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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos.4768-4771 OF 2011

IN THE MATTER OF:

Bhagwan Sri Ram Virajman Rep.By Next
Friend Trilokinath Pandey and others ... Appellants

-Versus-

Rajendra Singh & others ... Respondents

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COMPILATION 2

(JUDGMENTS)

BY SRI K. PARASARAN, SENIOR ADVOCATE

(PAPER BOOK)

(KINDLY SEE INDEX INSIDE)

FILED BY

P.V. YOGESWARAN

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COMPILATION II

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the employment of a *Mali* and of the "four greens." There was no evidence as to the nature and extent of the *Mali's* activities, and the word "green," read in the light of all the evidence, may be no more than a topographical expression, denoting only the superficial area close to, and surrounding, a hole. It does not seem probable that the "greens" on this waste land in the city of Calcutta would be readily recognisable as such by an eye accustomed to courses laid out in a more congenial soil and under more encouraging climatic conditions. The existence of the Golf Club was prayed in aid, but that club was already well established in 1934, and in that year Mr. Sawday wrote a letter in which he complained that the corporation was objecting to the grant of a remission of rates in respect of this land "on the plea that sometimes an officer of the B. N. Railway hits a golf ball about on it," and said "There are no facilities for play, no greens or anything of that sort.". Conditions may have changed between 1934 and 1937, but at least it may be said that the Bengal Nagpur Railway Golf Club appears to have been capable of existing without a golf course.

[11] No doubt the land in question could not properly be called "vacant" in the sense that no use whatever was made of it. With the owner's permission ten or, it may be, twenty gentlemen have been accustomed to walk on it, and to try their skill at hitting a golf ball in the course of their perambulation. But in another sense it is vacant land, as the appellant company has itself recognised from the first. It was acquired in order that it might be kept "vacant" for the prospective purposes of the appellant company, and it is equally, and in the same sense, "vacant" for the suppositious purposes of the hypothetical tenant. The case would of course be different if the physical characteristics of the land had been substantially altered so as to adapt it to a particular purpose. Full effect must always be given to the words "at the time of assessment" in S. 127, but it must not be thought that an owner, by making or permitting some trifling use of what is essentially vacant land, will escape all but a nominal charge as a ratepayer.

[12] The argument of the appellant company's counsel before their Lordships' Board recognised that, by insisting that there had been "beneficial user" of the land, the company might lose the advantage which it had hitherto enjoyed under S. 151. The High Court was not asked to decide whether there had been such user by the appellant company's servants as to render the company liable for the occupier's share of the rate or to deprive it of any claim to remission. There may be cases in which land must be regarded as "vacant" for the purpose of valuation, but is none the less "used" by its owner to an extent which, though limited, will bring him within the definition of "occupier" in S. 3. The Corporation has not suggested that this is such a case, and it may be that the mere granting of permission to an owner's servants to walk on the land, or even to exercise themselves upon it in other ways, does not necessarily amount to a "use" of the land within the section. Their Lordships do not find it necessary to express any opinion on this question in the present appeal. For the reasons given, their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant company must pay the costs of the respondent.

G.N. *Appeal dismissed.*

Solicitors for Appellant — *Solicitor, India Office.*
Solicitors for Respondent — *W. W. Box & Co.*

[C. N. 13.]

A. I. R. (34) 1947 Privy Council 53

(From Madras)

13th May 1946

LORD MACMILLAN, LORD JUSTICE DU PARCQ AND SIR JOHN BEAUMONT.

Thiruvenkata Ramanuja Pedda Jiyyangarlu Valu — Appellant v. Prathivathi Bhayankaram Venkatacharlu and others — Respondents.

Privy Council Appeal No. 33 of 1943.

Hindu law—Religious endowment—Worship—Ritual of — Tirumalai and Tirupathi temples — Jiyyangars are entitled to conduct worship exclusively with Tengalai Manthram—Vadagalais may participate in worship but have no right to use Vadagalai manthram either at beginning or end—Right to participate in worship does not carry with it right to use other manthrams.

In the Vaishnavite temples of Tirumalai and Tirupathi the Jiyyangar is entitled to conduct the worship exclusively in Tengalai order by commencing Prabandha Parayanam by saying *Sadit Arula* and going on with the Tengalai patram to the exclusion of the Vadagalai patram, and to use the same order in processions both inside and outside the temples. The Vadagalais can participate in the worship in the temple but their right to participate in worship does not carry with it the right to insist on using the Vadagalai ritual in the temple worship. The Vadagalai community cannot, therefore, interfere with the Tengalai ritual in the worship in these temples conducted by the Jiyyangar or his deputy by insisting on reciting their own manthram simultaneously with the Tengalai manthram: *Case law referred.* [Paras 19 and 29]

Sir Herbert Cunliffe and P. V. Subba Rao — for Appellant.

J. Eddy, R. Parikh and S. A. Ghafur — for Respondents.

Cases referred :—

1. ('82) 5 Mad. 313, Krishnasami v. Krishnama.
2. ('99) 9 M. L. J. 355, Srinivasa Thattachariar v. Srinivasa Aiyangar.
3. ('15) 1915 M. W. N. 281 : 2 A. I. R. 1915 Mad. 877 : 28 I. C. 604, Thiruvengada Chariar v. Krishnaswami Thattachariar.

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4. ('39) 1939-1 M. L. J. 124 : 26 A. I. R. 1939 Mad. 102 : 183 I. C. 258, Appaladorai Ayyangar v. Annangaracharlar.

Lord Macmillan.—Their Lordships address themselves in this appeal to the consideration of a controversy which in one form or another has agitated the Hindu religious community in the Presidency of Madras for upwards of two centuries. The main question between the parties relates to the right to regulate the conduct of the services in an important group of temples. To the understanding of the issue a short historical survey is essential.

[2] According to the Hindu creed the Deity manifests Himself in three aspects as Brahma, the Creator, Vishnu, the Preserver, and Siva, the Destroyer and Renovator. Those who are devoted to the worship of the Deity in His aspect as Vishnu are known as Vaishnavas and there are many temples, especially in Southern India, dedicated to the worship of Vishnu and known as Vaishnavite temples. The earliest Scriptures, dating from 2,500 years ago, are the Sanskrit Vedas or hymns, held sacred by all Hindus. A further series of sacred writings known as Prabandhams, consisting of 4,000 compositions in the Tamil language, was compiled in later times by certain Alwars who were Vaishnava devotees in Southern India. Subsequently, the Acharyas or learned Brahmins acted as religious preceptors. Of these the most famous was Ramanuja who flourished between 1017 and 1137 A.D., Vedanta Desikar who flourished between 1268 and 1369 A.D. and Manavala Mahamuni who lived between 1370 and 1443 A.D. These Acharyas composed a number of Sanskrit verses in praise of the Deity called Sthothra Patams. The Prabandhams at an early date became part of the ritual of the Vaishnavite temple services and later the Sthothra Patams were also recited on special occasions. The Alwars and Acharyas, the authors of the Prabandhams and Sthothra Patams, became themselves objects of worship in the temples.

[3] About the fourteenth century there appears to have arisen a difference of view among the Vaishnavites. One section, the followers of Vedanta Desikar, specialised in the study and exposition of the Sanskrit Vedas and regarded the Alwars and their Prabandhams as entitled to less reverence. These became known as Vadagalais or followers of the Northern cult. The other section, the followers of Manavala Mahamuni, specialised in the study and exposition of the Tamil Prabandhams of the Alwars and became known as Tengalais or followers of the Southern cult. It is important to bear in mind that both derive from and share a common religious origin and faith and that while each adheres to its own school of thought neither of them condemns or rejects the sacred character of the other's cult.

[4] In some of the Vaishnavite temples in the Presidency of Madras the Vadagalai cult prevails, in others the Tengalai cult. The question which shall prevail in particular temples has been the subject of frequent dispute and on several occasions of litigation. While the order of service is much the same in both classes of temples there are certain distinctive features of the Vadagalai and the Tengalai rituals respectively and it is with regard to the observance of these distinctive features that the present litigation is concerned.

[5] The temples to which this appeal relates are eighteen in number, one group of five in Tirumalai and another group of thirteen in Tirupathi, all in the Chitoor district of Madras. The conduct of the services in these temples is under the charge of what is known as the Adhyapakam office. At its head as president is the plaintiff, now the appellant, known as Pedda Jiyyangar, who may be described as the high priest. He is a Tengalai. He is assisted in the performance of his duties by a Chinna or Junior Jiyyangar, four Ekangis, and certain minor assistants called Adhyapakas and Acharya-purushas. These with the general body of ordinary worshippers when met in assembly constitute the Adhyapaka Goshti or congregation. There is now no question as to the authoritative and predominant position occupied by the appellant. It is in connection with the extent and nature of his rights in the conduct of the service that controversy has arisen.

[6] The order of worship in these, in common with other, Vaishnavite temples follows well recognised lines. First the Pedda Jiyyangar opens the service by saying "Sadit Arula" (please begin). Then follows the invocation of the patron saint consisting of five stanzas known as the manthram or pathram. The first stanza according to the Tengalai cult begins with the words "Sri Sailesa Dayapathram" and invokes the Tengalai guru Manavala Mahamuni. According to the Vadagalai cult the first stanza begins with the words "Ramanuja Dayapathram" and invokes the Vadagalai guru Vedanta Desikar. The remaining four stanzas are common to both. After the manthram or invocation comes the recitation of selected passages from the Prabandhams appointed for the day, each prefaced with a laudatory verse in praise of its author. The Prabandhams are common to both sects. At the conclusion of the recitation of the Prabandhams benedictory verses called Vazhi Tirunamam are recited, consisting of nine stanzas of which the first four are common to both sects, while the last five differ.

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[7] This outline of the service is probably sufficient to disclose the substantive divergence between the two rituals. It is the preliminary invocation or manthram which, so to speak, strikes the note of the service which follows, as being an act of devotion or worship in the one case in honour of the Vadagalai guru and in the other of the Tengalai guru. Hence, its importance to the worshipper.

[8] The respondents representing the Vadagalais do not challenge the right of the plaintiff and the Tengalai worshippers to recite their own manthram and invoke their own guru at the beginning of the service or indeed to conduct their worship throughout according to their own ritual. What they maintain is that this right is not exclusive and that they have a concurrent right to recite simultaneously their own manthram and throughout to observe their own ritual where it differs from that of the Tengalais. The Tengalais do not dispute the right of the Vadagalai worshippers to be present and take part in the services but they maintain that if they do attend the services they must conform to the Tengalai ritual or remain silent and in any event that they have no right to interfere with the Tengalai service by using simultaneously their own ritual where it differs. The success of the Vadagalai claim would not seem to conduce to the orderly and reverent conduct of the temple service. It is not surprising that the insistence of the Vadagalais on observing their own ritual in competition with the Tengalai ritual has led to disturbances and has been resisted by the appellant and those associated with him who are responsible for the worship of the temples. There are in Madras temples where the Tengalai ritual is admittedly used exclusively and where if Vadagalais attend the service they must refrain from using their own ritual; and there are temples where the Vadagalai ritual is admittedly used exclusively and where if Tengalais attend the service they in turn must refrain from using their own ritual. So far as their Lordships are aware there has hitherto been no instance of the judicial establishment of a right on the part of the Vadagalais and the Tengalais to use competitive rituals simultaneously at the service in a temple.

[9] The rights of the parties depend upon custom and practice. In a matter of this nature where feeling is easily inflamed little reliance can be placed on the oral testimony of partisans on one side or the other and counsel at their Lordships' bar almost entirely discarded the oral testimony in the case. Both sides agreed that the documentary evidence was what mattered and on it each side claimed the verdict. On the documents the Vadagalais maintained that the Tengalais had failed to prove the exclusive right which they claimed.

[10] A vast mass of documents and records of litigations has been accumulated. It has been exhaustively analysed and criticised both by the Subordinate Judge who heard the case in the first instance and in the judgment of the High Court (Madhavan Nair and Stodart JJ.), with the result that on the main question of the use of the manthram or invocation the Subordinate Judge decided in favour of the appellant and the High Court in favour of the Vadagalai respondents. Their Lordships have had their attention directed to all the relevant documents and to the observations thereon in both Courts. Counsel on each side have assisted their Lordships by selecting for consideration the documents on which they respectively relied as being of material significance and to these or at least to the most important of them it will be sufficient to refer.

[11] The appellant relies first on a document dated 1795 (EX. A). It appears from this document, which is stated to have been approved in the Huzur, that some Vadagalais in connexion with the funeral rites of one of their number had recited the verse beginning: "Ramanuja Dayapathram" in the Tiruchanoor temple, another Vaishnavite temple in Madras. It is recorded that they were taken to task for this and

"having been made to learn that it was wrong to recite Ramanuja Dayapathram in the temple they went away making an agreement that if necessary they would in future do so in their own respective houses as was done in Tirumalai and Tirupathi but not in the temple and that if they should so recite it they would be rendering themselves culpable."

This document has been produced in other proceedings and accepted as genuine. The Subordinate Judge states that it is "beyond the reach of criticism" and their Lordships are not impressed by the adverse comments made upon it in the High Court. The point of the document for the present purpose is that it records so long ago as 1795 that it was not permitted to recite Ramanuja Dayapathram in the Tirumalai and Tirupathi temples. It is also important, as will appear in the sequel, in that it recognises identity of practice as between the temple at Tiruchanoor and the Tirumalai and Tirupathi temples, which are mentioned in association in a number of the documents.

[12] Next comes a takid from the Collector of North Arcot in 1832 (EX. H) which confirms that in the case of the Tiruchanoor Vadagalais

"Ramanuja Dayapathram manthram should be recited in their respective houses and that nothing contrary should be done."

[13] More important is the litigation regarding the Tiruchanoor temple in 1887-1893. In this suit the Pedda Jiyyangar of Tirumalai Tirupathi and certain other residents in Tirupathi, suing in a

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representative capacity, claimed *inter alia* the exclusive right to recite the Tengalai manthram in the Tiruchanoor temple. The munsif before whom the case came in the first instance after a most searching investigation of all the documentary evidence satisfied himself that the practice in the temple at Tiruchanoor was identical with the practice in the temples of Tirumalai and Tirupathi and expressly found

"that the members of the Vadagalai sect are not entitled to utter the Vadagalai manthram called 'Ramanuja Dayapathram' jointly with the Tengalais or separately but that the Vadagalais are at liberty to utter it in their own houses but not before the Goddess."

Thus although the case related to Tiruchanoor the decision was based on the practice of Tirumalai and Tirupathi and is consequently of the highest significance as evidence of the usage of the temples in suit over half a century ago. On an appeal to the District Court of North Arcot the documentary history of the matter was again most closely scrutinised, the intimate association of the Tiruchanoor temple (which is about three miles from Tirupathi) with the temples in suit was emphasised and the decision of the munsif confirmed as in accordance with "the custom sanctioned by old usage." In the judgment a document of 1853 is quoted in which the Mahant expressly says that Tiruchanoor "is included in Tirupathi and Tirumalai Devasthanam." On further appeal to the High Court the decisions of the Courts below were affirmed. The judgment of the High Court concludes thus :

"It is alleged that [the Vadagalais] have great respect for the Tengalai saint in whose honour the verse is recited and they only want the religious privilege of being able to recite their own verse in the presence of the Deity. It appears to us that this professed respect for the saint is accompanied by a good deal of hostility to the saint's worshippers and that the permission could result in nothing but a breach of the public peace. All the evidence goes to show that by established custom the Ramanuja Dayapathram should not be recited and we think the decision of the Courts below is right."

[14] In 1915 another important judgment was pronounced by the District Judge of North Arcot in a suit in which the Pedda Jiyyangar and others on behalf of all Tengalai Brahmins resident in Tirumalai, Tirupathi and Tiruchanoor claimed that in the temples in these places the Tengalai manthram was alone permissible. The Subordinate Judge held that both manthrams might be repeated side by side but the District Judge reversed this decision and held that only the Tengalai manthram was permissible.

[15] Meantime there had been a series of other litigations between Tengalais and Vadagalais relating to other temples elsewhere in which the same issue was contested. The report of a case affecting the great temple at Conjeeveram is particularly instructive: 5 Mad. 313.[1] The suit was brought to restrain the Vadagalais from introducing their manthram in the temple service. The claim of the Vadagalais to do so was asserted, as in the present case, to be justified by usage. After a full investigation the exclusive right of the Tengalais to the use of their manthram in the services was established.

[16] In 9 M. L. J. 355[2] relating to the temples at Tinnevelly it was held by the High Court, affirming the judgment of the Subordinate Judge, that the Vadagalais were not entitled to interfere with the Tengalai ritual and must not repeat their Ramanuja Dayapathram at the beginning or their Vazhi Tirunamam at the end of the services. The Officiating Chief Justice (S. Subramania Aiyar) says at p. 359 :

"Now judging from the instances of dispute between Thenkalais and Vadakalais which have come not infrequently before the Courts in connexion with other temples the rule seems to be that but one patram is used on similar occasions."

When the High Court had again to consider the question in relation to a temple at Conjeeveram (1915 M. W. N. 281)[3] the history of the controversy was very fully examined and the exclusive right of the Tengalais to use their own manthram was affirmed. The learned Judges observe that the judgment of the High Court in the above-mentioned case in Vol. 9 of the Madras Law Journal "holds that only one manthram can be recited in a temple. This appears also reasonable." The exclusive rights of the Tengalais were further clarified in (1939) 1 M. L. J. 124.[4]

[17] The present troubles affecting the temples in suit seem to have originated about 1901 in an assertion by the Vadagalais of the rights which they now claim. In May of that year the superintendent of the Tirupathi temple complained to the mahant that the Vadagalais contrary to the custom of the temple were "newly" reciting their own manthrams and that disputes were greatly increasing. A further complaint was made in 1904 and the mahant made a representation to the local Magistrate that there was a risk of disturbance owing to the insistence of the Vadagalais in employing their own ritual contrary to usage. In 1905 the matter was taken into Court on a plaint by the Tengalais against the Vadagalais on the lines of the present suit. The Subordinate Judge of North Arcot found in favour of the joint use by each sect of its own manthram, but his judgment was reversed by the District Judge of North Arcot. "Upon the evidence," he said, "I must find that it has not been the custom to recite the Ramanuja Dayapathram." On a further appeal to the High Court the action was dismissed on a technical plea of misjoinder of parties without any opinion being expressed on the merits. Then came the present suit.

[18] The case for the defence, like that for the plaintiff, was almost entirely based on the docu-

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mentary evidence. Their counsel began with a reference to certain early documents of 1730, 1737 and 1786 (EXS. 24, 24a and 24b). But these relate to the Vedanta Desikar temple in which admittedly the service is conducted exclusively according to the Vadagalai ritual. It is significant to note, however, that they appear to recognise the propriety of the attendance of Tengalais at the services in this exclusively Vadagalai temple although Ramanuja Dayapathram is alone recited there. The right of both Tengalais and Vadagalais to worship in the Tirumalai and Tirupathi temples is also recognised but nothing is said as to the manthram used there and if any inference is to be drawn it would rather seem to be that the Tengalai manthram was alone employed there. Their Lordships were referred to other documents in support of the Vadagalai claim. They are discussed in great detail in the judgments of the Subordinate Judge and the High Court. Many of them are equivocal, none is conclusive. That their import is ambiguous is best evidenced by the fact that a careful study of them led the Subordinate Judge to one conclusion and the High Court to a different conclusion. No useful purpose would be served by going through them again in detail. It is enough to say that their Lordships find themselves in several instances unable to agree with the inferences—for they are only inferences—which the learned Judges of the High Court draw from them in favour of the defendants, and that they are generally in agreement with the view taken of them by the Subordinate Judge. On the other hand their Lordships are not convinced of the validity of the criticisms expressed by the Judges of the High Court depreciatory of the documentary evidence favourable to the plaintiff. Their Lordships are much more impressed by the fact that, so far as they are aware, in the whole series of litigations in Madras on this vexed question the Vadagalais have in no instance succeeded in establishing a right to the joint use of both manthrams in any temple, and that nowhere in the documents is there definite evidence of such joint usage.

