

## Charity Commissioner Cannot Divert Property of Trust

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### Abstract

Joint Charity Commissioner of Pune had passed an order in 2015, in an application filed for seeking prior permission for sale of trust property, thereby diverting additional sale proceeds to three different trusts. It was reasoned by Joint Charity Commissioner that, when trust intended to sale its property and completed tender process and bidding, trustees agreed to sale it for x amount, however during pendency of such application seeking permission, and after reissuing of tenders by Joint Charity Commissioner, the bid amount went to rise by more than 30%, which was never expected by Joint Charity Commissioner. Hence, he gave a proposal to trustees to donate such additional amount to three trusts. Order was accordingly passed, however that particular portion of order was challenged before High Court, which quashed and set aside the order to that extent and held that, Charity Commissioner has no power to divert trust fund beyond its objectives.

This recent judgment of December 2018, is latest in row and is putting necessary restrictions on hypothetical view taken by Charity Commissioner while according sanctions for sale of trust properties. In this backdrop it is necessary to go through provisions of the Maharashtra Public Trusts Act, 1950, to recheck the section 36, is scope and applicability, powers of Charity Commissioner in this respect and rulings given by higher courts, which this paper intends to cover.

**KEYWORDS:**The Maharashtra Public Trusts Act, 1950, public trust, Charity Commissioner, trust property, sale of trust property, sanction by Charity Commissioner, section 36 of the Maharashtra Public Trusts Act, 1950.

### **Section 36 of the Maharashtra Public Trusts Act, 1950**

Every public trust, which holds an immovable property, can sale it, lease it out or alienate however subject to the prior permission of Charity Commissioner. The section which mandates prior permission is section 36(1)<sup>1</sup> and it starts with non-obstante clause. Thus, for every registered public trust it is necessary to get sanction of Charity Commissioner or Joint Charity Commissioner as the case may be, before alienating any immovable property of the trust.

#### **Criteria to be checked while according sanction for sale**

It has been decided in many rulings that, trust property should be treated as public property and sale of trust property should be made by taking all precautions and by giving maximum publicity. When application is filed before Charity Commissioner under section 36(1), the Charity Commissioner is bound to satisfy himself about 3 important criteria:

- There is compelling necessity<sup>2</sup> to sale or alienate trust property
- The need is genuine and in the interest of public trust and its

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<sup>1</sup> **§36. Alienation of immovable property of public trust:** (1) Notwithstanding anything contained in the instrument of trust – (a) no sale, exchange or gift of any immovable property, and (b) no lease for a period exceeding ten years in the case of agricultural land or for a period exceeding three years in the case of nonagricultural land or a building, belonging to a public trust, shall be valid without the previous sanction of the Charity Commissioner. Sanction may be accorded subject to such condition as the Charity Commissioner may think fit to impose, regard being had to the interest, benefit or protection of the trust; (c) if the Charity Commissioner is satisfied that in the interest of any public trust any immovable property thereof should be disposed of, he may, on application, authorize any trustee to dispose of such property subject to such conditions as he may think fit to impose, regard being had to the interest or benefit or protection of the trust.

<sup>2</sup> Five Navtanpuri Dham-Khija Mandir Trust v. Anilbhai Bhagwanji Jobanputra, 2008(3) G.L.R. 2529; *see also* Hasan Ibrahim Abdul Latif Supediwala v. Bhaichand Pranlal Dhoneja, 1999(1) G.L.H. 854.

beneficiaries

- Intention of trustee for utilization of sale proceeds

Unless and until these pre-conditions are satisfied the Charity Commissioner should either not grant any sanction or refuse the application.

### **Scope and applicability of section 36 for sale of public trust properties**

When the Bombay Public Trusts Act, 1950<sup>3</sup> came into force, the section used to start with words, “subject to the directions in the instrument of trust”. Which means if only trust deed or constitution or scheme of trust allows trustees to alienate properties of trust, then no prior permission of Charity Commissioner was required for alienation.<sup>4</sup> In the year 1960,<sup>5</sup> those words were replaced by existing non-obstante clause, making it mandatory to seek prior permission of Charity Commissioner in every such matter irrespective of provisions of instrument of trust. The section applies to sale of trust property or lease in lease of agricultural land when period exceeds 10 years, and lease in case of non-agricultural land or building when it exceeds 3 years. This means that, leave and licenses of premises for a temporary period of 36 months or below does not require sanction of Charity Commissioner.

