the respondent no.1 was never appointed as the trustee of the Society. There is no material or evidence on record which shows that the respondent no.1 had ever been elected as trustee of the society. At the most she can be treated as a member of the Governing Body. Therefore no notice is required to be issued to respondent no.1 or any other person claiming to be the trustee of the society. Apart from that respondent no.1 in fact participated in the proceedings by submitting her consent letter for being appointed as Trustee as per the scheme to be settled pursuant to the suo motu proceedings. Having participated in such proceedings it is not open to the respondent no.1 to say that she was not issued any notice whatsoever. In this connection it would be relevant to refer to two decisions of the Apex Court. In the case of H.P. Transport Corporation V/s. K.C. Rahi, reported in (2008) 11 SCC 502 it is held as under:

"8. In the instant case we have been taken through various documents and also from the representation dated 19.10.1993 filed by the respondent himself it would clearly show that he knew that a departmental enquiry was initiated against him yet he chosen not to participate in the enquiry proceedings at his own risk. In such event plea of principle of natural justice is deemed to have been waived and he is estopped from raising the question of non-compliance with principles of natural justice. In the representation submitted by him on 19.19.1993 the subject itself reads "DEPARTMENTAL ENQUIRIS". It is stated at the Bar that the respondent is a law graduate, therefore, he cannot take a plea of ignorance of law. Ignorance of law is no excuse much less by a person who is a law graduate himself."

17.8 In the case of K.A. Nagamani V/s. Indian Airlines, reported in AIR 2009 SC 3240 it is held as under:

"26. Yet another aspect of the matter; That the appellant admittedly had participated in the similar selection process for erstwhile grade 15 and 16, Manager (Maintenance/Systems) respectively. The Corporation had given adequate opportunity to the appellant to compete with all other eligible candidates at the selection for consideration of the case of all eligible candidates to the post in question. The Corporation did not violate the right to equality guaranteed under Articles 14 and 16 of the Constitution. The appellant having participated in the selection process along with the contesting respondents without any demur or protest cannot be allowed to turn round and question the very same process having failed to qualify for the promotion. In Madan Lal & Ors. V/s. State of J & K & Ors [(1995) 3SCC 486], this Court observed: "It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair: Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful." Reference may also be made to the decision of this Court in Chandra Prakash Tiwari V/s. Shakuntala Shukla [(2002)6 SCC 127].

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17.9 Further, in the case of Chunilal Jashraj Lodha and others V/s. Munishi Mahamadhusain Shaikh and others, reported in 1976 GLR 227 it is held that the definition of the expression "manager" given in sub-section (8) of section 2 of the Bombay Public Trusts Act, 1950 makes it clear beyond any doubt that a manager is different from a trustee though both of them may have in the matter of administering a trust similar duties to discharge. It is wrong, therefore, to say that under the scheme of the Bombay Public Trusts Act, a manager is a trustee and a trustee is a manager.

17.10 Thus, once the proceedings initiated by the Charity Commissioner are found to be in order and as per the provisions of the Act, the Court below ought not to have entertained any challenge against the outcome of the proceedings solely on the ground that notice to respondent no.1 was not given especially when she herself had participated in the scheme by submitting her consent for being nominated as a Trustee under the Scheme.

17.11 An observation was made by the court below that Iraben is a Director and as per clause 3(b) she is a Trustee. However, the record does not show that she was ever appointed or acting as a Trustee of the Society. Further, no requisite form for trusteeship was filed before the Charity Commissioner.

18 Another contention raised is that the notice issued is not sufficient and no reasons are stated in the notice. In this connection it is required to be noted that the provision does not stipulate any type of reason or any prescribed format for issuance of notice. In the present case sufficient notice was given to which reply was also filed by the trustee. Further, the respondent no.1 has participated in the proceedings as if she is fully aware about the matter.