[19] There is one consideration of general importance which appears to have greatly influenced the decision of the High Court and to which their Lordships think it right to draw special attention. The learned Judges very properly take note of the admitted and undoubted right of the Vadagalais to participate in the services in the temples in suit. From this they would seem to infer that they must have the right to use their own manthram. The reasoning is that as the manthram or invocation is the keynote of the service the Vadagalais could not participate in the service at all unless permitted to use their own manthram. In short, to forbid the Vadagalais to recite their own manthram in the temples would be tantamount to excommunicating them altogether from the services. Their Lordships do not agree with this view or with the argument founded upon it. In point of fact the right to participate in the worship of a temple does not necessarily carry with it the right to insist on using a ritual other than the ritual in use in that temple. The reported cases consistently recognise the right of the Vadagalais to participate in the worship of temples conducted according to the Tengalai ritual, but on condition of conforming with or at least not interfering with the Tengalai ritual, and it is nowhere suggested that this is a barren or self-contradictory privilege. When the Tengalais attend in the temple of Vedanta Desikar they may not use their own manthram there; when the Vadagalais attend in the temple of Tirchanoor they may not use their own manthram. Among the documents in the present case there is a series of agreements dated between 1885 and 1889 whereby ekangis who were Vadagalais expressly undertook to conduct the services in the temples in suit according to the Tengalai ritual. It is thus made clear that it is not against conscience for Vadagalais to take part in services in which the Tengalai manthram is exclusively employed and that to hold that the Tengalai manthram alone must be used in the temples in suit does not mean, as the learned Judges of the High Court seem to think, the virtual exclusion of the Vadagalais from participation in the worship of the temples.

[20] The learned Judges of the High Court belittle the probability of disturbance or unseemly incidents if both manthrams are used simultaneously. But no one can read the papers in this case or the judgments in the other reported cases without noticing the frequent references to disturbances between the rival sects when each has insisted on using its own ritual. Where feelings obviously run so high the risk of violent conduct is manifest. It may be that the nature of the services is such that both parties could recite their respective manthrams without very great mutual interference, but as the District Judge of North Arcot observed in one of the cases :

"knowing the contentious spirit of the opposing factions, I am afraid there would never be peace between them."

[21] A separate issue was raised with regard to one of the temples in suit, the sub-shrine of Tirumalai Nambi in Tirupathi. The contention of the Tengalai appellant was that in this temple the Tengalai manthram or pathram alone might be used while the Vadagalais contended that

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their manthram alone might be used. The learned Subordinate Judge found that both may be used simultaneously. This is a singular result to have reached in a case in which the rights of the parties depend upon custom for it is a finding in favour of a custom which neither party alleged. The Vadagalais acquiesced in the decision of the Subordinate Judge but the appellant challenged it in the High Court which accepted it and their Lordships have now to deal with the matter.

[22] As in the opinion of the Subordinate Judge, and now of their Lordships, the appellant has established the exclusive right of the Tengalais to use their own manthram in all the other temples in suit, there would seem *prima facie* to be no reason to make an exception in the case of this temple unless there is clear justification for doing so. The Subordinate Judge after considering the meagre documentary evidence that has any bearing on the subject concludes somewhat haltingly :

"I should think, reading these disinterested Amulunamas of the Vicharanakartha and Ext. 24 series together that both patrams are used to the exclusion of neither patram,"

and the High Court "think that this finding should be accepted." Their Lordships have examined the relevant documents. They do not find in the "disinterested Amulunamas of the Vicharanakartha" (EXS. Y series) any reference to the manthram used in the Tirumalai Nambi temple or indeed any special discrimination of this temple from the others. As for EX. 24 series, the significant thing is the express direction that in the Vedanta Desikar temple the Vadagalai manthram alone is to be used and no discrimination is made of the Tirumalai Nambi temple from the other Tirumalai and Tirupathi temples. Had this temple been in the exceptional, indeed, as their Lordships hold, the unique position among the suit temples and so far as is proved among Vaishnavite temples in Madras generally of using both manthrams simultaneously, it is difficult to conceive why among the voluminous documents produced and in the numerous records of past litigations no express reference is to be found to this exceptional case. Both the Subordinate Judge and the High Court mention the Pedda Jiyyangar's Amulunamas (EXS. AA series), of which the High Court says that they "no doubt support the case of the plaintiff," but both the Subordinate Judge and the High Court apparently regard them as being of little evidential value because they are subsequent to the Tiruchanoor dispute. This does not seem a convincing reason for disregarding them when it is remembered that the Tiruchanoor case was decided in favour of the Tengalais because the ritual of the Tirumalai and Tirupathi temples was held to rule there. Had the double use been the custom in one of the Tirumalai and Tirupathi temples the fact would surely have been brought out in the Tiruchanoor case. Their Lordships accordingly find that in the temple of Tirumalai Nambi, as in the other temples in suit, both Tengalais and Vadagalais may join in the service but the Tengalai manthram alone may be used.

[23] A further question raised relates to the formula to be used in the benediction with which the service ends. Both the Subordinate Judge and the High Court have held

"that the plaintiff and the other Adhyapakam office holders have the right to close the prabandham recital."

But there is a contest between the parties as to the ritual to be observed at the closing ceremony known as Sathumurai. The Tengalais claim that their own Vazhi Tirunamam or benediction should alone be recited. The Vadagalais on the other hand claim the right to recite their own Vazhi Tirunamam, the last five verses of which differ from those of the Tengalai Vazhi Tirunamam, the rest of the verses being the same. The documentary evidence as to the practice in this matter is meagre and inconclusive and the conclusion reached in both Courts below is that no reason exists or case has been made out for excluding the Vadagalai Vazhi Tirunamam. If, as the High Court has held, contrary to the view of their Lordships, the Vadagalais are entitled at the opening of the service to recite their own manthram or invocation it would seem to follow almost as a matter of course that they should be entitled to recite their own Vazhi Tirunaman or benediction at its close. But if as the Subordinate Judge has held, and their Lordships also hold, the Tengalai manthram can alone be used at the opening of the service it would seem quite inconsistent to hold the Vadagalais entitled to use their Vazhi Tirunamam at the conclusion of the service. Here it is instructive to have regard to the practice in other Tengalai temples. The same point came under consideration in the important case relating to the Tinnevelly temple to which reference has already been made: 9 M. L. J. 355.[2] There it was expressly held that the Vadagalais should not be at liberty to interfere with the plaintiffs and other holders of the Adhyapakam office by repeating their Ramaniya Dayapathram of Vazhi Tirunamam either at the beginning or at the end of Sevakalam. Then again in the case of the temple at Conjeeveram to which reference has also already been made: 1939-1 M. L. J. 124,[4] Wadsworth J., after pointing out that in a previous suit 5 Mad. 313[1] it had been held that the Vadagalais were not entitled to interfere with the Tengalais in the recital of

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the manthrams otherwise than as ordinary worshippers, observed that the judgment did not expressly cover the Vazhi Tirunamam to be used at the conclusion of the service. The learned Judge then addresses himself to this question. 'It is recognised,' he says,

"that the Vazhi Tirunamam is the appropriate conclusion of the Adyapakam service and that the stanza recited must be in honour of the saint invoked in the manthram which begins the service."

He points out that the decree in the previous case in 5 Mad. 313,[1]

"though it does not in so many words prescribe the singing of the Thengalai Vazhi Thirunamam by the mirasdars does very clearly prescribe the conduct of the whole Adhyapakam service right up to its termination by those mirasdars. It restrains the Vadagalais from singing their own sectarian hymns and chants or taking any part except by joining the Ghoshti as worshippers and reciting the Prabandams recited by the mirasdars."

He accordingly has

"no doubt that the intention of the learned Judges was to authorise the mirasdars to append to the service its customary conclusion in the form approved by the sect to which they belonged, whose cult was to govern the service."

[24] Their Lordships in the present case, being of opinion with the Subordinate Judge that the Tengalais are entitled to open the service with their own manthram alone and that the Vadagalais are not entitled to recite their manthram concurrently, are satisfied, in the absence of any sufficient evidence to the contrary, that the service must also be concluded by the recitation of the Tengalai Vazhi Tirunamam alone.

[25] There remains the question of the recital of sthothrapatams. This matter is left in a very doubtful position on the evidence. The Subordinate Judge apparently found himself unable to reach any conclusion upon it and his formal decree makes no reference to it. The High Court in its decree finds in the sixth place

"that plaintiff is entitled to use Tengalai Patram in the recitation of sthothrapatams whenever sthothrapatam is recited outside the temples but this does not exclude the use of Vadagalai Sthothrapatam Tanian Sriman Venkatanadharya."

In the judgment of the High Court on the topic of the Sthothrapatams the learned Judges state that they "can find no reliable evidence to support the positive case of either party." Nevertheless they proceed to consider the matter "in the light of the probabilities," and conclude by saying

"We have already expressed our opinion under issue 8 that when Prabanda Sevakalam is once begun the Tengalais and the Vadagalais that take part in it carry on the service each reciting its own manthram. Judging the evidence in the light of the probabilities of the case we must come to the same conclusion with regard to Sthothrapatams also on all occasions when these are sung by the goshti."

By parity of reasoning their Lordships, having taken a contrary view as to the use of the Vadagalai manthram, should "in the light of the probabilities" come to the opposite conclusion from the High Court as to the Sthothrapatams. But they do not regard this as a legitimate method of disposing of the matter and accepting the view of the High Court that there is no reliable evidence to enable the custom of the sects to be ascertained they do not propose to make any finding on the subject.

[26] As regards the conduct of processions inside and outside the temples in suit the appellant in his plaint claims that the Tengalai ritual should be exclusively observed both in the service inside the temples and in processions inside and outside the temples. The respondents did not submit any argument for differentiating in this matter between the case of the service inside the temples and the case of processions inside and outside the temples and their Lordships hold that their decision should extend to both cases alike.

[27] Their Lordships also take note of the fact that the disallowance by the High Court of the appellant's claim relating to the recitations during the Anadhyayanam days was not the subject of any separate argument before them on the part of the appellant, but in the circumstances their Lordships think that the appropriate course is to make no order in the matter.

[28] As regards the third head of the decree of the High Court which saves the rights of certain Vadagalai families to the Adhyapakam office, the appellant intimated that he did not challenge this finding. The respondents did not withdraw their pleas that the suit was not cognisable in a civil Court and that it was barred by limitation but it is enough to say that their Lordships agree with both Courts below that they are untenable.

[29] Their Lordships will humbly advise His Majesty that the appeal be allowed and that the decree of the High Court of 18-3-1937 be varied so as to read as follows :

(1) That the plaintiff or any of his deputies Chinna Jiyyangar or any of the four Ekangis is exclusively entitled in the temples mentioned in Schs. A and B in the plaint and in processions both inside and outside the said temples to commence Prabanda Parayanam by saying Sadit Arula and to go on with the Tengalai patram to the exclusion of the Vadagalai patram.

(2) That the plaintiff is exclusively entitled to the headship of Adhyapakam miras.

(3) That the Vadagalais except the Dharmapuris, Kotikannikadanams and Thomalais (in Tirumalai) are not entitled to the Adhyapakam office in the plaint temples.

(4) That the plaintiff and the other Adhyapakam office holders have the right to close the prabandham recital.

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(5) That only the Tengalai Vazhi Tirunamam can be repeated whenever Vazhi Tirunaman is recited.

(6) That respondents 6, 7, 10-14, 16, 20 and 21 as individuals and as representing the Vadagalai community residing at Tirumalai-Tirupati and Tiruchanur are restrained by a perpetual injunction from interfering with the rights hereinbefore referred to of Pedda Jiyyangar or his deputies.

(7) That the rest of the plaintiff's claim (except so far as relating to the reciting of sthothrapatams and the recitations to be used on the Anadhyayanam days as to which no order is made) be and hereby is disallowed.

(8) That the parties shall each bear their own costs of the suit in the Court of the Subordinate Judge of Chitoor.

(9) That there be no costs in Appeal No. 119 of 1926 in the High Court.

(10) That respondents 6, 7, 10-14, 16, 20 and 21 in the present appeal do pay to the appellant his costs in the Appeal No. 466 of 1925 in the High Court and his costs of the present appeal.

D.R. *Appeal allowed.*

Solicitors for Appellant — *Lambert & White.*
Solicitors for Respondents — *Harold Shephard.*

[C. N. 14.]

*A. I. R. (34) 1947 Privy Council 60

(From Federal Court : ('45) 32 A. I. R. 1945 F. C. 2)

11th February 1947

LORD WRIGHT, LORD PORTER, LORD UTHWATT, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Prafulla Kumar Mukherjee and others — Appellants v. *Bank of Commerce Ltd., Khulna — Respondents. The Advocate-General of Bengal — Intervener*

Privy Council Appeal No. 19 of 1946.

*(a) Bengal Money-lenders Act (10 [X] of 1940), Ss. 30, 36, 38 and 2 — Act not ultra vires—Government of India Act (1935), Sch. 7, List I, Items 28, 38; List II, Item 27.

The Act is not void either in whole or in part as being *ultra vires* the Provincial Legislature. The pith and substance of the Act being money lending it comes within Sch. 7, List II, Item 27, Government of India Act, and therefore is within the competence of the Provincial Legislature and is not rendered invalid because it incidentally trenches upon matters reserved to the Federal Legislature namely promissory notes and banking in Sch. 7, List I, Items 28 and 38, Government of India Act : 1944 F. C. R. 370 : I. L. R. (1945) Kar. F. C. 28 : 32 A. I. R. 1945 F. C. 2 : 221 I. C. 351, *REVERSED.* [Paras 18, 31, 42, 43]

*(b) Government of India Act (1935), S. 100 — Powers of Federal and Provincial Legislatures — Method for determination of—Government of India Act (1935), S. 99.

It is not possible to make a clean cut between the powers of the Federal and Provincial Legislatures. They are bound to overlap and where they do the question to be considered is what is the pith and substance of the impugned enactment and in what list is its true nature and character to be found. The extent of invasion by the Provinces into subjects in Federal List is an important matter not because the validity of a Provincial Act can be determined by discriminating between degrees of invasion but for determining the pith and substance of the impugned Act. The question is not has it trespassed more or less but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not a Provincial matter but a Federal matter. Once that is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true import. [Paras 34, 37, 38]

No doubt where they come in conflict List I has priority over Lists III and II and List III has priority over List II but in each case one has to consider what the substance of an Act is and whatever its ancillary effect, attribute it to the appropriate list according to its true character. [Para 39]

(c) Bengal Money-lenders Act (10 [X] of 1940), Ss. 1 and 2 — Operation of Act.

It is not correct to say that the provisions of the Act remained suspended until the Government decided what banks should become notified banks under S. 2. [Paras 12, 13]

(d) Privy Council — Appeal — New point.

In the appeal before the Privy Council the respondents challenged the validity of the Bengal Money-lenders Act. In the trial Court no reliance was placed upon the contention that the Act was invalid as it interfered with banking rights which was a Federal matter. The point was taken in the High Court but no decision on it was given there or in the Federal Court :

Held that (1) the respondents were not entitled to argue that they carried on the business of banking, no proof having been given that they did so; [Para 13]

(2) but they were entitled to say that the Act dealt with banks and banking and therefore was void in whole or in part. [Para 13]

Cases referred :—

1. ('40) 1940 F. C. R. 188 : 28 A. I. R. 1941 F. C. 47 : I. L. R. (1941) Kar. F. C. 25 : 192 I. C. 225 (F. C.), Subramanyan Chettiar v. Muttuswami Goundan.
2. ('44) 1944 F. C. R. 126 : 31 A. I. R. 1944 F. C. 18 : I. L. R. (1944) Kar. F. C. 46 : 212 I. C. 138 (F. C.), Bank of Commerce Ltd. v. Amulya Krishna Basu Roy.

Sir Walter Monckton and B. Mackenna — for Appellants.

Sir Herbert Cunliffe, S. P. Khambatta and P. C. Basu — for Respondents.

Lord Porter.—This group of cases and those which immediately follow necessitate a consideration of the principle upon which the respective jurisdictions of the Federal and Provincial Legislatures in India are to be delimited and of the method to be adopted in determining the subjects which are to be dealt with by the one or the other under the provisions of Ss. 99 and 100, Government of India Act, 1935, and the three lists set out in Sch. 7 thereto.

[2] The question immediately in dispute is as to the validity of the Bengal Money-lenders Act, 1940. By way of introduction it is enough to say that that Act limits the amount recoverable by a moneylender on his loans for principal and in-

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the question whether S. 17, Provincial Small Cause Courts Act was mandatory or not and whether the security deposit made within thirty days though it did not accompany the application for setting aside the *ex parte* decree under O. 9, R. 13, Civil P. C., was sufficient compliance with the requirements of S. 17, Provincial Small Cause Courts Act, and they answered both the questions in the affirmative. It follows that the decision in *Sudalaimuthu Kudumban* v. *Andi Reddiar*, 45 Mad. 628 : (A. I. R. (9) 1922 Mad. 186), and the subsequent decisions that followed it are not inconsistent with the principle laid down in the Full Bench and they hold the field.

[4] I must therefore hold that the order of the lower Court is wrong and ought to be set aside. Since the lower Court did not go into the merits of the application under O. 9, R. 13, this ought to be remanded for fresh disposal according to law, in the light of the observations made by me above. The costs of this petition will abide the result of the application in the lower Court.

C.R.K./V.R.B. *Order set aside.*

A. I. R. (38) 1951 Madras 473 *[C.N. 142.]*

VISWANATHA SASTRI J.

on a difference of opinion between

SATYANARAYANA RAO AND GOVINDA MENON JJ.

T. R. K. Ramaswami Servai and another — Appellants v. *The Board of Commissioners for the Hindu Religious Endowments, Madras, through its President—Respondent.*

Appeal No. 419 of 1947, D/- 2-9-1949.

(a) Madras Hindu Religious Endowments Act (II [2] of 1927) (as amended by Madras Act (X [10] of 1946), Ss. 62 and 84 (1) and (2) — Proceedings for settling scheme under S. 62 — Decision that there was temple as defined by Act—Remedy under S. 84 (2), if available to trustees.

Per *Viswanatha Sastri and Satyanarayana Rao JJ. (Govinda Menon J.* contra.) — Section 84 (1) is designedly framed in wider terms. When the Board decides a dispute as to whether an institution is a "temple" as defined in the Act, whatever be the nature or stage of the proceeding in which such dispute arises or decision is given, the Board acts under S. 84 (1) of the Act. Section 84 (1) does not insist that the dispute should be brought before the Board by means of an independent application or original petition or that the dispute contemplated by the section should be the only matter arising for the decision of the Board. The remedy under S. 84 (2) is, therefore, open to the trustees to set aside the decision of the Board, given in the course of the proceedings for settling a scheme, that there was a "temple" as defined by the Act, whether the Board decides the dispute by holding a fresh enquiry or by holding that its prior order that the temple was an excepted temple was conclusive. [Paras 34, 35]

(b) Madras Hindu Religious Endowments Act (II [2] of 1927) (as amended by Madras Act (X [10] of 1946), S. 84 (2) and (3) — District Judge wrongly acting under S. 84 (2) — Order, if appealable.