However, the scope is more than what is prima-facie seen. There are even powers of revocation, for some period of time, post facto sanction was also allowed, however this article is not intended to cover entire section 36. This article restricts to only the powers of Charity Commissioner, if any, over sale proceeds.

From the perspective of this article, words inserted to the Act, in 1971<sup>6</sup> “Sanction may be accorded subject to such conditions as the Charity Commissioner may think fit to impose, regard being had to the interest, benefit or protection of the trust”. Phrases ‘subject to such conditions’ ‘as Charity Commissioner may think fit’ are highly

<sup>3</sup> *Hereinafter* the Act.

<sup>4</sup> Charity Commissioner v. Shantidevi Lalchand Chhaganlal Trust, 1989 Mh.L.J. 1048 (D.B.); A.I.R. 1990 Bom. 189.

<sup>5</sup> Bombay Amendment Act, No.6 of 1960.

<sup>6</sup> Bombay Amendment Act No.20 of 1971.

important. These words do not mean that unfettered rights are given to Charity Commissioner to decide whatever conditions he may think fit. Those conditions must be 'in the interest, benefit or protection of the trust'. These words are more important than earlier. Infact these last words are the soul of powers vested with Charity Commissioner while deciding such cases. For researcher, last word 'trust' appearing in that clause means only the trust whose property is to be alienated and not any other trust. Here lies absolute restriction on the powers of Charity Commissioner, that he has to think of sale proceeds only for interest, benefit or protection of trust of which property is for alienation, and of no other trust and hence cannot divert sale proceeds. On the top of this, for assessing interest and benefit of trust, Charity Commissioner has to see objectives enumerated in the instrument of trust and he cannot take divorce from the intentions of settlor, else it will be clear exceeding of the jurisdiction.

### **Judicial vista regarding section 36 of the Maharashtra Public Trusts Act, 1950**

Full bench judgement of *Shailesh Developers v. Joint Charity Commissioner, Maharashtra*,<sup>7</sup> is considered to be landmark judgment besides other. Few important aspects laid down by this judgement can be summarized as (i) powers vested under section 36 are not confined to merely grant or refusal of sanction to sale, (ii) power extends to inviting offers from public and directing trustees to sell trust property to a person whose bid is the best in the interest of trust, (iii) offers cannot be invited just to check market value as no genuine buyer would come forward and overruled law laid down by *Arunodaya Prefab*.<sup>8</sup> (iv) Charity Commissioner cannot remain silent spectator and he will be the final authority and not the trustee, hence upheld view taken in *A. R. Khan Construwel case*.<sup>9</sup> The Supreme Court has held that, it trust property can be sold to price lower than fair market value, if circumstances are compelling.<sup>10</sup> However, nowhere any of the authorities had given any right to Charity

<sup>7</sup> 2007(3) Mh.L.J. 717.

<sup>8</sup> *Arunodaya Prefab v. M.D. Kambli*, 1979 Mh.L.J. 104 (overruled).

<sup>9</sup> *A. R. Khan Construwel Company v. Youth Education and welfare Society*, 2006(1) Bom.C.R 170.

<sup>10</sup> *C.B. Gautam v. Union of India*, 1992(3) Suppl. S.C.R. 12; 1993(1) S.C.C. 78; 1992(3) S.C.A.L.E. 138.

Commissioner to consider use of sale proceeds while sanctioning sale.

Supreme Court has interpreted the word 'belonging' used in section 36, holding that, irrespective of title and ownership over property, it would be deemed to be vested in governing body and not in trustees.<sup>11</sup> When we consider this, only consent of trustees or one of them won't be enough and again consent of entire General Body should be taken if sale proceeds are to be diverted to cause other than objects of that trust. On these related citations, we need to consider few facts of case and flow of events of a case.