18.1 Thus, as discussed hereinabove, Iraben and others had consented for being appointed as Trustees under the Scheme being framed by the Charity Commissioner and authorized the Advocate to take up the matter on board and therefore they have acquiesced in the proceedings. They have not even filed appeal against the order of the Charity Commissioner. The Charity Commissioner has noted that there were discrepancies in accounts, non-maintenance of statutory records, non-compliance with reporting procedures and the administration and management of the Trust was being done de hors its memorandum and rules and regulations. The letter dated 24th March 2005 issued by Shri Dinesh Patel to the Assistant Charity Commissioner mentioned the irregularities and illegalities of the Trust on the basis of the documentary evidence like audit report and other documents. As per the provisions, there can be only three Trustees on the Board of Trustees of the Society, but seven names were entered in the record and there is nothing to show that all of them are Trustees or members of the Governing Body. Mr. Dinesh Patel had also admitted that governing body was not appointed and he was managing the affairs of the trust. Therefore there was sufficient reason to believe to frame a suo motu scheme for the proper management of the Trust. As per the rules and regulations of the society in force, there should be three trustees of the society. However, the record does not show that apart from Shri Dinesh Patel, no other person was appointed as trustee. The Court below proceeded on the basis that there are more than three trustees on the Board of Trustees, which cannot be accepted. Therefore the service of notice on Managing Trustee for the Trust is sufficient notice for framing a suo motu scheme, especially when there are no other specific trustees nor Governing Body. Since the required trustees were not there, the public advertisement was issued. Further an opportunity of being heard is given to Managing

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Trustee on behalf of the Trust. He has submitted his reply also. Therefore there was no force in the submission that no notice was issued to the trustees. As stated above, Iraben Desai had given consent for appointment under the scheme which would mean that she is aware about the scheme and she had participated in the proceedings. Therefore it cannot be said that she had no notice at all.

19 In view of the foregoing reasons I am of the view that the Charity Commissioner has not committed any illegality in initiating suo motu scheme and there are no procedural lapses in such initiation.

20 However, I am of the view that the Charity Commissioner has committed an error in appointing seven persons as trustees as suggested by one Bhanvarlal Sharma. As per the provisions there can be only three Trustees. The order of the Charity Commissioner reveals that such appointment was made only on the basis of affidavit of Bhanvarlal Sharma who had claimed himself to be the Chairman of the Ankur Trust. It is also evident that the Charity Commissioner has not examined the credentials of the said seven persons and appointment was made only by relying on the affidavit of Bhanvarlal Sharma. There is nothing in the order to show that the Charity Commissioner has arrived at his own subjective satisfaction for such appointment.

21 The family group managed the affairs of the Society and there is serious mismanagement. The Society is running an institution where many students are prosecuting their studies. When there is mismanagement it affects the institution and the future of the students are at stake. Therefore unless there is a very good management, it may even result in liquidation of the society putting many into serious difficulties. Therefore efficient and sincere persons are required to be appointed as trustees and Governing Body of the trust. Their credentials are required to be verified. It is also required to be noted that in the earlier rules and regulations there are provisions for nomination of members of Governing Body from prominent educationists, parents of the school, reputed establishments, directors of the school etc. In the present case, it appears that the Charity Commissioner has appointed the persons without applying his mind merely on the affidavit filed by Mr. Bhanvarlal Sharma. Therefore such appointment cannot be permitted to be continued in the interest of the society. The Charity Commissioner was not right in his decision to the aforesaid extent.

22 In the premises aforesaid, the order of Court below is quashed and set aside. The order of the Charity Commissioner initiating suo motu scheme under section 50A and settling the same except appointment of Executive Committee is confirmed. However, the appointment of Governing Council shall be continued on adhoc basis till 31st December 2012 i.e. till new Trustees and Governing Council are appointed by way of election or as per the procedure prescribed. It will be open to the Charity Commissioner to elect Trustees and Members of Governing Council as per the Scheme i.e. appointment of three trustees and seven members of Governing Council and other members. Such appointment shall be made on or before 31st December 2012. The election shall be held by the Charity Commissioner from different categories of persons referred to in the bye-laws. It is clarified that if no members are available then new members can be enrolled from persons connected with School such as students, staff, parents or doners or any person rendering honorary services. Till the appointment of Trustees and Governing Council as per the Scheme, the Executive Committee shall continue to function for managing the day today affairs of the Society purely on adhoc basis upto 31st December 2012. Appeals are allowed to the aforesaid extent with no order as to costs.

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23 In view of the orders passed in the main matters, Civil Applications shall not survive and are accordingly disposed of.

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