Per *Viswanatha Sastri and Satyanarayana Rao JJ. (Govinda Menon J.* contra.)—An order purporting to be passed by a Court of first instance under an appealable provision of law will be open to appeal even though, on the facts, the order is one that should not have been passed under that provision. [Para 36]

Where, therefore, a District Judge, in entertaining and deciding a petition, purported to act under, and exercised the jurisdiction conferred by S. 84 (2), even though he might have erred in holding that S. 84 (2) applied to the case, still, as he purported to entertain and decide the petition in the exercise of the jurisdiction assumed to have been conferred upon him by that section, the right of appeal given to an aggrieved party by S. 84 (3) against an order under S. 84 (2) is attracted. [Para 36]

(c) Madras Hindu Religious Endowments Act (II [2] of 1927) (as amended by Madras Act (X [10] of 1946), S. 84 (1) — Board erroneously deciding that there was temple — Decision allowed to become final — Correctness of decision, if open to question.

Per *Viswanatha Sastri and Govinda Menon JJ. (Satyanarayana Rao J.* contra.) — The only preliminary fact or condition that must exist in order to attract the Board's jurisdiction under S. 84 (1) is the existence of a dispute as to whether an institution is a "temple" as defined in the Act. The enquiry by the Board must extend to, and indeed begin with, a consideration of the question whether the institution with reference to which the dispute has arisen is a temple or not. The decision of the Board as a result of the enquiry might be that there is a temple as defined in the Act or there is not. In either case, its order, right or wrong, will be within its jurisdiction and not outside it. [Para 43]

Where, therefore, the Board which is competent and empowered by the Legislature to decide the question, whether an institution is or is not a temple, erroneously decides that it is a temple and the decision is allowed to become final by the inaction of the trustees of the institution, its correctness is not open to question in proceedings for settling a scheme. [Para 44]

(d) Madras Hindu Religious Endowments Act (II [2] of 1927) (as amended by Madras Act (X [10] of 1946), S. 9 (12)—Presence of idol, if requisite under definition.

Per *Viswanatha Sastri J.* — If the public or that section of the public who go for worship consider that there is a Divine presence in a particular place and by offering worship at that place, they are likely to be the recipients of the bounty or blessings of God, then, one has got the essential features of a temple as defined in S. 9, Cl. (12) of the Act. The presence of an idol, though an invariable feature of Hindu temples, is not a legal requisite under the definition of a temple in S. 9, Cl. (12) of the Act. [Para 47]

S. Muthiah Mudaliar—for Appellants; M. Chockalingam—for Respondent.

Satyanarayana Rao J.—This is an appeal under S. 84 (3), Madras Hindu Religious Endowments Act (II [2] of 1927), as amended by Madras Act X [10] of 1946, against the order of the learned District Judge dismissing the appellants' petition under S. 84 (2) of the Act.

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[2] The facts relating to this matter have been fully set out in the judgment of my learned brother which he is about to deliver and which I had the advantage of perusing, and therefore, need not be set out in great detail. One Venkataswami Servai executed on 18-3-1920, a deed of gift (EX. R-2) declaring that he had already endowed nineteen acres, ninety-eight cents of nanja land to Alagarswami temple devasthanam and that the temple was already under construction. He also expressed in that document his intention to have the deity Alagarswami installed in the building which was then under construction and to have *kumbabhishekam* performed after completion of the building. Under this deed he appointed two trustees, besides himself, Kamakshi Servai and Alagar Servai, and laid down the duties to be discharged by the trustees. He, being the founder of the charity, laid down the rules for the devolution of the trusteeship and provided that, if no male issue were born to him, the trusteeship should devolve on the two trustees appointed by him under the deed and their heirs in perpetuity. The founder Venkataswami Servai died in 1925 leaving no male issue. Kamakshi Servai died some time in 1931 and was succeeded to the trusteeship by Ramaswami Servai (appellant 1). Alagarswami also died later and was succeeded by appellant 2, Subbiah Servai.

[3] In the year 1937, the Hindu Religious Endowments Board demanded contribution from the trustees on the assumption that the temple of Sri Alagarswami was completed and came into existence. The claim was for 8 faslis, 1339 to 1346, amounting to RS. 600. When this demand was made, Ramaswami Servai filed a petition before the Board alleging that the order of the Board demanding contribution proceeded under a mistake that the family temple came into existence and that as the temple was not completed and the idol was not installed and consecrated, the endowment was entirely outside the scope of the Hindu Religious Endowments Act. In the petition, it was claimed that there should be a declaration by the Board that the trust created by Venkataswami was outside the scope of the Act and that the Board should refund the sum of RS. 600 collected from the trustees as contribution. This application was considered by the Board under S. 84 of the Act and the Board passed an order on 27-9-1938, in these terms :

"Sri Alagar temple, Thevaram, Periyakulam taluk, Madhurai district, is a temple as defined in the Madras Hindu Religious Endowments Act, 1926, and is also an excepted temple."

[4] The annexur to this order containing the reasons for the above decision was not filed by the Board in these proceedings and it is not known whether the Board after enquiry came to the conclusion on the evidence placed before it that the conditions of the definition of a "temple", as contained in the Act, were satisfied or not. From a later order of the Board, it is gathered, however, that at the time of the passing of the above order, both sides agreed to have the temple declared to be an excepted temple and that the deed of foundation supported that view. It is not clear from the evidence now adduced who the other side to the petition, EX. R-1, was. In the cause title of the petition itself there is no name of any respondent and it appears from the preamble to the order that Sri N. Sivaraj, advocate for the appellant alone, appeared at the time of the final hearing of the petition. As there is no legal evidence such as the annexure containing the grounds of the decision, it is difficult to know what exactly were the reasons that influenced the decision of the Board and who the other party to the proceedings was. The statement in EX. P-2, later order of the Board, cannot be treated as secondary evidence of the contents of the annexure to the order in EX R-1. Further, if the other party was the Board, how far the consent of the Board and that of the petitioner would be a substitute for an enquiry contemplated by the petition. Exhibit R-3 is a matter which will be considered later. No steps, however, were taken by any person to have the correctness of the order questioned in an appropriate proceeding.

[5] In the year 1940, the Board *suo motu* initiated proceedings under S. 62 of the Act for the settlement of a scheme for Sri Alagar temple Thevaram. The reasons given in the notice issued on 9-5-1940 (*vide* EX. P-2) for starting the scheme proceedings by the Board were : (i) steps have not been taken for the construction of the temple, (ii) each trustee leases the temple lands without the knowledge of the other, which results in litigation, (iii) accounts are not maintained (the word 'not' is omitted in EX. P-2 at p. 23), and (iv) trustees have not taken possession of certain properties endowed for the temple. After this notice, the matter came up for consideration before the Board and an objection was taken that the Board had no jurisdiction to frame a scheme as the temple had not come into existence. This question was taken as a preliminary point for consideration by the Board consisting of Mr. Mannadi Nair and Mr. Kameswara Rao. Mr. Mannadi Nair was of opinion that as no temple had come into existence and as the existence of a temple was the first requisite for

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the exercise of the jurisdiction of the Board under the Act, including the framing of a scheme under Ss. 62 and 63 the proceedings were without jurisdiction. He thought that the prior order of the Board declaring the temple an excepted one must have proceeded under a mistake and that merely by reason of that order he could not assume the existence of a temple for the purpose of framing a scheme, when in fact none existed. Mr. Kameswara Rao, however, differed from this view. His opinion was that, as the prior decision was not challenged in a Court of law as provided by the Act, the Board had no right to go beyond the view contained therein which proceeded on the basis that there is a "temple" which is an "excepted temple" and that therefore the Board had jurisdiction. He, however, overlooked the fundamental fact that the very notice stated as the first ground for framing a scheme that steps had not been taken for the construction of the temple which clearly establishes that notwithstanding the order, there was in fact no temple in existence. The matter thereafter came up for consideration before a full Board as a result of the difference of opinion between the two Commissioners Mr. Ramachandra Chettiar, Commissioner No. 1 expressed as his opinion that the notional existence of a temple was sufficient to justify the action of the Board, notwithstanding that the building was not completed, the idol was not installed, and *pranaprathishta* and *kumbabhishekam* were not performed and expressed further that though it has not been possible for the public to go and worship the deity at the place, because there has not been a formal ceremonial consecration, it was still a temple which attracted the provisions of the Act. The Commissioner No. 3, Mr. Krishna Rao, thought that the prior order of the Board was final as it was not a case where the Board lacked inherent jurisdiction but was a case where the Board exercised jurisdiction irregularly. As a result of this opinion of the full Board, it was decided that the Board had jurisdiction to start an enquiry under Ss. 62 and 63 of the Act. This order was dated 2-5-1945. On this the two trustees filed in the District Court a petition under S. 84 (2) of the Act to set aside the said order of the Board on the ground, that the Board had no jurisdiction to initiate proceedings under Ss. 62 and 63 of the Act, as there was no temple in existence at any time and as at the time of the passing of the prior order, first petitioner's advocate was not authorised to consent to any such order and that while fighting the jurisdiction of the Board, the advocate could not possibly and legally have consented to the passing of such an order. It was also alleged in the petition that one of the joint trustees was not a party and that the order of the Board was without jurisdiction. The Board in the counter filed on their behalf pleaded that the prior order under S. 84 of the Act was final and barred the present application and that the petition did not lie under S. 84 (2). The Board did not, however, specifically deny in their counter the categorical assertion of the petitioners that there was no temple in existence as no idol was installed and consecrated.

[5a] The learned District Judge found that there was no "temple" as defined by S. 9 (12) of the Act, there was no building, there was no consecrated idol and consequently, there could have been no occasion for any public religious worship. With reference to the contention that the petition did not lie under S. 84 (2), the learned District Judge was of opinion that, as the Board held in Ex. P. 1, that it had jurisdiction to hold an enquiry under Ss. 62 and 63 of the Act on the basis that the institution in question was an excepted temple, the application would lie under S. 84 (2), but according to the learned District Judge, the prior order under Ex. R. 1 became final and that it was not open to the petitioners to challenge the finality of the order under Ex. R. 1 in the present proceedings. The only ground, therefore, on which the learned District Judge dismissed the petition was that the order in Ex. R. 1 was final and its legality could not be questioned in the present proceedings. In the result he dismissed the petition.

[6] In this appeal the points argued and raised in the judgment of my learned brother are as follows: (i) Is the present appeal competent? (ii) Was the application maintainable under S. 84 (2) of the Act? (iii) Was there a temple as defined in the Act? (iv) Does the prior order of the Board preclude the petitioners from now contending that there was no temple in existence?

[7] Section 84 (3) of the Act, which was introduced by the Madras Amending Act X [10] of 1946, gave a right of appeal to this Court against every order of the District Judge on an application under S. 84 (2) within three months from the date of the order. The learned District Judge in the present case clearly held that the application under S. 84 (2) to avoid Ex. P. 1 would lie. He therefore purported to exercise a jurisdiction under S. 84 (2) of the Act. Whether he had in fact the right to exercise the jurisdiction under that section or not, if he had purported to exercise jurisdiction under S. 84 (2), the appellants would have an undoubted

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right of appeal to this Court. As pointed out by Wadsworth J. and Govindarajachari J. in *Somasundaramma* v. *Seshagirirao*, 1947-1-M. L. J. 292: (A. I. R. (34) 1947 Mad. 378):

"There is a considerable line of authority that when the Court wrongly acts under an appealable provision of law and passes an order, which, having regard to the provision of law under which it is passed is appealable, an appeal will lie even though the order should have been passed under a provision of law which would not carry with it a right of appeal."

The line of authority adverted to by the learned Judges begins from *Latchmanan Chetti* v. *Ramanathan Chetti*, 28 Mad. 127: (14 M. L. J. 436) and the Full Bench decision in *Muthiah Chettiar* v. *Govinddoss Krishnadoss*, 44 Mad. 919: (A. I. R. (8) 1921 Mad. 599 F. B.). There are other cases on the same line. It is unnecessary to cite them in view of the latest decision of the Bench in *Somasundaramma* v. *Seshagirirao*, 1947-1- M. L. J. 292: (A. I. R. (34) 1947 Mad. 378). Even assuming therefore that the learned District Judge was wrong in his view that the application was maintainable under S. 84, still, the aggreived party has got a right of appeal as the learned Judge purported to exercise jurisdiction under S. 84 (2) and though on the merits he held that the application was barred by the prior order which became final. We are here concerned with an order which purports to have been passed in the exercise of jurisdiction under S. 84, whether that jurisdiction in fact existed or not. The question whether the order was a final order in the sense that, if the Board ultimately were to decide that no case for framing a scheme was made out, the proceedings should be dropped is beside the point. So far as that Court is concerned, the decision of the learned Judge is final and can be set aside only by an appeal under S. 84 (3). It is therefore a final order which attracts the provisions of S. 84(3) and an appeal would clearly lie against that order in the light of a catena of decisions holding that in such a case an appeal lies.

[8] It was next contended that the application under S. 84 (2) did not lie to the District Court as this dispute was raised in proceedings under S. 62 of the Act. The objection proceeds on the assumption that an application specifically restricted to the dispute contemplated by S. 84 (1) is necessary and only in cases where a proceeding was initiated under S. 84 (1) that an application under S. 84 (2) would lie. It becomes necessary here to bear in mind the language employed by S. 84 (1). It says:

"If any dispute arises as to whether an institution is a mutt or temple, as defined in this Act or whether a temple is an excepted temple, such dispute shall be decided by the Board."

The section, in my opinion, clearly, enjoins a duty on the part of the Board to decide a dispute of the nature contemplated by the section at whatever stage and in whichever proceedings the dispute was raised. The dispute may be raised in a proceeding under S. 62 or otherwise. In all cases, it is imperative on the part of the Board to decide that dispute. A person may raise a dispute independently without the existence of a pending proceeding, by a petition under S. 84 (1); in such a case also, the dispute has to be settled and decided. When the petitioners raised the dispute under S. 62 that the Act did not apply and that the Board had no jurisdiction to frame a scheme; it would be incumbent on the part of the Board to resolve that dispute. That is the reason why the Board was obliged to consider the question of its jurisdiction to proceed further under Ss. 62 and 63 of the Act. It would be open to the Board, in deciding the dispute raised, to consider the question of the finality of its own order passed on a prior occasion. The fact, that the prior order was left unchallenged and therefore became final, would not preclude the Board from considering now or would not absolve it from its duty to consider the dispute raised. In deciding the dispute the Board may come to the conclusion that its hands were tied by the existence of a prior order which had become final. That does not mean that the Board is precluded from entertaining the dispute, though in its opinion it is bound by its own prior order. I therefore, agree with the view of the learned District Judge that the application under S. 84 (2) is maintainable.

[9] The learned District Judge has definitely found that there was no "temple" as defined by the Act in existence. The Board in the counter filed in the lower Court did not seriously dispute this position and indeed in view of the notice of 9-5-1940, which was the foundation for the proceedings *suo motu* taken under S. 62, the Board could not dispute that position. Even the Commissioners who considered the question did not find that there was a "temple" as defined by the Act. One Commissioner went to the length of finding, notwithstanding that the idol was not consecrated and installed and the structure was not completed, that there was, what he calls, a notional temple. A temple is defined under S. 9 (12) of the Act as follows:

"Temple means a place, by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by the Hindu community or any section thereof as a place of religious worship."

Confining the attention to this definition, the essence of the matter is the existence of a

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place of public religious worship. In the case of a temple, it becomes a place of public religious worship when the idol was installed and consecrated and the *pranaprathishta* or vivification ceremony was performed. Until then, it is elementary knowledge that the image does not become an object of worship. The deity does not begin to reside in the idol (the visible image) until the consecration or the appropriate ceremony is completed. After the image is completed by the artist, it is brought in procession from the artist's place to the hall of ablation and thenceforward the ceremonies of consecration commence. This applies to *prathishta sthalams*, i. e., to the temples in which the deity is established newly by observing a certain set of rules as opposed to *swayambhu sthalams*, temples in which the idol or the deity is *swayam vyektha* or self-revealed, i. e., the image is not established by the act of men. A description of the ceremonies in the case of *prathishta sthalams* is to be found in Saraswathi's Hindu Law of Endowments (p. 109) and in P. R. Ganapathi Aiyar's Religious Endowments (p. 224). Unless and until these ceremonies are gone through, the place where the idol is installed, and in the idol itself, does not become a fit object of religious worship. We are not in this case concerned with other places of religious worship where it may be by custom or usage some stone image or wooden image becomes an object of worship. We are concerned only with the coming into existence of the temple as contemplated by the founder, the installation of the idol of Alagarswami and its consecration and performance of *kumbabhishekam* after the completion of the building. In the present case, therefore, there is no place of public religious worship. This aspect of the definition was clearly emphasized by the decision in *Board of Commrs. for Hindu Religious Endowments, Madras* v. *Rugmini*, 55 Mad. 636 : (A. I. R. (19) 1932 Mad. 470), where, at p. 638, Beasley C. J. observed as follows :

"The definition of a temple in the Act requires it to be a place which is used; and this temple, not only was not used and is not being used, but it cannot be used until it is rebuilt. It has in fact been in ruins for many years. I, therefore, think, that the learned trial Judge was perfectly right in holding that the Board had no jurisdiction with regard to its properties."

The learned Chief Justice pointed out, lower down in the judgment, that the Board had no jurisdiction where the temple clearly is non-existent. It is therefore difficult to hold that when there is no temple as defined in the Act, the Board could have any jurisdiction in the matter. When the Act contains a definition of the word "temple" and when it says, in defining the words used in the Act, that unless there is anything repugnant in the subject or context, the word would have a particular meaning, it is not permissible to adopt the dictionary meaning of the word. It is not suggested—and there is no reason to assume — that in the subject or context there is any repugnancy to justify the adoption of the dictionary meaning of the word in preference to the meaning given to it by the Legislature by the definition of the word in the Act. Adopting therefore the definition of the word as given in the Act, there is nothing in the evidence on record or in any of the orders of the Board which justify the inference that there is any temple or a place of public religious worship, as defined by the Act. The very foundation of the jurisdiction of the Board to apply the Act is the existence of the temple. If it did not exist, the Act ceases to apply. By this, it should not be understood that Venkataswami failed to establish a valid religious charity. According to Hindu religion, the deity always exists and soon after the property is dedicated by an appropriate method, it vests in the deity. By the dedication the property ceases to belong to the owner and vests in the deity, but until the idol is establised and consecrated and the *pranaprathishta* is performed, the deity does not begin to reside in the idol so as to make a proper object of religious worship. The jurisdiction of the Board over the endowments or the property dedicated commences only when appropriate ceremonies are performed, the idol is established and the place is made fit for public religious worship. Until then, it has no jurisdiction under the Act to exercise any powers over that property under the Hindu Religious Endowments Act. The trust created by the founder can well be enforced by other appropriate proceedings, but we are concerned in this case only with the jurisdiction of the Board to frame a scheme of administration in the exercise of the powers vested in it under Ss. 62 and 63 of the Act. The powers can be exercised only if there is a temple in existence in the sense in which it is defined in the Act. I therefore agree with the view of the learned District Judge and Mr. Mannadi Nair that there is no temple in existence.