### **Facts of case in hand**

A trust registered within jurisdiction of Pune charity office, was belonging to Parsi community and was established by one Parsi for the benefit exclusively of Parsi people. He had donated his own land with constructions by creating a public trust, for establishing a Sanatorium for providing temporary residential accommodation to poor Parsis who are recovering from illness. Out of the total land, main sanatorium cottages were sold in the year 2008 with prior permission of Charity Commissioner. Now what had remained was office and other small rooms which were in dilapidated conditions being some 110 years old, irreparable and couldn't be utilized for achieving the objectives of trust. Thus, trustees published open tender notice in two newspapers, and from tenders took auction bidding. One prospective purchaser was finalized for tender value of ₹6.10 crores for which MOU was entered into. Thereafter they filed application seeking prior permission from Joint Charity Commissioner Pune. Few months passed in and fresh tenders were invited by Joint Charity Commissioner Pune. Once again bidding took place and finally sale price went to ₹8.30 crores. Now Joint Charity Commissioner Pune had a creative mind and asked an applicant trustee if trust can donate ₹1.5 crore to 3 trusts as trustee had finalized bid earlier at ₹6.10 crores and are now getting ₹2.30 crores more, so there should not be any problem in donating ₹50 lacs each to 3 trusts. Ultimately trustees consented to the proposal and order was passed. Important point is that, none of those 3 trusts were

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<sup>11</sup> Tata Memorial Hospital Workers v. Tata Memorial Centre, (2010)8 S.C.C. 480.

working for Parsi community and were chosen by Joint Charity Commissioner only.

### **Challenge before High Court and verdict**

Before the sale could take place, that order of Joint Charity Commissioner stated above, was challenged before High Court Mumbai by one of the Parsi person on two grounds, (i) Charity Commissioner has no jurisdiction to decide what is to be done with sale proceeds and (ii) those sale proceeds were diverted against the intention of settlor.<sup>12</sup>

High Court considered these objections and quashed and set aside operative part to extent by which Charity Commissioner had put fetters on ₹ 1.5 crores and tried to divert it to 3 trusts. Remaining order was maintained as it is.

While passing that order, few important observations are made by the High Court which are important to understand that, Joint Charity Commissioner under section 36 cannot divert sale proceeds as per his whims and fancies and certainly not to other trusts, even though those may be established for charity. Whatever will be sale proceeds shall belong to same trust, whose property is to be sold. Charity Commissioner cannot exceed his jurisdiction and go against the wishes of settlor or against the objects of that particular trust for utilization of sale proceeds. One of the observations, was that, the Charity Commissioner did not reason that, as per section 55 of the Maharashtra Public Trusts Act, 1950, none of the objects of trust could have been utilized and hence sale proceeds could be transferred to other trusts. Further question raised was considered that, there is no mention of any procedure followed by Charity Commissioner while deciding those 3 trusts to whom ₹ 50 lacs each was to be transferred.

### **Impact of judgement on other similar proceedings and action of Charity Commissioner**

It has already been held that when property is gifted to the trust before its sale, intention of donor will be observed. If such intentions

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<sup>12</sup> Natasha Nekoo v. Joint Charity Commissioner, Pune, W.P. No.5700 of 2015, (Date of Decision Dec. 11, 2018) (unreported).

are not brought to the knowledge of Charity Commissioner, then for want of gift deed, matter deserves to be dismissed.<sup>13</sup> In *Ratilal P. Gandhi v. State of Bombay*,<sup>14</sup> it was observed that, court or Charity Commissioner has no authority to sanction any deviation from intentions expressed by the settlor, even though Charity Commissioner deems it proper or expedient. Such use of power was held to be unwarranted encroachment on the freedom of religious affairs. It is also held by Supreme Court that, even surplus should be applied as nearly as possible to the original usages and purposes of the trust.<sup>15</sup> Recently this doctrine of *cy-pres* is explained at length by the Supreme Court in *Abid Hatim Marchant v. Janeb Saheb Shaifuddin*.<sup>16</sup> Nothing to that sort was considered or resorted to by Joint Charity Commissioner in deciding case under discussion in this article. Thus, that part of order was set aside by High Court.

### **Usefulness of this order and observations of High Court:**

It is generally observed that, Charity Commissioner generally tends to invite from public trusts doing good work and appeals to them to part with their money for public cause. Many such incidences occurred when public trusts conducted activities like *Samudayik VivahSohla* (Collective Marriages), blood donations, contributing to foundations of renowned personalities etc., even though that was not an objective in their instrument of trust. This amounts to clear diversion from the intentions of settlor or from the objectives which form part of registered trust deeds or constitution. Charity Commissioner should not divert from their duties, powers and should not interpret law to divert any trust property for the use not intended in the trust deed. What is intended by trustees of proposed utilization of sale proceeds, is discretion of trustee. At the maximum Charity Commissioner can consider that, trustees should not divert from objectives of trust for utilization of sale proceeds. However, in order to bridge a gap between those trusts who struggle for income or have low income, Charity Commissioner cannot misuse its position to

<sup>13</sup> 2011(6) Mh.L.J. 268.