[10] If there was no temple in existence, does the prior order of the Board under Ex. R. 1, preclude the petitioners from now contending that there was no temple in existence. According to the learned District Judges, as the order under Ex. R. 1, became final, it is not open to the petitioners to contend now that there is no temple in existence. The contention urged on behalf of the appellants is that the order was passed without jurisdiction and that therefore

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it is a nullity. Is this contention well-founded? An act done by a Court or a quasi-judicial body without any power to do so is null and void. If a Court has no jurisdiction over the subject matter, its judgment is a nullity and does not require to be set aside. On the other hand, if a judicial body has jurisdiction over the subject matter and, in the exercise of that jurisdiction, decides a matter erroneously, that adjudication is not void but has to be avoided by an appropriate proceeding such as an appeal preferred against that judgment within the time permitted by law. The distinction, therefore, between the jurisdiction of a Court to try and determine a matter and the erroneous decision of a Court in the exercise of its admitted jurisdiction must be borne in mind. The line of demarcation between an error of judgment and the usurpation of power is that, in the former case, the decision is reversible by an appellate Court and could be thus avoided, while in the latter case, the judgment is an absolute nullity. The decision in *Mallikarjun* v. *Narhari*, 25 Bom. 337: (27 I. A. 216 P. C.), which is very often cited for the position that when the parties are before the Court and present to it a controversy, which the Court has an undoubted authority to decide, the Court has jurisdiction to decide rightly as well as wrongly falls under the category of a mere error of judgment. If the Court has no jurisdiction over the subject-matter of a suit or proceeding, that the parties cannot by their consent confer jurisdiction upon the Court and convert the proceeding into a proper judicial process was settled very early by the Privy Council in the well known case of *Ledgard* v. *Bull*, 9 ALL. 191 : (13 I. A. 134 P. C.), which was followed in the later case of *Minakshi* v. *Subramania*, 11 Mad. 26: (14 I. A. 160 P. C.). Very often the jurisdiction of a Court or of a quasi-judicial body depends upon the fulfilment of a condition or the establishment of a collateral fact not touching the merits of the case. The power of a Collector to sell an estate under Bengal Act XI [11] of 1859 is dependent upon the condition that the arrears of revenue existed. But if in fact no arrear of revenue was due on an estate, the Collector has no jurisdiction to sell the property and the sale is a nullity. The procedure prescribed by Bengal Act XI [11] of 1859 and Bengal Act VII [7] of 1868 to challenge such proceedings on the ground of irregularity or illegality in the sale proceedings would not preclude the person affected by the sale, when no arrear has existed, from challenging the sale in a civil Court; see *Balkishendas* v. *Simpson*, 25 Cal. 833: (25 I. A. 151 P. C.). Sometimes, the jurisdiction of a Court or a quasi-judicial body is dependent on the establishment of collateral facts. A familiar example of such a case is the jurisdiction of the Revenue Courts to try suits under the Madras Estates Land Act. If the land is in an estate, certain suits have to be instituted only in the revenue Court. If, on the other hand, the land is not part of an estate, the ordinary civil Courts alone would have jurisdiction to entertain suits for relief in respect of such land. Very often, therefore, as a condition precedent for the exercise of jurisdiction, Courts are called upon to decide the question whether the village in which the land is situate and in respect of which a suit was instituted was or was not an "estate". The decision of the question whether the village is an "estate" or not depends upon a consideration of facts to be proved by evidence, oral and documentary. For instance, in cases falling under S. 3 (2) (d), Estates Land Act, the Court has to consider the question whether the grant in a given case was of the whole village or not. The decision of this question necessitates usually the consideration of the *inam* proceedings of 1860 to find out whether the grant was of the nature contemplated by S. 3 (2) (d). In such cases the decision of the Court on the question whether the village was an "estate" or not is a collateral fact, on the decision of which would depend the forum of the suit. In the case of, what one might call, jurisdictional facts a Court by a wrong decision upon such facts cannot give itself jurisdiction which it would not otherwise possess. If a civil Court decides that the land is not an "estate", and if that decision is erroneous, the adjudication in the civil Court on the question of fact is not final and can be interfered by the High Court under S. 115, Civil P. C., as held in *Atchayya* v. *Sri Seetharamachandra Rao*, 39 Mad. 195: (A. I. R. (2) 1915 Mad 1223 F. B.). The point is also illustrated by the case of *Bunbury* v. *Fuller*, (1853) 9 Ex. 111: (23 L. J. Ex. 29), where at p. 140, Coleridge J. observed:

"Suppose a Judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits;"

The question, as will be seen, for decision, to settle the jurisdiction of the Court in such a case is whether the matter has occurred within the jurisdiction of a particular hundred or not, which is a collateral fact, collateral in the sense that it does not touch the merits of the case. The collateral fact has to be decided in the first instance. The decision in *Madhavarao* v. *Papayya*, I. L. R. (1946) Mad. 760: (A. I. R. (33) 1946 Mad. 431), establishes that a decision of a a Revenue Court when the land is not *ryoti*,

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is without jurisdiction and does not operate as *res judicata*.

[11] In the light of these principles, one has to determine whether the order under EX. R. 1, was passed by the Board without jurisdiction or whether the Board merely committed an error n the exercise of its undoubted jurisdiction. The existence of a temple is a pre-requisite for the applicability of the Act and the exercise of the jurisdiction by the Board. It is in the nature of a collateral fact upon which depends the applicability or otherwise of the Act. As the annexure to EX. R.1, was not filed in the case, there is nothing to show that the Board investigated the facts and came to a conclusion on the evidence placed before it that the temple in fact had existed. The statement in EX. P. 2 that both sides agreed to have the temple declared as an excepted temple, even if it be permissible as secondary evidence of the contents of the annexure, only shows that far from there being an enquiry by the Board, the matter proceeded with the consent of the petitioners and the Board. It is clear from the extract in EX. P.-2 that what was conceded was not the existence of a temple, but only to have the temple declared as an excepted temple. A temple cannot be declared an excepted temple unless its existence is established in the first instance. The order in EX. R.-1 goes beyond the concession, assuming that there was one, as it states that Algar temple is a temple as defined in the Madras Hindu Religious Endowments Act. What is declared by EX. R.-1 is, therefore, totally different from what was agreed to by both sides, as stated in EX. P.-2. If, in fact, there was no material on which the Board could have come to the conclusion that there was a temple in existence at the time, it is impossible to find any basis for the order under EX. R.-1. Further, this being a collateral fact, the Board cannot by a wrong decision, assuming that there was one, confer upon itself a jurisdiction which in fact did not exist. By consent a jurisdiction cannot be conferred and there is nothing to show that the consent extended to facts establishing the existence of jurisdiction. It is common ground that the temple had never existed.

[12] Under these circumstauces, the case does not fall within the principle of the decision in *Malikarjun* v. *Narhari*, 25 Bom. 337 : (27 I. A. 216 P. C.) as the Board had no jurisdiction at all to deal with the matter. It is not as if the Board had undisputed jurisdiction and in exercise of that jurisdiction decided a matter or a controversy placed before it in an erroneous manner. The order, therefore, in EX. R.-1 is entirely without jurisdiction and is a nullity.

[13] There is also another aspect from which the matter can be viewed. Exhibit P.-2 establishes that the very basis on which the proceedings under S. 62 were *suo motu* initiated by the Board was that the construction of the temple was not completed, as no steps were taken by the trustees in that direction. This is the basis on which the Board wanted to start the proceedings under S. 62. It is not now open to the Board to go behind their own notice and behind the statement of facts in that notice and contend that in fact the temple had existed either in fact or even notionally. If on the face of the notice, the Board has no jurisdiction to initiate proceedings under S. 62, the present order of the Board that it has jurisdiction to start an enquiry under SS. 62 and 63 of the Act is totally without jurisdiction. It is unnecessary to consider from this point of view the effect of the prior order EX. R.-1 and its finality. Even if that order had become final and was passed on the footing that the Board had jurisdiction to pass it, it does not affect the present proceedings for the simple reason that the very foundation of the proceedings is the non-existence of the temple. I am, therefore, clearly of opinion that the present proceedings of the Board are entirely without jurisdiction and that the appeal should be allowed and the order of the Board, dated 2-5-1945, in O. Appln. No. 375 of 1940 must be set aside with costs here and in the Court below.

[14] As my learned brother takes a different view, the matter has to be placed before a third Judge, and for this purpose papers may be placed before the Honourable the Chief Justice.

[15] **Govinda Menon J.** — Under sub-s. (3) of S. 84, Madras Hindu Religious Endowments Act, the appellants who were the petitioners in the District Court of Madura, appeal to this Court against the judgment and decree of the learned District Judge in O. P. No. 44 of 1946, which was a petition praying that the Court may be pleased to set aside an order, dated, 2-5-1945, in O. Appln. No. 375 of 1940, passed by the Board of Commissioners for the Hindu Religious Endowments, Madras. Though the order of the Board of Commissioners aforesaid was stated to be passed in proceedings under S. 62 of the Act for the settlement of a scheme of administration for Sri Alagar temple, Thevaram Periyakulam taluk, Madura district, the appellants herein have construed it as an order passed by the Board under S. 84 (1) of the Act and on that basis the present appeal has been preferred.

[16] The Board, by a majority, decided that it has jurisdiction to start an enquiry under

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Ss. 62 and 63 of the Act and it is this order that the appellants, construing it as one under S. 84 (1), have sought to get modified by the application under S. 84 (2) of the Act.

[17] It is necessary to set out in brief outline the events which culminated in the filing of the above petition. One Venkataswami Servai residing in Thevaram in Periyakulam taluk, by a deed of gift, Ex. R.-2, dated 18-3-1920, endowed and dedicated certain properties in favour of Sri Alagar temple, Thevaram, the construction of which building had been commenced by him before his death. The work was then progressing and his idea was to have the deity, Alagar, installed in the building and to have the *kumbabhishekam* performed after the completion of the building. By the said deed of gift he appointed two other persons along with himself as trustees of the said devasthanam for the conduct of the said charity permanently and without default and for improving the properties which have been endowed as aforesaid. By this document, it is conceded that there had been created a valid trust and dedication in favour of the deity Alagar and, therefore, the properties vested in the said deity, with the three trustees as managers thereof. The donor Venkatasami Servai died in 1925 and thereafter the other two trustees appointed by him continued as joint trustees. One of them, Kamakshi Servai, died on 1-4-1931 and was succeeded as trustee by his minor son, the present first appellant. The second of the trustees, Alagar Servai, died on 19-6-1939, having been succeeded by the second appellant as the joint trustee. But it is to be noted that the construction of the building was not completed and there was neither the installation nor the consecration of the deity, Alagar, in the temple.

[18] In the meanwhile, the respondent Board took steps to collect the contribution which it is entitled to levy under the Act, and for the eight Fasli from 1339 to 1346 both inclusive, a sum of Rs. 600 was collected from the trustees. Thereupon, the first appellant filed a petition before the Board in January 1938 praying that the President of the Board may be pleased to hold and declare that the endowment under the deed of trust by Venkataswami Servai was outside the scope of the Act and for an order to refund the sum of Rs. 600 collected from the trustees as contribution. Though the petition does not mention the provision of law under which it is made, the parties rightly proceeded under the belief that the proper provision of the statute applicable was S. 84. We see from Ex. R.-1, the order of the Board of Commissioners, dated 27-9-1938, that the application was treated as one under S. 84 of the Act to decide whether the institution in question was a temple as defined in the Act and if so, whether it was an excepted one or not. The decretal order of the Board is contained in Ex. R.-1; but the reasons or the annexure, containing the grounds of the decision have not been placed before the Court by either of the parties. The order, dated 27-9-1938, is in the following terms :

"Sri Alagar Temple, Thevaram, Periyakulam taluk, Madura district, is a temple as defined in the Madras Hindu Religious Endowments Act, 1926, and is also an excepted temple."

Thereafter, nothing seems to have been done for some time, but in 1940, the Board, of its own accord, started proceedings under S. 62 of the Act for the settlement of a scheme of administration for the suit temple; whereupon, a preliminary objection was taken that the Board had no jurisdiction to proceed with the framing of the scheme on the ground that the institution in question cannot be said to be a temple as defined in S. 9 (12) of the Act and, therefore the Act had no appliction. Two of the Commissioners who heard this objection differed in their opinion, Commissioner III holding that the Board had no jurisdiction to frame a scheme, while Commissioner I held that it had jurisdiction. The matter was taken before a full Board who by a majority held that the Board had jurisdiction to start the enquiry and pass the order, dated 2-5-1945, about which reference has already been made. After that the appellants filed O. P. No. 44 of 1946 which has given rise to this appeal, under S. 84 (2) of the Act and S. 151, Civil P. C., for setting aside the order of the Board in O. Appln. No. 375 of 1940, dated 2-5-1945. The learned District Judge found that even though the construction of the temple had not been completed and no deity had been installed or consecrated therein, still the Board had jurisdiction to frame a scheme because the previous order of the Board in O. Appln. No. 58 of 1938, dated 27-9-1938, holding that the institution in question was a temple as defined in the Act, had become conclusive since no proceedings were taken to modify or set aside that order within the time allowed by law. Upholding the objection taken on behalf of the respondent Board, the learned Judge dismissed the petition and the present appeal is from that order.

[19] At the very outset it seems to me that the appeal itself is incompetent. The order of the Board holding that it has power to frame a scheme is certainly not a final order but is in the nature of a preliminary order. If, after enquiry, the Board were to hold that no scheme

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should be framed there is an end of the matter. If, on the other hand, a scheme is settled as provided under S. 63 of the Act, then it is open to the trustees or any person having an interest in the institution, within six months from the date of the publication of such scheme, to institute a suit in the Court to modify or set aside such an order (last clause of S. 63). Therefore, it is clear that the proper remedy is to file a suit in case the Board decided to frame a scheme, and not an application under S. 84 (2) of the Act. Moreover, the proceedings before the Board, being under S. 62 of the Act for framing a scheme under S. 63 it cannot be said that there was any application by the trustees requesting the Board to exercise its functions under S. 84 (1) of the Act, which it had already decided by its previous order, dated 27-9-1938. It is not pretended that the present application before the lower Court is a suit as contemplated by the last clause of S. 63. The petition itself is designated an Original Petition and not an Original Suit since what is contemplated by the last clause of S. 63 is a regular suit to modify or set aside an order by which a scheme is settled for the institution. I am therefore of opinion that both the application before the District Judge and the appeal to this Court are incompetent.

[19a] One of the arguments advanced by the learned counsel for the appellants is to the effect that when the Board *suo motu* embarked upon the task of attempting to settle a scheme by taking action under S. 62 of the Act, a dispute has arisen as to whether the institution in question is a temple as defined in the Act or not and when the Board, as a preliminary issue, decided that question the provisions of S. 84 (2) have been immediately attracted and therefore the petition before the lower Court and the present appeal are maintainable. This contention overlooks the fact that already a dispute had arisen and a decision arrived at, which, by not being modified or set aside, has now become final and cannot be questioned. To my mind, it is a fallacious argument to contend that in spite of an earlier decision, every time the appellants contend that the Act is not applicable to this institution, a dispute has arisen as envisaged in S. 84. If the earlier decision of the Board was the outcome of an action entirely without jurisdiction passed by a tribunal incompetent to decide the dispute, then, how is it that the Board is competent to decide it now and how does an application under S. 84 (2) lie to the District Court? If the Board is now proceeding upon a course of action unwarranted by law in investigating as to whether the institution is a temple as defined in the Act or not and takes steps to frame a scheme, the proper remedy for the appellants is either to file a regular suit restraining the Board from proceeding further or to approach this Court, if the appellants have any such legal right, for the issue of one of the prerogative writs for preventing the so-called illegal action of the Board. Without resorting to either of the above remedies, the appellants cannot now be heard to say that the later order of the Board is tantamount to a decision under S. 84 (1) of the Act and a petition lies to set it aside under S. 84 (2). Therefore, on the appellants' own showing, since the order, dated 2-5-1935, was passed by the Board in the exercise of its proper jurisdiction, it necessarily follows that the earlier order also stands on the same footing.

[20] But Mr. Muthiah Mudaliar, for the appellants, contends that since, admittedly, there is no temple building in existence and no deity installed or consecrated, the institution cannot be a temple as defined in S. 9 (12) of the Act or the trust a "religious endowment" as defined in S. 9 (11). For this purpose, reliance is placed on *Vythilinga Pandara Sannadhi v. Sadasiva Ayyar*, 55 M. L. J. 605 at pp. 612, 613 : (A. I. R. (15) 1928 Mad. 1272) and the appeal therefrom reported in *Board of Commrs. for H. R. E., Madras* v. *Rugmini*, 55 Mad. 636 : (A. I. R. (19) 1932 Mad. 470). In the earlier case, Kumaraswami Sastri J. has held that, where there is no temple in existence as a place of worship when the Act came into force, the old temple having fallen into ruins or having been demolished long ago S. 84 of the Act does not give the Board any power to call upon the trustees to account for the endowed properties or to direct them to rebuild the temple or to apply the income in a particular manner by invoking the doctrine of *cypres* for the purpose of dealing with the income. It was therefore declared the Act did not apply to the properties which originally were dedicated or endowed for a temple which had been demolished or destroyed long prior to the coming into existence of the Act. Beasley C. J. and Cornish J. in appeal from the above decision, agreed with the view of the trial Judge and held that the Board had no jurisdiction where the temple was clearly non-existent, not temporarily but permanently, and there was no apparent intention of bringing it into existence again. But where it had been temporarily abandoned as a place of worship either on account of its being washed away by flood or submerged or burnt down, in such a case there is no permanent annihilation of the institution and as such the Act would apply to the properties of such a temple. This is clear

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from the definition of the word "temple" in S. 9 (12) to which reference has already been made. In order that the Act should be made applicable, the institution in question should be used firstly, as a place of public religious worship and secondly, dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of religious worship. The definition connotes two distinct matters. There should be firstly a place of public religious worship and secondly dedication or user by the Hindu community or any section thereof. It is unnecessary that a building should be in existence: for, it is a matter of common knowledge that in many places in South India there are idols being worshipped without a roofing to cover the idol. One is aware of idols in forests or under trees without any roofing. In the present case, there is no user of the place for the purpose of religious worship because it is admitted that though an idol is in existence, it has not been installed or consecrated. The creator of the trust, as is seen from the trust deed, EX. R-2, contemplated the existence of the temple with the deity installed though the building had not been completed, because in more than one place in the document it is clearly mentioned that the dedication is to the deity, in the temple to be built thereafter. Therefore it may be that the contention of the learned advocate for the appellants that the order of the Board dated 27-9-1938 is a wrong order on the merits cannot be rejected.

[21] The question then arises whether, without setting aside the order, it is open to the appellants to contend that the Board now has no right to take proceedings to frame a scheme. In order to justify such a contention the argument is advanced that the order of the Board evidenced by EX. R-1 is *ab initio* void and without jurisdiction, because the Board acted absolutely without any jurisdiction in holding that where there was no public worship, a temple as defined in S. 9 (12) exists. Reliance was placed for this contention on *Thiruvengadam* v. *H. R. E. Board, Madras*, I. L. R. (1946) Mad. 268: (A. I. R. (32) 1945 Mad. 273). The facts of that case were as follows: There was a separate charity connected with the Sri Nachiar Temple at Srivilliputhur. Treating it as a specific endowment attached to the temple, the Board levied an annual contribution under S. 69 whereupon, the trustee filed a petition under S. 84 (2) of the Act before the District Judge for a decision whether the endowment came within the purview of the Act. The District Judge, on the acquiescence of the Board that S. 84 applied to such a case, held that the charity did constitute a specific endowment. In spite of this decision the trustee filed a suit in the Sub-Court for a declaration that the charity is a private charity and should not be regarded as a specific endowment. On the Subordinate Judge dismissing the suit holding that the previous order of the District Judge under S. 84 (2) was a bar to the suit, an appeal was filed to the High Court. Leach C. J. and Yahya Ali J. held that, since the District Judge had no power to pass an order on an application under S. 84 (2) because the dispute was not one of the nature referred to in the first sub-section, the suit was maintainable and therefore held that the order of the Subordinate Judge dismissing the suit was not correct. Because S. 84 refers only to a mutt or temple as defined in the Act, the learned Judges were of opinion that it had no application to the question as to whether the endowment is a specific endowment to the temple or a private charity, even though the trustees themselves had invoked the powers under S. 84 for a decision under that section. It is contended that this decision is in favour of the appellants for the reason that the principle underlying it is to the effect that, where the original decision was one without jurisdiction, even if the parties invited the Court to pass it and acquiesced in such a decision, a subsequent suit is still maintainable. If the circumstances of the present case are exactly similar to those in *Thiruvengadam* v. *H. R. E. Board, Madras*, I.L.R. (1946) Mad. 268 : (A. I. R. (32) 1945 Mad. 273), I am bound by that decision. But in my view the facts of the present case are different. That the original donor intended the existence of a temple is clear; and therefore the question before the Board was whether a temple as defined in S. 9 (12) existed or not. The Board had to decide whether such a temple or institution was used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of religious worship. It may be that the Board wrongly decided that the place was used as a place of public religious worship. But that would not be sufficient to justify the view that the Board had no initial jurisdiction. The utmost that could be said is that the action of the Board amounted to a wrong exercise of the jurisdiction vested in it, on the merits of the case, and hence such a wrong decision ought to have been set aside by appropriate proceedings under S. 84 (2) of the Act, in default of which the order would become final. The question whether a suit can be filed for that purpose has now been set at rest by the amendment of S. 84 itself probably as a result of the deci-

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sion in *Iswarananda Bharathi Swami* v. *Board of Commissioners for Hindu Religious Endowments, Madras*, 54 Mad. 928 : (A. I. R. (18) 1931 Mad. 574). In my opinion the Board, in passing the order, EX. R-1, acted in full exercise of its jurisdiction. I would clarify my view by an illustration. Suppose there is a temple situated in and appurtenant to a residential house which the owner uses as a private temple where members of the Hindu community are not allowed to worship and suppose a dispute arises before the Board that such an institution is one coming within the definition in S. 9 (12) and the Board, after enquiry, wrongly decides that it is used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, can it be said that the order of the Board is without jurisdiction? I am of opinion that though the order may be wrong, it is in the exercise of jurisdiction. As I have already pointed out, a building is not a necessary *sine qua non* for the existence of a temple. The point before the Board was whether the temple in existence was one as defined in S. 9 (12), i. e. fulfilling the necessary conditions laid down in that definition, in order that it might be a temple as defined in the Act. Where a Court or a tribunal having power or jurisdiction to decide a particular dispute comes to a wrong conclusion, it is difficult to say that such an order is void. The observations of the Judicial Committee in *Malikarjun* v. *Narhari*, 25 Bom. 337 at p. 347 : (27 I. A. 216 P. C.) have to be applied to such circumstances :

"The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramalingappa. He contended that he was not the right person, but the Court having received his protest, decided that he was the right person, and so proceeded with the execution. In so doing, the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law."

[22-23] In this connection, it is useful to refer to the dictionary meanings of the word "temple". In the Concise Oxford Dictionary, at p. 1261, the meaning of the word "temple" is given as follows : "Edifice dedicated to service of God; or place in which God resides.' In the new English Dictionary, Vol. IX, Part II, the meaning for the word "temple" is given thus :

"An edifice or place regarded primarily as the dwelling place or house of a deity. Hence an edifice devoted to divine worship. Historically, the word is applied to sacred buildings of Egyptians, Greeks, Romans, etc., but now to those of Hinduism, Budhism, Confucianism, Taoism, Shudasm, etc."

It seems to me therefore that when the donor endowed the property to the Alagar temple which was being built by him, there was a place which was intended to be used as a place of divine worship and there would have been nothing wrong in characterising that unfinished building as a temple as understood in common parlance. If the Board is invited to decide whether such a temple is an institution coming within the definion of S. 9 (12) and accordingly, the Board comes to a conclusion, which is either right or wrong. I fail to see how it can be successfully argued that the Board's action was entirely without jurisdiction and therefore *ab initio* void. To a case like this, the decisions like *Ledgard* v. *Bull*, 9 ALL. 191 : (13 I. A. 134 P. C.) and *Minakshi* v. *Subramania*, 11 Mad. 26 : (14 I. A. 160 P. C.) have no application, because in both those cases the Courts dealing with the proceedings had no initial jurisdiction and therefore any acquiescence by the parties in the Court's jurisdiction cannot confer a right on it.

[24] It is noteworthy that the appellants herein by their own misconduct, are gaining an advantage which the law cannot countenance. The maxim, *nemo ex suo delicto meliorem suam conditionem facere potest* (No one can better his condition by his own wrong), applies to the facts of this case very well. It is seen from EX. P. 2 that the landed properties endowed under EX. R. 2 yield roughly an income of nearly Rs. 3000 annually. In Ex. R. 3, dated January 1938, appellant 1 herein states as follows :

"It is only for the last few months that the petitioner has been constructing the temple in which the family deity Alagarswami is to be installed. It will take another two or three years to complete the temple."

In the application to the lower Court dated 11-9-1946, we find the statement, in para. 6, that the temple and the deity had not come into existence even on that date. The donor dedicated the properties as long ago as 18-3-1920 and he died in 1925. More than a quarter of a century has now elapsed and the trustees have not performed the trust imposed upon them by constructing the temple and installing the deity. In these circumstances can they be allowed to say :

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"though we are trustees and are enjoying the income from the trust property we have not yet built the temple and performed the *Prathishta* and therefore the temple has not come into existence and the Board has no jurisdiction ?"

In my view, a statement like that emanating from the trustees carries with it its own condemnation. Therefore, it seems to me that, if the argument on behalf of the appellants is to be accepted the result comes to this, that the appellants are gaining an advantage as a result of their own misconduct. Moreover; if the appellants do not construct the temple at all and if, according to their arguments, S. 9 (12) of the Act has no application, then the Board, in my view, cannot even proceed for the settlement of a scheme by resorting to a Court of law under S. 73 of the Act. How far S. 92, Civil P. C., in such circumstances, would be applicable is really a moot question and as I am not concerned at this stage to give an answer on the applicability of S. 92, Civil P. C., I refrain from doing so.

[25] I am therefore of opinion that the decision of the learned District Judge holding that the order EX. R. 1, since it was not set aside by appropriate proceedings within the time allowed by law, has become final, is right, and if finality is thus attached to it, it is not competent for the appellants to question its correctness now.

[26] The appeal is therefore dismissed with costs. With due and profound respect to my learned brother I regret to find that I cannot agree with his decision and therefore the appeal will have to be heard by another Judge whom my Lord the Chief Justice nominates.

[As the two Judges differed, the appeal was referred to a third Judge, Viswanatha Sastri J., for opinion.]

[27] **Viswanatha Sastri J.** — This case discloses a divergence of opinion among the legal minds that have been applied to its decision, the Commissioners of the Madras Hindu Religious Endowments Board, the learned District Judge of Mathurai, and two learned Judges of this Court who have differed in their reasoning and conclusions. I need recapitulate only the essential facts.

[28] Venkataswami Servai, a pious Hindu of Thevaram village, Mathurai district, executed a deed of gift EX. R. 2, dated 16-3-1920, endowing about twenty acres of nanja lands for the upkeep of "Alagarswami temple now under construction". The deed provided that after the completion of the building by the donor in his village, the deity Alagarswami should be installed therein and *Kumbhabhishekam* (consecration ceremony) performed. Three persons including the donor were constituted trustees under the deed for carrying out these objects, the management of the endowed lands and the conduct of the daily *pooja* and periodical festivals in the temple. The donor died in 1925 and the other trustees followed suit. Today things remain where they stood in 1923. The building is yet unfinished, the idol Alagarswami, though said to be ready for its reception into the temple, has not been installed and the place could not be used as a place of public worship. The heirs of the two stranger trustees claim to be the present trustees and have been in possession for a long time now of the incomplete building and the endowed lands yielding a considerable annual income. I agree with Govinda Menon J. that the conduct of the trustees is blameworthy. They have shown a keen appreciation of the fact that Courts provide but an imperfect instrument for rectification of wrongs and have not evinced any anxiety to fulfil the purposes of the trust. I shall endeavour, however, to disembarrass the case of the prejudice that might arise from their conduct.

[29] The Madras Hindu Religious Endowments Board (hereinafter called the Board) collected a sum of RS. 600 from the trustees as contribution leviable under the Madras Hindu Religious Endowments Act of 1927 (hereinafter called the Act) on "temples" as defined in the Act. One of the trustees filed a petition in January 1938 (EX. R. 3) before the Board, praying the Board

"to hold and declare that the endowment under the deed of trust of Venkataswami Servai is outside the scope of the Act and to order refund of rupees six hundred collected from the trustees as contribution."

[30] The Board treated the petition as one under S. 84 of the Act and passed an order, EX. R. 1, dated 27-9-1938 in these terms :

"Sri Alagar Temple, Thevaram, Periyakulam taluk, Madura District, is a temple as defined in the Act, 1926, and is also an excepted temple."

The annexure to the order of the Board is not in evidence. The trustee appeared by counsel before the Board when this order was passed. In a later proceeding of the Board (EX. P. 2) there is a statement that the counsel for the trustee agreed to have the temple declared an excepted one at the time when the Board passed its order, EX. R. 1. It is not clear whether counsel admitted that there was a temple or whether he stated that if the Board decided that there was a temple, it could declare it an excepted temple. Exhibit R. 3, the petition of the trustee, had stated that, as there was no temple in existence, the Act did not apply. Be it as it may, matters were allowed to rest there till 1940 when the Board started proceedings

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for the settlement of a scheme for the "Sri Alagar temple" under S. 62 of the Act.

[31] The proceedings for the settlement of a scheme dragged on from 1940 till 1945 and apparently no scheme has yet been framed. The two trustees objected to the jurisdiction of the Board to frame a scheme in respect of a temple which, according to them, had never come into existence. The Board, by a majority of its members, overruled the objection of the trustees by its order, Ex. P. 2, dated 2-5-1945 and held that it had jurisdiction to frame a scheme. One of the members of the Board who was of the majority, held that there was a temple, as the founder had intended there should be a temple and had even called the building a temple and endowed it with properties. Another member of the majority (with whom the President agreed) held that the "notional existence of the temple was sufficient for the Board to act", and that since the donor "had laid the foundation of the building" and "given a name to the deity" he had "conceived more or less the temple". That the "conception" did not result in the birth of a temple was a matter of no consequence to him and in his view, "the structure would still be a temple to which the Act applied" Another reason given by the majority—and one that has been canvassed at great length in this Court—was that the Board had, in the exercise of its jurisdiction under S. 84 (1) of the Act decided in Ex. R. 1, dated 27-9-1938 that the institution was a temple and an excepted one, and the said order of the Board, not having been set aside or modified in the manner provided by S. 84 (2), had become final and conclusive in the scheme proceedings. After deciding that the institution was an excepted temple, the Board was about to frame a scheme when the trustees started the proceedings which have culminated in this appeal.

[32] The trustees filed O. P. No. 44 of 1946 on the file of the District Court of Madura under S. 84 (2) of the Act to set aside the decision of the Board, Ex. P. 2, dated 2-5-1945, to the effect that there was here a temple amenable to the jurisdiction of the Board in respect of which a scheme could be framed. The learned District Judge of Madura, while holding that the temple building was incomplete, the deity had not been installed and the public could not use the place for worship, dismissed O. P. No. 44 of 1946, on the ground that the prior order of the Board, Ex. R. 1 dated 27-9-1938, declaring that there was here a temple and an excepted temple, had been allowed to become final and conclusive under S. 84 (2) of the Act. The trustees appealed to this Court against the order of the learned District Judge, and Satyanarayana Rao and Govinda Menon JJ. who heard the appeal, differed on most of the points raised and also about the result of the appeal. As the case is one of some difficulty, it would be convenient to deal separately with each of the points raised by the learned counsel appearing in the case.

[33] Objection is raised by the Board to the maintainability of O. P. No. 44 of 1946 in the lower Court under S. 84 (2) of the Act. Govinda Menon J. upheld the objection, but I am unable to agree. The argument for the Board is that its order Ex. P. 1 dated 2-5-1945, overruling the objections of the trustees and holding that it had jurisdiction to proceed with the scheme is an interlocutory order or preliminary decision, analogous to the decision of a preliminary issue in a suit, and it is only if and when a scheme is framed by the Board under S. 63 that the trustees have a right of suit to set aside the scheme under S. 63, cl. 7 of the Act. Govinda Menon J. holds that if, as alleged by the trustees, the Board had no jurisdiction to declare the institution a temple and an excepted temple, under S. 84 (1) when it passed the order Ex. R. 1 dated 27-9-1938, it had equally no jurisdiction to decide the same question in the later proceedings for framing a scheme and that the proper remedy of the trustees is not to file an application under S. 84 (2) of the Act but to file a suit for an injunction against the Board or

to approach this Court if the appellants have any legal right, for the issue of one of the prerogative writs for preventing the so-called illegal action of the Board."

Apparently the learned Judge was thinking of the *writs of qua warranto* and prohibition and was not reminded of the *Ryots of Garbando* v. *Zamindar of Parlakimidi*, I. L. R. (1944) Mad. 457 : (A. I. R. (30) 1943 P. C. 164). The remedy by an original suit would not be available to the trustee by reason of the prohibition contained in S. 84 (1) of the Act unless the initiation of the proceedings was wholly without jurisdiction. Be this as it may, I consider that the existence of other remedies, if any, did not stand in the way of the trustees claiming an enquiry under S. 84 (1) of the Act.

[34] A dispute as to whether an institution is a "temple" as defined in the Act may arise in the course of the numerous proceedings which the Board might claim to initiate in respect of temples, in the exercise of the powers conferred upon the Board by the several sections of the Act. Such a dispute may arise in the course of any of the proceedings contemplated by Ss. 18, 38, 42, 45, 51 to 57, 59, 60, 65, 69, 70, 73, 75-A, 76 and 80. A decision of the dispute as to whether an institution is a temple as defined in the Act

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might be essential before further action is taken under the above sections by the Board or the Assistant Commissioner, as the case may be. Section 84 (1) is designedly framed in wider terms. When the Board decides a dispute as to whether an institution is a "temple" as defined in the Act, whatever be the nature or stage of the proceeding in which such dispute arises or decision is given, the Board acts under S. 84 (1) of the Act. Section 84 (1) does not insist that the dispute should be brought before the Board by means of an independent application or original petition or that the dispute contemplated by the section should be the only matter arising for the decision of the Board. If this view is correct, the remedy under S. 84 (2) was open to the trustees to set aside the decision of the Board, given in the course of the proceedings for settling a scheme, that there was here a "temple" as defined by the Act.

[35] Govinda Menon J. holds that it could not be said that there was here a dispute of the kind referred to in S. 84 (1) of the Act, because that dispute had already been decided by the prior order of the Board, EX. R. 1, dated 27-9-1938. According to his view, there could be no further dispute about the character of the institution as that had been finally decided by EX. R. 1. Therefore, he holds that S. 84 (1) would not apply to the case. But it must not be forgotten that one of the points debated before the Board in the scheme proceedings was that the prior order of the Board EX. R. 1 was wholly without jurisdiction and the whole matter was *res integra*. Further a plea of *res judicata* is no bar to the institution of a suit but only a bar to its trial. It is only the decision of a tribunal of competent jurisdiction that is a bar to a subsequent proceeding for the same relief, and the plea of the trustees in the present case is that the Board has no jurisdiction to pass the prior order, EX. R. 1. It is apparently for these reasons that the Board, in the present case, held that the dispute raised by the trustees was one under S. 84 (1) of the Act and gave its decision (EX. P. 2), dated 2-5-1945, holding that the institution was a "temple" in respect of which it was competent to the Board to frame a scheme. Whether the Board decided the dispute by holding a fresh enquiry or by holding that its prior order was conclusive, in either case, it seems to me that there is a decision of the Board under S. 84 (1) which attracts the provisions of S. 84 (2). For these reasons I hold that the petition to the lower Court was competent.

[36] I am also of the opinion, differing from Govinda Menon J. that the appeal to this Court was competent. The learned District Judge held that the petition (O. P. NO. 44 of 1946) filed by the trustees to set aside the order of the Board, EX. P. 1, dated 2-5-1945, was maintainable under S. 84 (2) of the Act. In entertaining and deciding the petition, he purported to act under and exercised the jurisdiction conferred by S. 84 (2) of the Act. Section 84 (3) gives a right of appeal to this Court against every order of the District Judge passed under S. 84 (2). Even though the District Judge might have erred in holding that S. 84 (2) applied to the case, still, as he purported to entertain and decide the petition in the exercise of the jurisdiction assumed to have been conferred upon him by that section, the right of appeal given to an aggrieved party by S. 84 (3) against an order under S. 84 (2) is attracted. This is the view that has consistently been taken by this Court. In the leading case of *Abdul Rahiman Sahib* v. *Ganapathi Bhatta*, 23 Mad. 517 : (10 M. L. J. 305) the District Judge, under a misconception of his powers under S. 43, Guardians and Wards Act, granted an injunction and appointed a receiver in a proceeding to remove a guardian. An appeal would have lain in this Court if the orders had been made under Ss. 492 and 503, Civil P. C. of 1882 then in force. This Court entertained an appeal and reversed the orders of the District Judge as having been made without jurisdiction. The objection to the maintainability of the appeal was overruled by this Court in these terms :

"The fact that the District Judge had no power in this case to pass an order under these sections (Ss. 492 and 503, Civil P. C. of 1882) does not bar this Court from treating the order as having been passed thereunder for the purpose of entertaining an appeal against the order, seeing that there is no provision of law under which the Judge could pass an order attaching the property or appointing a receiver without such order being subject to appeal."

An order purporting to be passed by a Court of first instance under an appealable provision of law will be open to appeal even though, on the facts, the order is one that should not have been passed under that provision. Authority for this view will be found in *Muthiah Chettiar* v. *Govinddoss Krishnadoss*, 44 Mad. 919 : (A.I.R. (8) 1921 Mad. 509 F B.) and *Somasundaramma* v. *Seshagiri Rao*, 1947-1 M. L. J. 292 : (A.I.R. (34) 1947 Mad. 378).

[37] The question that now arises for consideration and on which my learned brethren have differed is as to the effect of the prior order of the Board, EX. R. 1, dated 27-9-1938, declaring the institution a temple and an excepted temple. Under S. 84 (4) the decision of the Board is final subject only to the result of an application in the District Court under S. 84 (2) or appeal to this Court under S. 84 (3).

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No such application was at all preferred in the present case to set aside the order EX. R. 1. Govinda Menon J. in effect, holds that the Board had jurisdiction under S. 84 (1) of the Act to decide whether an institution in question was a temple or not and the decision in EX. R. 1, right or wrong, had become final and conclusive and could not be reopened or questioned in these proceedings for framing a scheme. Satyanarayana Rao J. holds that the existence of a temple was essential to give jurisdiction to the Board to start an enquiry under S. 84 (1) of the Act, that there was no temple in this case at the time when the Board passed its order, EX. R. 1, and that the order of the Board, EX. R. 1, was one passed wholly without jurisdiction, and therefore null and void. It is a striking proof of the fineness of the distinction between want of jurisdiction and the erroneous exercise of jurisdiction in particular cases, that my learned brethren while purporting to follow settled principles, have arrived at contrary results.