<sup>14</sup> A.I.R. 1954 S.C. 388; 56 Bom.L.R. 1114.

<sup>15</sup> *ChhotalalLallubhai v. Charity Commissioner*, A.I.R. 1965 S.C. 1611.

<sup>16</sup> A.I.R. 2000 S.C. 899.

divert money of well-established trusts, to other trusts, howsoever those low-income trusts may be deserving.

One contingency must be considered, that, if some amount is diverted from sale proceeds of one trust (donor trust) to other trust (donee trust), and in future such first trust (donor Trust) whose property was sold, requires money to purchase property, or have any loan over property or for any other activity, then such money cannot be arranged easily and there will be cost for arranging such money. Likewise, such trust won't get any concession in loan repayment or interest just because it has donated some amount to another trust out of sale proceeds. Even donee trust won't be able to help earlier donor trust. Also, the settlor who established one trust with intentions to utilize trust property for specific use, would not have had donated anything from his personal earnings if one day his donations would be utilized to any other object. Such action of Charity Commissioner would be breach of trust reposed by settlor.

### **Precautionary measures to be taken while dealing with trust properties**

Researcher has some suggestions for proper handling of matters under section 36 of the Maharashtra Public Trusts Act, 1950 which are as follows:

1. Monthly tenancy is not clearly prohibited by the Maharashtra Public Trusts Act, 1950. It is observed that, trustees create monthly tenancy, and then approach Charity Commissioner for sale of trust property saying that, there are tenants who cannot be settled, there are encroachments and then tenants approach Charity Commissioner with request that, they desire to purchase said trust property. This collusion observed many times between trustees and tenants is direct threat to public trust properties. Law need to be amended to protect trust property from all such contingencies.
2. Charity inspectors should be directed to visit personally the property of trust to be sold, if it's not possible for Charity Commissioner to personally visit the same.
3. Better utilization of property to be sold can be ascertained by some project reports from specialized agencies approved by Charity Commissioners office, so that before coming to



conclusion of the matter, Charity Commissioner should have some experts report in hand, for allowing or rejecting the matter. For deserving sale proposals, such project report fees can be given from Public Trusts Administration Fund, if trust don't have that much money to spend.

4. Separate machinery should be established at charity office to ascertain then current valuation of the property to be sold. For this report from sub-registrar offices within whose jurisdiction such property is registered can be called for.
5. Sub-Registrars, should be made known that, unless there is authentic orders from Joint Charity Commissioner, for sale attached to deeds of trust for sale, no deed should be registered. Neither Deputy Charity Commissioner nor Assistant Charity Commissioner has these powers of sanctioning sale.
6. Trusts should be given exemption from capital gain tax and from bearing stamp duty if after sale of its property it purchases another property within 5 years of sale. This will save huge amount spent on stamp duties by public trusts.
7. Public tender notices to be issued at the instance of Charity Commissioner for inviting tenders for sale, should be given on concessional rates, irrespective of whether such public trust has capacity to bear it or not. It is actually recommended that, such notice charges should be borne from Public Trusts Administration Fund maintained by Charity Commissioner under section 58. This will save huge amounts of trusts.
8. Time limit should be fixed for deciding such applications.
9. Preference should be given to public trusts which are in requirement of immovable properties of the location and value of which application for sanction is filed. For this one register should be maintained at the office of Charity Commissioner, wherein requirements of lands, buildings, offices, flats by public trusts should be entered into, which can be easily called when proposal for prior sanction for sale or lease is filed.
10. Even joint venture projects could be allowed if objectives of two or more trusts can be satisfied without going for sale of trust property, and if before going to sale, such joint venture can be the best solution.
11. It is recommended that, trustees should be made available with machinery by State of Maharashtra, for best utilization of trust

properties, instead of going for its sale. Sale may be the easiest way, however may not be foresightedly in the better interest of trust. Sale may be because of lack of experience, lack of knowledge, lack of enthusiastic initiative by trustees to think in other way by which trust property can be protected and objectives can be achieved.

12. If loan rates for public trusts are reduced then many trust properties can be saved from getting sold and better utilized for public cause than its commercial exploitation by prospective purchasers.