[38] The expression "want of jurisdiction" is often loosely used to cover a variety of objections to orders or judgments deciding rights of parties. If, on the face of the order and a reading of the relevant statutory provisions under which action was taken, the jurisdiction of the tribunal is found to have been ousted, it is a patent defect of jurisdiction and the order of the tribunal will be a nullity. The want of jurisdiction in such a case is patent or apparent, the order being on the face of it "a speaking order" to use the language of Earl Cairns L. C. in *Walsall Overseers* v. *L. & N. W. Rly. Co.*, (1878) 4 A. C. 30 at p. 40 : (48 L. J. Q. B. 65). The present case does not fall under this category. The order of the Board, EX. R. 1 is *ex facie* regular and apparently within the ambit and scope of the power conferred on the Board by S. 84 (1) of the Act. On the face of the order, it cannot be said that the Board acted outside its jurisdiction.

[39] There may be other cases where the want or defect of jurisdiction is not apparent from the record but is latent, consisting of matters which are collateral or extrinsic to the merits of the case. Objections founded on the personal incompetency of the Judge or the nature of the subject-matter or the absence of some essential preliminary to the enquiry are defects of this type. The Court may not be properly constituted, the Judge or member of the Court being disqualified. Jurisdiction over the subject-matter may not have been given or might have been taken away. Such objections, if substantiated, would render the decision one passed without jurisdiction. The observations of Sundara Aiyar J. in *Atchayya* v. *Sri Seetharamachandra Rao*, 39 Mad. 195 at p. 207 : (A. I. R. (2) 1915 Mad. 1223 F. B.), that, if a Court, by an error of law in deciding whether it had jurisdiction, exercised jurisdiction not vested in it, the High Court's power to interfere under S. 115 cannot be objected to on the ground that the Court had jurisdiction to decide whether it has jurisdiction or not, had reference to this class of cases. The decision in *Madhavarao* v. *Papayya*, I.L.R. (1946) Mad. 760 : (A.I.R. (33) 1946 Mad. 431) is another illustration of this class of cases. In this case it was held that decrees of revenue Courts both original and appellate, decreeing rent in favour of a landholder were without jurisdiction and nullities, as the land in respect of which rent had been decreed was not *ryoti* land, that being a condition precedent for the exercise of jurisdiction by revenue Courts. The general rule is that

"no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends.";

per Coleridge J. *Bunbury* v. *Fuller*, (1853) 9 EX. 111 : (23 L. J. EX. 29), cited by Blackburn J. with approval in *Pease* v. *Chaytor*, (1863) 3 B. & S. 620 : 122 E. R. 233 : (39 L. J. M. C. 121).

[39a] Unless forced to that conclusion by the express language of an enactment, Courts will not countenance the view that a body of limited jurisdiction can, by an erroneous decision of its own, extend its jurisdiction. Satyanarayana Rao J. holds that the present case falls under this category.

[40] There is a third class of cases where the objection to an order is that

"the Judge has erroneously found a fact which though essential to the validity of this order, he was competent to try. This objection proceeds on the assumption that, having general jurisdiction over the subject matter, he properly entered upon the enquiry but miscarried in the course of it."

The Colonial Bank of Australasia v. *William*, (1874) 5 P. C. 417 at p. 443 : (43 L. J. P. C. 39). It is in connection with this class of cases that the oft-quoted observation of the Judicial Committee in *Mallikarjun* v. *Narhari*, 25 Bom. 337 : (27 I. A. 216 P. C.) repeated in *Joy Chand Lal Babu* v. *Kamalaksha Chowdhury*, 76 I. A. 131 : (A.I.R. (36) 1949 P. C. 239) that a Court has jurisdiction to decide rightly as well as wrongly, applies. Where a Judge decides an issue or convicts a man without evidence or misconstrues a statute or misconceives a point of law in the course of reaching his decision, he could not be said to have acted without jurisdiction. If the Court has gone wrong in such matters, the remedy of the aggrieved party is by way

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of appeal from the erroneous order, if the statute provides an appeal. Otherwise, the decision, however wrong, cannot be disturbed or questioned in subsequent proceedings. The error, however serious, does not amount to an usurpation of jurisdiction and the decision cannot be ignored as a nullity or impeached or reopened in collateral proceedings. The respondent Board maintains that the present case falls within this last category.

[41] There have been instances where, by statute, jurisdiction has been conferred upon a tribunal not conditionally upon the existence of a state of things, but it is left to the tribunal itself to decide the question whether or not the state of things exists, as part of the jurisdiction conferred upon it. The distinction between the two types of cases is well brought out in the following passage from the judgment of Lord Esher M. R. in the *Reg* v. *Income-tax Commissioners*, (1888) 21 Q. B. D. 313 ; (57 L. J. Q. B. 513) :

"When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more . . . . . In the second of the two cases, I have mentioned, it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends . . . ."

[41a] This statement of the law has been approved by the Judicial Committee in *Rex* v. *Nat Bell Liquors Ltd.*, (1922) 2 A. C. 128 at p. 151 : (91 L. J. P. C. 146), and followed in *Rex* v. *Bloomsbury Income-tax Commissioners*, (1915) 3 K. B. 768 : (85 L. J. K. B. 129). If a Tribunal is given jurisdiction to embark upon an enquiry and also decide the preliminary, extrinsic or collateral facts which related to its jurisdiction, then, its decision on such matters though erroneous, will not render its ultimate decision devoid of jurisdiction. The error is a matter for correction by way of appeal or otherwise as the statute may provide just like an error affecting the decision on the merits of the case.

[42] The facts, on which the presence or absence of jurisdiction turns, may themselves be such as can only be determined as part of the general enquiry and in such cases, the question of jurisdiction does not depend on the ultimate view of the Court as to the truth or otherwise of the facts investigated. To find out whether such a large and extended jurisdiction of this type has been given to the Board, the scheme of the Act and the terms of S. 84 have to be carefully examined. Unless the jurisdiction to decide the preliminary facts or extrinsic and collateral matters which must exist before the Board decides a dispute under S. 84 has also been given to the Board, it will be usurping jurisdiction, if, by erroneous decision on those preliminary facts or extrinsic and collateral matters, it proceeds to decide the merits of the dispute.

[43] In the light of these principles, I shall examine the provisions of the Act and consider the effect of the order of the Board, EX. R. 1, declaring the institution to be a temple and an excepted one. I may at once point out that the only point now open to the appellants is whether the order was passed without jurisdiction. Its soundness in law or on the facts is not a matter that can be canvassed in these proceedings. It is only if EX. R. 1 is held to be an order passed without jurisdiction, the matters purporting to be decided by it can be considered afresh by the Board in the proceedings for framing a scheme or by the Court in this appeal. The language of S. 84 is wide and comprehensive to the effect that, if any dispute arises as to whether an institution is a temple as defined in the Act, such dispute shall be decided by the Board. The aggrieved party is given a remedy by an application to the Court under S. 84 (2) and an appeal to this Court under S. 84 (3), as amended in 1946. Subject to the result of such application or appeal, the decision of the Board is final. The ordinary original jurisdiction of civil Courts to try such disputes was held to be barred by implication in *Iswarananda Bharathi's case*, 54 Mad. 928 : (A.I.R. (18) 1931 Mad. 574) and is now expressly barred by S. 84 (1) as amended in 1946. As I have already pointed out, a dispute of the kind mentioned in S. 84 (1) might arise in the course of very many proceedings contemplated and authorised by the Act and whatever be the nature or stage of the proceedings in which the dispute arises, the Board is empowered, and indeed required, to decide the dispute. The only preliminary fact or condition that must exist in order to attract the Board's jurisdiction is the existence of a dispute as to whether an institution is a "temple' as defined in the Act. The

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enquiry by the Board must extend to, and indeed begin with, a consideration of the question whether the institution with reference to which the dispute has arisen is a temple or not. The decision of the Board as a result of the enquiry might be that there is a temple as defined in the Act or there is not. In either case, its order, right or wrong, will be within its jurisdiction and not outside it.

[44] The view of Satyanarayana Rao J. is that no temple was in existence in 1938 when the Board passed the order Ex. R-1 and as the existence of a temple, in the usual and accepted sense of that term, was an essential prerequisite to give jurisdiction to the Board under S. 84 of the Act, its order, Ex. R-1, was one passed without jurisdiction. It would be a strained construction of S. 84 to say that it merely empowered the Board to declare that a temple was a temple or that a temple admitted to be such, was a temple as defined in the Act. When the Board decided in Ex. R-1 that there was 'a temple' as defined in the Act, it decided that the institution was a temple. If the matter were *res integra*, I would hold with Satyanarayana Rao J. that in spite of the several features adverted to by the Board, there was here no temple according to ordinarily accepted notions. But this question had to be and was decided, though erroneously, by a tribunal competent and empowered by the Legislature to decide it, and the decision of that tribunal has been allowed to become final by the inaction of the trustees. Its correctness is, therefore, no longer open to question.

[45] It is common knowledge that there are in this Presidency many institutions of a mixed character, whose exact place among religious and charitable foundations is likely to be a matter of doubt or dispute. There are some samadhis or tombs and sepulchres of holy men, where an image of Siva is usually installed and worship, regular or occasional, is offered. Some of them have come to be considered as public temples by reason of the sanctity of the persons interred. There are private mausoleums where idols are installed and *pooja* offered, but which are not temples or temples as defined in the Act, because the public either do not care or are not allowed to worship at such places: *Draiviasundaram* v. *Subramania*, I.L.R. (1945) Mad. 854: (A.I.R. (32) 1945 Mad. 217), *Velusami Goundan* v. *Dandapani*, (1946) 1 M. L. J. 354: (A. I. R. (33) 1946 Mad. 485). There having been cases where memorials erected originally in honour of heroes or martyrs have developed into places of public worship and have been declared to be public temples; *Board of Commissioners for H. R. E. Madras* v. *Narasimham*, (1939) 1 M. L. J. 134: (A.I.R. (26) 1939 Mad. 134). There are institutions like *Bhajana matams* where pictures or idols of God of the Hindu pantheon are kept, the public congregate daily or on stated occasions, sing the praise of God and receive *prasadams*. There are institutions loosely called mutts which, however, are private buildings in which house holders, belonging to particular sects or following particular tenets, live with their families. A so-called mutt may merely be the residence of a *sanyasi* or *paradesi*. There are also endowed mutts which are public institutions established for propagating particular systems of religious philosophy, presided over by an ascetic head. There are chaultries resorted to by the public, where images of Gods are installed and daily worship offered. There are also endowments of immovable property and cash for institutions of the foregoing types. There are foundations, of which it is difficult to say whether they are temples or mutts at all and whether they are temples or mutts as defined in the Act. If with reference to institutions of this kind, a dispute arises as to whether they are temples or mutts as defined in the Act, the Board is empowered, and indeed the duty is cast on the Board by S. 84 to enquire into and decide this dispute. If on enquiry the Board decides that the institution in question is not a temple or a mutt, its decision will be final, subject to the result of an application and an appeal under S. 84 (2) and (3) of the Act. Its decision cannot be considered to be one rendered by a Tribunal without jurisdiction merely because it turned out as a result of the enquiry that there was no mutt or temple. The same result would follow a decision of the Board that there was an institution answering the description of a temple or mutt as defined in the Act. Though the Act applies only to temples and mutts which are public institutions and though the jurisdiction of the Board does not extend to private temples or mutts which are not of the type defined in S. 9, cls. (7) and (12) of the Act, still, the Board is, in my opinion, empowered by S. 84 to decide on the true character of these institutions as a preliminary to its exercising the other powers conferred by the Act in respect of "temples" and "mutts." In my opinion, the whole scheme of the Act and the language of S. 84 (1) bring this case within the category of cases referred to by Lord Esher M. R. in *Reg.* v. *Income-tax Commissioners*, (1888) 21 Q.B.D. 313: (57 L.J.Q.B. 513) and in this case, the Legislature has entrusted the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does

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exist, to proceed further or do something more. It is an erroneous application of the formula to say that in such a case the tribunal cannot give itself jurisdiction by wrongly deciding certain facts to exist because the Legislature gave it jurisdiction to determine all the facts including existence of the preliminary facts on which the further exercise of its jurisdiction depends. If this reasoning is correct, it cannot be said that EX. R-1 was an order passed without jurisdiction. The appellants, however, have relied strongly upon a decision of this Court in *Board of Commissioners for H. R. E., Madras* v. *Rugmini*, 55 Mad. 636: (A.I.R. (19) 1932 Mad. 470) in support of their contention and my learned brother Satyanarayana Rao J. has also placed considerable reliance on this decision to support his conclusion. In that case, Kumaraswami Sastri J. sitting on the original side of this Court, passed a decree declaring that the Act did not apply to the properties endowed for a temple which had disappeared long before the Act came into force and granting an injunction restraining the Board from exercising any of the powers conferred by the Act in respect of that endowment; *Sri Pythilinga Pandara Sannadhi* v. *Sadasiva Aiyar*, 55 M.L.J. 605: (A.I.R. (15) 1928 Mad. 1272). This decree was affirmed by Beasley C. J. and Cornish J. in *Board of Commissioners for H. R. E., Madras* v. *Rugmini*, 55 Mad. 636: (A. I. R. (19) 1932 Mad. 470). The learned Chief Justice referred to the fact that the temple in question had been in ruins for many years, that there was no prospect of its reappearance and that it was not used and could not be used as a place of public worship as contemplated by S. 9 (12) of the Act. He also held that the Board had no jurisdiction over the endowments of a temple where the temple itself was clearly not in existence, not temporarily but permanently and there was no apparent intention of bringing it into existence. He added, however, a qualification of this proposition in these terms:

"The difficulty, however, is in laying down that the building of the temple must actually exist in order to give the Board jurisdiction as cases can be imagined where clearly the Board should and must be intended by the Legislature to exercise its control."

[46] By way of illustration, the case of a temple temporarily submerged by a flood was mentioned. There might be other cases as well. There have been cases where the image of the deity is periodically set up and destroyed. Section 9 (11) of the Act has been amended in 1946 so as to nullify the effect of the decision in *Board of Commissioners for H.R.E., Madras* v. *Rugmini*, 55 Mad. 636: (A.I.R. (19) 1932 Mad. 470). The passage from the judgment quoted above does not suggest that in the view of their Lordships who decided that case, S. 84 of the Act was confined in its application to institutions admitted or conceded to be temples. The Hindu law recognises the validity of dedications for the establishment of a deity and the maintenance of its worship. It is immaterial that the image of the deity has not been established before a gift or bequest is made for it. The decision in *Thiruvengadam* v. *H. R. E. Board, Madras*, I.L.R. (1946) Mad. 268 : (A.I.R. (32) 1945 Mad. 273), relied upon by the appellants has no bearing on the question now under consideration. Section 84 of the Act, as it stood before its amendment in 1946, did not empower the Board to decide a dispute as to whether any property endowed was a specific endowment as defined in the Act or a mere private charity and its decision on this question was held to be one given without jurisdiction. Section 84 has since been amended in 1946 by the insertion of cl. (c) in sub-s. (1) so as to give the Board jurisdiction to decide such disputes as well.

[47] It is next contended by Mr. Muthiah Mudaliar that there is no "institution' in this case so as to attract the operation of S. 84 (1), the institution, according to him, coming into existence only if and when the building is completed and the idol installed and consecrated in the manner prescribed by the *Agama Sastras*, and described by Satyanarayana Rao J. in his judgment. Consecration, according to the ceremonial rites prescribed by the *Agama Sastras*, is not a legal requisite, though it is a sacredotal necessity according to the views of the orthodox. The test is not whether the installation of an idol and the mode of its worship conform to any particular school of *Agama Sastras*. If the public or that section of the public who go for worship consider that there is a divine presence in a particular place and by offering worship at that place, they are likely to be the recipients of the bounty or blessings of God, then, you have got the essential features of a temple as defined in S. 9, cl. (12) of the Act. The presence of an idol, though an invariable feature of Hindu temples, is not a legal requisite under the definition of a temple in S. 9, cl. (12) of the Act. The word "institution" which is used in S. 84 (1) of the Act is a term of very wide import, capable of different meanings according to the context in which it is used. It means, among other things, a foundation, a system, a constitution, an establishment, or organisation, a place designed for the promotion of some religious, charitable or other object of public utility and so on. In this case, the place for the construction of the temple had been fixed, the building had been substantially erected though

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not completed, the idol was ready to be installed, properties had been endowed and trustees appointed for the conduct of the worship and the management of the properties. The Board had jurisdiction to decide the preliminary fact, whether there was an institution within the meaning of S. 84 (1) and whether it was a temple as defined in the Act. It decided in the affirmative in its order Ex. R-1, dated 27-9-1938. Its decision has not been set aside in the only manner permitted by law and has now become final and binding on the trustees. Merely because I would have come to a different conclusion from the Board, I cannot treat the order of the Board as null and void.

[48] The learned advocate for the appellants boldly suggested that the Act would be *ultra vires* if such a wide interpretation were to be put on S. 84 (1), but he did not support his contention by any reasons, evidently because he had no faith in it. It was next urged that it could hardly have been the intention of the Legislature to invest the Board with such wide and sweeping powers as are claimed by it. In theory, it may be objectionable to make a body invested with limited jurisdiction a judge of the question as to whether the subject of enquiry is within its jurisdiction or not. In spite of forensic protests, the legislative practice of substituting for the jurisdiction of the Court that of a specially constituted tribunal has become increasingly frequent both here and in England and, in such cases, the Court is concerned only with the question whether the Tribunal has acted within its jurisdiction. It must, however, be pointed out that Ss. 84 (2) and 84 (3) of the Act provide ample and adequate remedies by way of an application to the District Court and an appeal to this Court for the correction of an erroneous decision of the Board.

[49] Though I have reached the same conclusion as my learned brother Govinda Menon J. I have travelled by a different route. I have also differed from the conclusion of Satyanarayana Rao J. for whose opinion I have unfeigned respect. The case is also one of some difficulty and importance. For these reasons I have stated at length the considerations which have compelled me to the conclusion that I have formed.

[50] Following the precedent in *Dasureddi* v. *Venkatasubbammal*, 57 Mad. 979: (A.I.R. (21) 1934 Mad. 436), the appeal will be posted before the Bench for orders passed in accordance with the opinion of the majority of the Judges who have heard the appeal.

[The appeal on coming for final hearing before the Court, Satyanarayana Rao and Govinda Menon JJ. after expression of opinion by Viswanatha Sastri J. the judgment of the Court was delivered by :]

[51] **Satyanarayana Rao J.** — Following the opinion of the third Judge, the appeal has now to be dismissed with costs. The learned advocate for the appellants now states that he mentioned some other points when the appeal was argued in the first instance before us and that he should have an opportunity now to argue and develop those points. We have dealt in our judgments with the points that were urged before us and argued at length. Even at the time when our judgments were delivered on 18-2-1949, the learned advocate for the appellants did not draw our attention to the fact that there were other points, which he mentioned at the time of the arguments and which we omitted to consider in our judgments and that, at any rate, he should have a further opportunity to argue those points. In those circumstances, we think we are not justified in re-opening the hearing of this appeal at this distance of time and giving a further opportunity to the appellants' learned advocate to further argue the appeal.

C.R.K./V.R.B. *Appeal dismissed.*

A. I. R. (38) 1951 Madras 491 *[C. N. 143.]*

PANCHAPAKESA AYYAR J.

Kajjam Lakshminarasamma — Petitioner v. *Tanniru Seshayya and others — Respondents.*

Civil Revn. Petns. Nos. 316 to 320 of 1947, D/- 4-8-1950.

(a) Civil P. C. (1908), Ss. 7 (a) (iii), 39, O. 21, R. 82; O. 38, R. 13 — Small Cause Court decree—Execution—Attachment of immovable property—Jurisdiction.

Though the Judge on the Original Side and the small cause side is the same, the Courts are different under S. 33, Provincial Small Cause Courts Act, and a transfer is essential to confer jurisdiction on the Court on the Original Side to attach and sell immovable properties for satisfying small cause decree. [Para 2]

Errors of Court, ordering the attachment of immovable properties, without a transfer order will not cure want of jurisdiction. [Para 2]

Anno: C. P. C., S. 39 N. 10.

(b) Limitation Act (1908), S. 3 — Plea of limitation—If technical.

It is against all law and equity to overlook limitation, and rob the vested rights of parties, in the absence of fraud, or at least fraud in equity though it is a technical right and may grate against the ordinary layman's sense of fair-play. Limitation is as valid and binding as any other plea in law, when it is fully proved. [Para 2]

Anno. Lim. Act, S. 3 N. 28, 39.

(c) Civil P. C. (1908), S. 11—Execution proceedings—Orders without jurisdiction — If can operate as *res judicata*.

When the Court has no jurisdiction to entertain an execution petition on the Original Side and attach

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the order as if such an order is an order of a civil court and the Controller shall also have all the powers of civil court. The entrustment of the powers of execution to the Rent Controller and the conferment of all the powers of civil court on him with reference to such execution would take in all the provisions of Or. 21 C. P. C. as well as Sec, 47 C. P. C. Though it has been held that S. 47 C. P. C. would apply in relation to the execution proceedings in respect of orders of eviction under S. 9 of the TamilNadu Act 15 of 1946 and 25 of 1949 and S. 18 of Act 18 of 1960, the same would be the position under S. 18 as amended by Act 23 of 1973.

9. Therefore, the contention of the learned counsel for the petitioner that the application under S. 47 C. P. C, is not maintainable is not acceptable. In my view, therefore, the objection of the petitioner was rightly overruled by the lower court. The civil revision petition therefore fails and is dismissed but there will, however, be no order as to costs.

VCS

M. L. Hanumantha Rao

v.

Sri Sai Baba represented by its Trustees

Ramanujam. J.

28th April, 1972/S.A. No.743 of 1971*/Appeal against the Decree of the City Civil Court (Principal Judge), Madras in Appeal Suit No. 373/69 preferred against the decree of the City Civil Court (VIII Assistant Judge), Madras in Original Suit No. 2728/60.

C.P.C. S.9, Hindu Law, *and* Trusts—*Suit on behalf of a deity—Maintainability—Deity of Sri Sai Baba installed in a temple—Property endowed for the deity—Suit for recovery—Maintainability.*

* The question for consideration in this case was whether the idol of Sri Sai Baba installed in the Sri Sai Baba Temple at Guindy is a legal person who is capable of suing and being sued.

[Para 7]

It was contended for the defendant-appellant that unless the idol of Sai Baba is treated as a deity, it cannot have the requisite legal personality of suing and being sued and that such an idol cannot be recipient of a donation and cannot own property. that unless the idol. even if located in a temple is treated as a deity, it cannot be treated as a juristic entity and that a gift or dedication to a temple as such cannot be recognised in law.

[Para 8]

Held: it is true that the decisions make a distinction between a deity and the structure called "temple" in which the deity is located. But, the question here is whether the idol or image of Sri Sai Baba is a deity and what are the deities which could normally be recognised under the Hindu pantheon as juristic entities [Para 8]

It is well known that Hindus worship not only the various attributes of the Trinity, but also other forms of images. The decisions show that the worship of Gurus who have been held in reverence by their disciples and of warriors who have been held ni esteem was not unknown among the Hindus. Therefore, the mere fact that the idol is in a human form cannot make it (*sic*) any the less a deity if it is worshipped as personifying the Supreme being. [Para 21]

It is also well known that the Hindu religion recognises or tolerates the worship of certain deities personal to them, that is "*Istha Deivatha*". As amatter of fact, Hindu religion preaches the worship of personal God and such personal God may take the shape of the Guru or Sage who has exhibited certain extraordinary spiritual power, Therefore, the whole question depends upon the faith of the persons who worship the idol and if they feel that by worshipping that idol they are elevated spiritually that idol can be said to be a deity symbolising the particular religious purpose. [Para 21]

Normally, the images worshipped by the Hindus are visible symbols representing some form of the three-foid attributes of God based upon the Hindu idea of Trinity, namely, creator, preserver and destroyer. The object of worship is not the image, but the God believed to be manifest in the image for the benefit of the worshippers who cannot conceive or think of the deity without the aid of perceptible form on which they may fix their minds and concentrate attention for the

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Note: This decision may be read along with the decision next reported, and immediately following, the questions of law arising in it being the same as herein—*Ed.*

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purpose of meditation. According to the Hindu notion the image itself is not the God, but it is the visible personified deity manifesting itself to the devotees by means of the image. Where a Hindu dedicates property for the worship of a God by means of an image, the property is, by a legal fiction, deemed to be vested in a juristic or juridical person, and the God which is believed to be manifest in the image is to be deemed the fictional person holding property. Material image is merely a means of worship of God and the consecrated image is the body of which the invisible spirit is the soul. [Para 18]

Therefore, the suit has to be held to have been properly constituted. The suit is maintainable and the objection taken by the appellant as to the maintainability of the suit cannot be sustained. [Para 22]

Held: A reading of the trust deed shows that there has been a dedication of the property to Sri Sai Baba temple, Guindy, the object being to maintain the said temple and also for performance of pooja therein on the third day of February every year....The fact that the trustee is allowed to live in a small portion of the suit property will not also go against the truth of the trust deed. Therefore, there is no substance in the defendant's contention that the trust deed, Ex.A 4, is in any way illusory. [Paras 5, 8]

1928 Lah. 375; I.L.R. 1954, Nag. 302;
44 Madras 831; 12 Bom. 247 (West, J.);
17 Cal. 3 (P.C.); 53 All. 70;
33 All. 793; 46 Cal. 951;
37 Cal. 128; 1950-2-M.L.J. 511 (Satyanarayana Rao, J. and Viswanatha Sastri, J.);
58 L.W. 160; 59 L.W. 263;
48 L.W. 791; 66 L.W. 944;
83 L.W. 472 (Srinivasan, J.);
1969 S.C. 1089; 27 Mad. 435;
1925 P.C. 139; and
Mukherjee on "Hindu Law of Religious and Charitable Trusts", 3rd Edn.;
and 1971 Orissa 15

—Ref. to

—Second Appeal dismissed.

M/s. A. Sundaram Iyer for Applt.
M/s. T. S. Balakrishnan for Respts.

JUDGMENT

1. The first defendant is the appellant. He unsuccessfully resisted in the Courts below the suit, O.S. 2728 of 1960 filed originally on behalf of Sri Sai Baba temple for declaration of title and for possession of a room in the first floor of premises No. 13, Big Street, Triplicane, Madras-5 which is in his occupation. The facts and circumstances which led to the filing of the above suit and the rival pleadings between the parties have been fully and elaborately set out in the judgments of the Courts below and I do not consider it necessary to set them out here again in much detail. I therefore, straightway proceed to consider the questions involved in this second appeal.

2. The substantial questions that are raised and are to be considered in this second appeal are: (1) whether door No. 13, Big Street, Triplicane, Madras-5, belonged to the joint family of Loganatha Mudaliar and his sons, including the appellant at any time or whether the same remained as self-acquired property of Loganatha Mudaliar till he executed the settlement deed, Ex.A 3 in favour of his daughter, Leela, (2) whether the settlement deed, Ex.A 3 executed by Loganatha Mudaliar in favour of his daughter, Leela in respect of the suit property is true and valid as urged by the plaintiffs or whether it is invalid or sham and nominal as contended by the appellant, (3) whether, even if the settlement deed, Ex.A 3 is true and valid, the trust created by the said Leela under Ex.A 4 in favour of Sri Sai Baba, the first plaintiff is illusory and invalid as contended by the appellant and (4) whether the suit as framed is maintainable.

[After discussing the evidence on the question whether the suit house was the self-acquired property of Loganatha the learned Judge proceeded as follows —Ed.]

x x x x

Therefore, I see no reason to interfere with the finding of fact given by the Courts below that the suit property continued to be the self-acquired property of Loganatha till he executed the settlement deed, Ex. A 3, in favour of his daughter, Leela.

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4. On the second question also, I am inclined to agree with the view taken by the Courts below that the settlement deed, Ex.A 3 executed by Loganatha in favour of his daughter, Leela, is true and valid and that it has not been shown to be sham and nominal by the defendants.

[The discussion of facts is omitted—Ed.]

x x x x

Therefore, the settlement deed, Ex.A 3, taken in the light of the compromise in the said suit, should be deemed to have been acted upon and given effect to at least at the time of the compromise and that the settlee has become the absolute owner of the property ever since. Therefore, it is not possible to take any exception to the finding given by the Courts below that the settlement deed, Ex-A 3 is true and valid and it is not sham and nominal as alleged by the first defendant.

5. The next question is as to whether the trust deed, Ex. A 4 dt. 30th June, 1958 executed by Leela in favour of Sri Sai Baba temple constituting her father Loganatha as a trustee during his lifetime is true and valid or whether it is illusory and invalid as contended by the first defendant. It is urged that the conduct of both Loganatha and his daughter Leela shows that for some ulterior motive the property was put in the name of Leela and again got back by Loganatha in the form of this trrust deed, Ex.A 4 and that the terms of the trust deed themselves showed that it was only illusory. Here again, I am not in a position to disagree with the view taken by the Courts below that the trust deed executed by Leela was real and not illusory. A reading of the trust deed shows that there has been a dedication of the property to Sri Sai Baba Temple, Guindy, the object being to maintain the said temple and also for performance of pooja therein on the third day of February every year. It is not in dispute that all the members of the family were very much devoted to Sri Sai Baba. Ex.A 5 dt. 3rd February, 1949, a trust deed executed by Loganatha himself shows that he had erected a temple for Sri Sai Baba in the land owned by him at Guindy and he had endowed about 11 grounds of land for the purpose of performing the pooja and annual festival in the temple. This trust deed has not been challenged as illusory in these proceedings. The trust deed, Ex.A 5, executed by Loganatha has been attested by the members of the family including the first defendant. In fact, the recital in the document, Ex.A 5 shows that the family members are subscribing their signatures thereto in token of their interest and sincerity in carrying out the trust. It is also not in dispute that in fact Sri Sai Baba temple exists in Guindy. Leela, the author of the trust deed, Ex.A 4, has remained unmarried and the evidence shows that she is very much devoted to Sri Sai Baba and had decided not to lead a married life. It is in this background it has to be seen whether Ex.A 4 is real or illusory.

6. On behalf of the first defendant various circumstances have been pointed out to show that the trust deed, Exhibit A4 was only illusory. It is pointed out that Exhibit A4 provides for the application of the income from the property for the maintenance of the temple and for performing the annual festival only after clearing the debts over the property, which means, that there will be practically no income left for carrying out the object of the trust. It is also pointed out that in respect of the direction for discharging the debts over the suit house, the trustee Loganatha did not pay any part of the debt and that it was Lecla herself who had been discharging the debt even subsequent to Exhibit A4. The third circumstance pointed out is that Leela had appointed only her father Loganatha as the life trustee of the trust and this showed that Loganatha has been put in effective possession of the property with no liability to account for the income. But, all these circumstances do not, in any view, establish that the trust deed Exhibit A 4 was illusory. It may be that though the trustee was directed to discharge the debts out of the income, Leela herself discharged the debts from out of her own earnings as a lecturer in a city College so as to preserve the suit property in fact for the purpose of the trust. The fact that the father Loganathan was appointed aa a life trustee is also inocuous. Loganatha has already constructed a Sai Baba temple and endowed certain properties for its maintenance. Therefore, his daughter Leela might have thought, while executing Exhibit A 4, that

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Loganatha was the proper person to administer the trust. One other circumstance that is pointed out is that the trust deed, Exhibit A 4 gives a right of residence to the trustee in a portion of the premises. The fact that the trustee is allowed to live in a small portion of the suit property will not also go against the truth of the trust deed. But the evidence discloses that even though the recital in Exhibit A 4 is to the effect that the trustee can take up residence in a small portion of the suit property, Loganatha actually took up his residence in the Sri Sai Baba temple which he built, and he has been looking after the temple affairs there. The fact that the trustee is not accountable to others in administering the trust created under Exhibit A 4 will not also make the trust illusory. Such a clause might have been introduced only with a view to see that the trust, being a private one, the public or any worshipper in the temple may not seek an account from the trustee. Therefore, I see no substance in the first defendant's contention that the trust deed, Exhibit A 4, is in any away illusory.

7. To appreciate the last contention regarding the maintainability of the suit, the following facts are to be noted: At the first instance the suit was filed in the name of Sri Sai Baba temple by sole trustee M. J. Loganatha Mudaliar. As already stated, the dedication in the trust deed, Exhibit A 4 was in favour of Sai Baba temple represented by sole trustee M. J. Loganatha Mudaliar and perhaps that is the reason the plaintiff was styled in such a manner. But, the defendants raised the plea in their written statement that the suit as framed is not maintainable as a temple not being a person in the eye of law cannot maintain the suit. With a view to meet such a plea by the defendant, the cause-title was amended showing the first plaintiff as Sri Sai Baba represented by its Trustees, M. J. Loganatha Mudaliar, T.A. Ramaswami Reddiar, Vedkataswamy, Nagarathna Mudaliar and M.L. Leela. The second and third plaintiffs are M. L. Ramakrishnan and M. L. Sampathkumar and they had been added after the death of M. J. Loganatha Mudaliar who has been constituted as the trustee for life in the trust deed, Exhibit A 4. Even after the amendment, the defendants raised the plea that the first plaintiff, Sri Sai Baba, is not a deity capable of acquiring or owning any property or of suing and being sued as such, that the said Sai Baba was only a spiritual person and is not a God or deity recognised by the Hindu Pantheon or by the Aghamasastras capable of owning the property, that the deletion of the word "Temple" in the plaint will not cure the defect as to the maintainability of the suit. The defendants also contended that the persons shown as trustees of Sri Sai Baba the first plaintiff, are only trustees of Sri Sathya Sai Mandali, an institution created under the trust deed, dated 3rd February 1949 executed by Loganatha and that they cannot be said to be trustees entitled to represent Sri Sai Baba even assuming that Sri Sai Baba is a deity. It has also been contended that the second and third plaintiffs also cannot and do not purport to represent Sri Sai Baba. It is also pleaded that Sri Sai Baba temple having been located in the burial ground of the family of Loganatha was only a Samadhi and that, therefore, there cannot be any valid dedication for a Samadhi and for performing the death anniversy of the deceased Sai Baba. Though the various grounds set out above have been taken in the written statement, some of the grounds were not pursued before me. As regards the contention that the temple was only a "Samadhi" and that therefore, there cannot be any valid dedication of the properties to the same, admittedly Sri Sai Baba was not buried or cremated in that place, and there is no question of Sri Sai Baba temple being treated as a "Samadhi". Naturally, therefore, this question was not pressed. It is also not in dispute that there is a statue or idol of Sri Sai Baba installed in Sri Sai Baba temple at Guindy by Sri Sathya Sai Baba. Even the first defendant admits in his evidence that he was present during the installation ceremony. Therefore, the crucial question is whether the idol of Sri Sai Baba installed in the Sri Sai Baba temple at Guindy is a legal person who is capable of suing and being sued.

8. Mr. Sundaram Iyer, learned counsel for the appellant contends that unless the idol of Sri Sai Baba is treated as a deity, it cannot have the requisite legal personality of suing and being sued and that such an idol cannot be recipient of a donation and cannot own property, that unless the idol even if located

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in a temple is treated as a deity, it cannot be treated as a juristic entity and that a gift or dedication to a temple as such cannot be recognised in law. Reference is made to the decision in *Thakardwara Amristsar* v. *Ishar Das*[1] where a Division Bench expressed the view that though a deity or a mutt is a juridical person, the building in which the idol is located cannot become a religious institution, and that such unwanted extension of the juristic personality to the building in which the idol is located would result in the two juridical persons co-existing in the same institution. *Sri Gajanam Maharaj Sansthan, Shegaon* v. *Ramarao*[2] was also referred. There it was held that though the statue of idol or a mutt as a juristic entity has been sanctified by Hindu religious usage and has obtained judicial recognition, the temple or a secular institution stands on a different footing and they are *per se* only inanimate objects which, in the eye of law, are incapable of holding property and acting for its protection. The reason given by the learned Judges for taking that view was that in the case of a temple the building is obviously intended for the abode of a deity and until the idol is consecrated, it is only a structure of brick and lime, devoid of life and soul; whereas, in the case of a Sansthan, the object associated with the religious teacher and installed in the institution may itself symbolise the spirit of the sage and impart to it a spiritual existence and therefore, it has the same juristic personality which an idol is recognised to possess. It is true that these two decisions, make a distinction between a deity and the structure called "temple" in which the deity is located. But the question here is whether the idol or image of Sai Baba is a deity, now that the plaintiffs have deleted the word "Temple" by amending the cause title.

9. The question is what are the deities which could normally be recognised under the Hindu pantheon as juristic entities. In *Vidya Varuthi* v. *Balusami Ayyar*[3] their Lordships of the Judicial Committee held that under the Hindu Law the image of a deity of the Hindu pantheon is, as has been aptly called, a "juristic entity" vested with the capacity of receiving gifts and holding property, and that religious institutions, known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them *eo nomine*. According to Mr. Sundaram Iyer for the appellant all idols or images cannot be treated as juristic persons and it is only such idols which can properly be called deities which can own properties and sue and be sued as a living person, and that it is only those idols which represent the Trinity or its various forms can be treated as deities according to the Hindu theology and Sastras. The question is how far this contention could be accepted.

10. One of the earliest cases is *M. Ganesh Tambhokar* v. *Lakshmiram Govindram*[4]. West, J. stated :

"The Hindu Law, like the Roman Law, and those derived from it, recognises, not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations."

11. In *Gosami Sri Gridhariji* v. *Romanlalji Gosami*[5] the Privy Council treated even a consecrated portrait of a Sadhu which was worshipped by his disciples to be legal person to whom property could be gifted. In *Bankey Lal* v. *Peare Lal*[6] there was an endowment in favour of one of the Gods of the Hindu Pantheon, who was mentioned by name as "Sri Ram Chanderji Maharajji, the God of the two worlds" and the deity was not associated with any particular idol or shrine. It was argued that such an endowment was void for uncertainty according to Hindu Law and as such it cannot be operated. The Court held:

"It is true that under the Hindu system of jurisprudence a general endowment for the worship of an impersonal God for whom the benefit of an endowment was intended to take effect was void for uncertainty. This has been held in *Phundan Lal* v *Arya Prithi Nidhi Sabha*[7] and in *Ghandi Charan Mitra* v. *Haribola Das*[8]. In the present case it could not be argued that the endowment was void for uncertainty. Here we have a

1. A. I. R. 1928 Lahore 375.
2. I. L. R. 1954 Nag. 302.
3. I. L. R. 44 Mad. 831.
4. 12 Bombay 247.
5. I.L.R. 17 Calcutta 3. (P.C.)
6. I.L.R. 52 All. 70.
7. I.L.R. 33 All. 793.
8. I.L.R. 46 Cal. 951.

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trust created in favour of Sri Ram Chanderji Maharaj, who is worshipped as an incarnation of Vishnu."

In *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*[1] there was a gift to certain trustees who are to employ the surplus income of the properties by spending the same in the establishment and pooja of Goddess Kalee under the name and style of "Iswar Anandamoyee Kalee". It was contended that the bequest is invalid as it is not in favour of a sentient person who is capable of accepting it and that a trust for the establishment and consecration of the image of Goddess Kalee and her worship was void inasmuch as the deity had not been established at the time of the gift. In rejecting the said contention Mukerjee, J. expressed that the proposition that gift to be valid must be in favour of a sentient person in existence and capable of taking from the donor at the time when the gift is to take effect is inapplicable in the case of bequests for the establishment of images for the deity and for their worship, and that it is established beyond the possibility of dispute that the ordinary conception of a gift is not applicable to the case of a dedication to a deity:

"Under the English Law it is well settled that a gift for the advancement of religion in general terms, as for instance, a gift to be employed "in the service of My Lord and Master" or "for the worship of God" are valid." ... ... It is further clear that, under the English Law, a valid gift may be made to a charity not *in esse* at the time but to come into existence at some uncertain time in the future, provided there is no gift of the property in the first instance for the benefit of any private corporation or person, or perpetuity in a prior taker."

The learned Judge ultimately summed up the position thus—

(i) The view that no valid dedication of property can be made by a will to a deity, the image of which is not in existence at the time of death of the testator is based upon a double fiction, namely, first, that a Hindu deity is for all purposes a juridical person, and secondly, that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of those propositions is too broadly stated, and the second is inconsistent with the first principles of Hindu jurisprudence:

(ii) The Hindu law recognises dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed *extra commercium* and is entitled to special protection at the hands of the Soverign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments."

1. I.L.R. 37 Calcutta 128.

Chatterjee, J., in his separate but concurring judgment made a distinction between "an image" and "a deity" and expressed the view that the deity exists and manifests itself in the image upon the invocation of the worshipper with certain *mantras* and that such a deity will be a sentient being, and that the Hindu idea of the various forms attributed to God is only for the convenience of worship. The learned Judge observes:

"A particular image may be insentient until consecrated but the deity is not. If the image is broken or lost, another may be substituted in its place and, when so substituted, it is not a new personality, but the same deity and properties previously vested in the lost or mutilated *Thakur* become vested in the substituted Thakur. A Hindu does not worship the "idol" or the material body made of clay or gold or other substance, as a mere glance at the *mantras* and prayers will show. They worship the eternal spirit of the deity or certain attributes of the same, in a suggestive form, which is used for the convenience of contemplation as a mere symbol or emblem. It is the incantation of the mantras peculiar to a particular deity that causes the manifestation or presence of the deity or, according to some, the gratification of the deity."

Jenkins, C.J. said:

"But whatever may be the true view on this obscure and complex question that is at least seems clear that the rule which requires relinquishment should be to a sentient person does not forbid the gift of property to trustees for a religious purpose, though that purpose cannot in strictness be called a sentient person: (*Ramtonoo Mullick's case*[2].) It would seem that the rule propounded by Jimutawahana had regard rather to the general proposition for which he was contending, e.g., that the Act of the giver is the cause of property, than to its application to particular objects of benevolence. The fiction that an idol is a person capable of holding property must be kept within its proper limits, and were we to accede to the argument that has been advanced before us, we should be allowing fiction to be built on fiction to the hindrance and not for the furtherance of justice."

12. In *Ramaswami Serval* v. *Board of Commissioner, H.R.E., Madras*[3], a Hindu executed a deed of gift on 18th March, 1920 endowing certain properties for the upkeep of "Alagarswami temple now under construction". The deed of gift provided for the installation of the deity and *Kumbabhishekam* after the completion of the temple and also for constitution of the donor and two others as trustees for the carrying out of the objects of the trust. When the Hindu Religious and Charitable Endowments Board attempted to levy contribution from the trustees,

2. (1829)-1 Knapp. 245.
3. 1950-2 M L J 511

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they resisted the same contending that there was no temple in existence and therefore, the endowment was outside the scope of the Act. When the matter ultimately came before this Court the main question was whether the institution was a "temple" as defined in the Madras Hindu Religious Endowments Act (Act 2 of 1927). Satyanarayana Rao., J. expressed the view that:

"In the case of a temple, it becomes a place of public religious worship when the idol was installed and consecrated and the *pranapratishta* or vivification ceremony was performed. Until then, it is elementary knowledge that the image does not become an object of worship. The deity does not begin to reside in the idol (the visible image) until the consecration or the appropriate ceremony is completed. After the image is completed by the artist, it is brought in procession from the artist's place to the hall of ablution and thenceforward the ceremonies of consecration commence. This applies to *prathishta sthalams*, i.e., to the temples in which the deity is established newly by observing a certain set of rules as opposed to *Swayambhu sthalams*, temples in which the idol or the deity is *swayam vyektha* or self revealed, i.e., the image is not established by the act of men... .....Unless and until these ceremonies are gone through, the place where the idol is installed and the idol itself, does not become a fit object of religious worship."

13. But Viswanatha Sastri, J. took a slightly different view. The learned Judge says:

"It is common knowledge that there are in this Presidency many institutions of a fixed character, whose exact place among religious and charitable foundations is likely to be a matter of doubt or dispute. There are some samadhis or tombs and sculptures of holy men, where an image of Siva is usually installed and worship, regular or on occasions, is offered. Some of them have come to be considered as public temples by reason of the sanctity of the persons interned. There are private mausoleums where idols are installed and pooja offered, but which are not temples as defined in the Act, because the public either do not care or are not allowed to worship at such places: *Dravidasundaram* v. *Subramania*[1], *Veluswami Goundan* v. *Dandapani*.[2]. There have been cases where memorials erected originally in honour of heroes or martyrs have developed into places of public worship and have been declared to be public temples: *Board of Commissioners for the H. R. E. Madras* v. *Narasimhan*[3]. There are institutions like *bhajana matams* where pictures or idols of gods of the Hindu pantheons are kept, the public congregate daily or on stated occasions, sing the praise of God and receive *prasadams*". As regards the observation of Satyanarayana Rao, J. that a temple could come into existence only if and when the building is completed and the deity is installed and consecrated in the manner prescribed by the Agama Sastras, the view of Viswanatha Sastri, J. was:

"Consecration according to the ceremonial rites prescribed by the Agama Sastras is not a legal requisite, though it is a sacerdotal necessity according to the views of the orthodox. The test is not whether the installation of an idol and the mode of its worship conform to any particular school of Agama Sastras. If the public or any section of the public who go for worship consider that there is a Divine presence in a particular place and by offering worship at that place, they are likely to be the recipients of the bounty or blessings of God, then, you have got the essential features of a temple as defined in S.9, Cl.(12) of the Act. The presence of an idol, though an invariable feature of Hindu temples, is not a legal requisite under the definition of a temple in S.9, Cl.(12) of the Act."

14. In *Ratnavelu Mudaliar* v. *Commissioner for H.R. & C.E.*[4] the above observations of Viswanatha Sastri, J. were cited with approval while considering the question whether an institution which had its origin in a samadhi could come under the definition of "temple". It was held in that case that where the public had for a long period regarded an institution as a place of religious worship which the public was entitled to use as a matter of right though the institution had its origin in a samadhi and continued to retain traces of its origin, the institution will be a temple as defined in S.9 (12) of Madras Act 2 of 1927. In *Senthivel Pillai* v. *Kulandaivel Pillai*[5], Srinivasan, J. speaking for the Bench expressed the view that where an idol has been installed, even if it happens to be a private family

1. 1945-I M.L.J. 328 = 58 L.W. 160.
2. 1946-I M.L.J. 354 = 59 L.W. 263.
3. 1939-I M.L.J. 134 = 48 L.W. 791.
4. 1953-II M.L.J. 574 = 66 L.W. 944
5. 82 L.W. 472.

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idol and the family endows property for the upkeep of the idol and for the performance of poojas and the like, the idol as a distinct entity becomes the owner of the property and thereafter the donors, the members of the family, have no surviving power to take away the property from the idol.

15. In *Jogendra Nath* v. *I. T. Commissioner*[1] the Supreme Court had occassion to consider the question whether a Hindu deity could be treated as a unit of assessment under Ss. 3 and 4 of the Income-tax Act, 1922. After considering some of the vedic tests the Supreme Court said:

"It is well established by high authorities that a Hindu idol is a juristic person in whom the dedicated property vests",

16. The Supreme Court cited with approval the following passage from the judgment of Subramania Ayyar, J. in *Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami*[2] :

"It is to give due effect to such a sentiment, widespread and deep-rooted as it has always been, with reference to something not capable of holding property as a natural person, that the laws of most countries have sanctioned the creation of a ficiitious person in the matter, as is implied in the felicitous observation made in the work already cited "perhaps the oldest of all juristic persons is the God, here or the saint"

(Pollock and Maitland's History of English Law Volume I, P. 481).

17. The learned Judges also referred to the observations of Lord Shaw in *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*[3] :

"A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law, a "juristic entity". It has a juridical status with the power of suing and being sued. Its interests are attended to by the person he has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, an analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities; for this doctrine, thus simply stated, is firmly established".

According to their Lordships of the Supreme Court the juristic person in the idol is not the material image, and it is an exploded theory that the image itself develops into a legal person as soon as it is consecrated and vivified by the Pran Pratishta ceremony and it is not correct that the supreme being of which the idol is a symbol or image is the recipient and owner of the dedicated property, and the correct legal position is that the idol as representing and embodying the spiritual purpose of the donor is the juristic person recognised by law and in this juristic person the dedicated property vests. The view of the Supreme Court was that a dedication to a deity is not only a compendious expression of the pious purpose but also a material embodiment of the pious purpose, and though there is difficulty in holding that the property can reside in the aim or purpose itself would be quite consistent with sound principles of jurisprudence to say that a material object which represents or symbolises a particular purpose can be given the status of a legal person and regarded as owner of the property which is dedicated to it. The Supreme Court, however, pointed out the distinction between spiritual and legal aspect of the Hindu idol which is installed and worshipped. According to them from the spiritual standpoint the idol may be to the worshipper a symbol (pratika) of the Supreme God-head intended to invoke a sense of the vast and intimate reality, and suggesting the essential truth of the real that is beyond all name or form and it is a basic postulate of Hindu religion that different images do not represent different divinities, but they are really symbols of One Supreme Spirit and in whichever name or form the deity is invoked the Hindu worshipper purports to worship the Supreme Spirit and nothing else. It is, however, possible that the founder of the endowment or the worshipper may not conceive on this highest spiritual plane but held that the idol is the very embodiment of a personal God, but that is not a matter with which the law is concerned. The relevant observations are:

"Neither God nor any supernatural being could be a person in law. But so far as the deity stands as the representative and symbol of the particular purpose which is indicated by the donor, it can figure as a legal person. The true legal view is that in that capacity alone the dedicated property vests in it. There is no principle why a deity as such, a legal person should not be taxed if such a legal person is allowed in law to own property, even though in the ideal sense and to sue for the property in its name

1. A. I. R. 1969 S. C. 1089.
2. 27 Madras 485.
3. A. I. R. 1925 P. C. 139.

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rent and to defend such property in a Court of law again in the ideal sense."

The legal position, therefore, appears to be this. Normally the images worshipped by the Hindus are visible symbols representing some form of the three-fold attributes of God based upon the Hindu idea of Trinity, namely, creater, preserver and destroyer. The object of worship is not the image but the God believed to be manifest in the image for the benefit of the worshippers who cannot conceive or think of the deity without the aid of perceptible form on which they may fix their minds and concentrate attention for the purpose of meditation. According to the Hindu notion the image itself is not the God but it is the visible personified deity manifesting itself to the devotees by means of the image. Where a Hindu dedicates property for the worship of a God by means of an image, the property is, by a legal fiction, deemed to be vested in a juristic or juridical person, and the God which is believed to be manifest in the image is to be deemed the fictional person holding property. Material image is merely a means of worship of God and the consecrated image is the body of which the invisible spirit is the soul.

18. Mukherjee in his Treatise on "Hindu Law of Religious and Charitable Trusts" third edition, traces the history of the idol worship. He says that:

"It is difficult to say at what period of time idol worship was introduced among the Hindus ..... the Gods that the popularly worshipped by the Hindus at the present day are for the most part Puranic deities, descriptions of which occur in the various Puranas. The puranic Gods became popular in India after the rise of the School of Buddhism..... Some Puranas extol the worship of Vishnu while others are in favour of Siva worship. Upanishads which embody the philosophical truth of the Vedas describe Brahman or the Supreme being as 'that from which all things born that by which when born they live and into which they enter at death. These creative, preservative and destructive functions or aspects of the divinity constitute the trinity of the Purana and are symbolised respectiveiy by Brahma, Vishnu and Siva. The puranas say expressly that Brahma, Vishnu and Siva though three in form really constitute one entity and there is no difference amongst them except that of attributes. The reason is that each of the functions of creation, preservation and destruction implies the others and contains the others in a latent form."

19. At page 31 the learned author, while considering the question whether property can reside in the aim or purpose, says that:

"After all, juristic personality is a mere cration of law and has its origin in a desire for doing justice by providing as it were centres for jural relations. In the Hindu Debutter it seems that the position is slightly different and in such cases not whole endowment but the ideal which as an exmodiment of a pious or benevolent idea constitutes the centre of the fonndation, is looked upon as the juristic being in which the Debutter property vests."

According to the learned author "dedication to a deity" is not only a compendious expression but a material embodiment of the pious purpose and though there is difficulty in holding that the property can reside in the aim or purpose itself, it would be quite consistent with sound principles of Jurisprudence to say that a material object which represents or symbolises a particular purpose can be given the status of a legal person, and regarded as owner of the property which is dedicated to it. This view has been accepted by the Supreme Court in *Jogendra Nath* v. *I. T. Commissioner*[1].

20. In this case it is urged by the appellant that the image of Sri Sai Baba installed in the temple in question is symbolic of a human being and not of any of the attributes of the Trinity and as such, it cannot be called a "deity" with a juristic personality of owning property and with the power to sue and being sued. It is well known that Hindus worship not only the various attributes of the Trinity but also other forms of images. The decisions referred to above go to show that the worship of Gurus who have been held in reverence by their disciples and of warriors who have been held in esteem was not unknown among the Hindus. Therefore, the mere fact that the idol is in a human form cannot make it (*sic*) any the less a deity if it is worshipped as personifying the Supreme being. It is also well known that the Hindu religion recognises or tolerates the worship of certain deities personal to them, that is, "Ishta Devatha". As a matter of fact, Hindu religion preaches the worship of personal God and such personal God may take the shape of the Guru or Sage who has exhibited certain extraordinary

1. A. I. R. 1969 S. C. 1089

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spiritual power. Therefore, the whole question depends upon the faith of the persons who worship the idol and if they feel that by worshipping that idol they are elevated spiritually that idol can be said to be a deity symbolising the particular religious purpose.

22. In this case originally the deity of Sri Sai Baba Temple was shown as the first plaintiff represented by its trustee, Loganatha Mudaliar. But after Loganatha's death, his sons, plaintiffs 2 and 3 have been impleaded in their capacity as trustees. Later, the word "Temple" was deleted and Sri Sai Baba alone was shown as the plaintiff represented by Sai Baba Mandali trustees of whom Loganatha was one. It is said that the Mandali trustees cannot be the trustees of Sri Sai Baba even if it is treated as a deity and that they cannot maintain the suit. But Loganatha was one of the persons shown as a trustee and he can validly represent the deity of Sri Sai Baba as he is the only named trustee under Ex. A-4. After his death, his other sons have come on record and they can continue the suit as representing the deity of Sri Sai Baba. As pointed out in *Guru Charan* v. *Satyanarayana* [1]

"As to whether the deity represented by some of its shebaits is adequately represented or as to whether the suit proceeds with the consent and approval of the entire body of shebaits is in the final analysis a mere question of procedure and expediency and is meant more to protect the interest of the shebaits than of the deity itself. Therefore, if the Court is satisfied keeping in view the facts of the particular case before it that the deity is adequately represented and on account of non-impletion of some of the co-shebaits the deity is not affected, the suit cannot be thrown out."

Therefore, the suit has to be held to have been properly constituted. In my view the suit is maintainable and the objection taken by the appellant as to the maintainability of the suit cannot be sustained. The second appeal, therefore, fails and is dismissed with costs. No leave. Time for possession four months.

V.C.S.

Sri Sai Baba and *others*
v.
M. L. Hanumantha Rao,
Ramanujam, J.

28th July, 1977. C.S.Nos. 126 of 1972, and 82 of 1975.

1. A.I.R. 1971 Ori. 15.

C.P.C. *Ss.9, 11 and 92*, Hindu law, Alienations, Joint Family, Limitation, Trusts and Constitution of India (42nd Amendment), Part IV (a)—*Endowment in favour of the deity of Sri Sai Baba installed in a temple—Suit on behalf of the deity—Maintainability—Decree in earlier suit for similar relief and between the same parties in City Civil Court—Binding nature in subsequent suit filed in High Court—Suits in different Courts on account of pecuniary jurisdiction—Binding nature of the decree of one in the other suit—Question of spiritual belief, not to be decided with reference to Fundamental Duties specified in Part IV*—Held, *installation of deity of Sai Baba and worship thereof cannot constitute any violation of the Fundamental Duties of Part IV of Constitution—Trust not illegal or against public policy—Bar of limitation after 3 years of the plaintiff attaining majority*, held *will apply—Suit* held *not barred under S.92, C.P.C.—Suit for partition without specific prayer for setting aside the alienation by the managing member*, held *has to fail—Representation by the Managing member in a suit—Binding nature upon other coparceners—Scope.*

[NOTE :—This case raises similar questions as in the decision reported at Page 328, and hence is reported immediately following it.

The decision reported herein arises out of a common judgment in two suits. The facts in the first suit are: The suit was filed on behalf of the deity, Sri Sai Baba, and the Sri Satya Sai Mandali, represented by its trustees, on the Original Side of the High Court for delivery of vacant possession of certain portions of the suit premises. The plaintiffs relied on the decree passed after contest in an earlier suit in the City Civil Court filed for recovery of possession of two rooms in the occupation of the defendants as binding on the defendants on the principle of *res judicata*. The suit was resisted on the plea that the present suit could not have been filed in the City Civil Court where the earlier suits have been filed on account of pecuniary jurisdiction and that S.11, C.P.C., cannot come into operation as the City Civil Court could not have tried the present suit. It was also contended for the defendants that the establishment of Sri Sai Baba Temple at Guindy and the installation of Sri Sai Baba deity therein and the endowment of the suit house for the performance of pooja therein violated the fundamental duties as set out in the Forty Second amendment to the Constitution of India, being opposed to rational belief and scientific truth and that therefore, the creation of the temple and the endowment of the properties for its maintenance are all unconstitutional. It was also claimed that as the creation of such a temple is against public policy the trust itself is illegal and that in any event the objects set out in the trust deed were void for uncertainty as one of the purposes of the trust is the propagation of "His Faith" and "His Desire" without any detailed specifications of the same.

[Paras 1 to 10 & 22.]

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FULL BENCH.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Stephen, Mr. Justice Mookerjee, Mr. Justice Coxe and Mr. Justice Chatterjee.

1909
Aug. 28

BHUPATI NATH SMRITITIRTHA
v.
RAM LAL MAITRA.*

Hindu Law—"Relinquishment in favour of a sentient person"—Bequest for establishment of an image and worship of a Hindu deity.

The principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, nor does it make such a bequest void.

Upendra Lal Boral v. *Hem Chundra Boral* (1), *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2) and *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (3) overruled so far as they conflict with the view of this Full Bench.

THE reference to Full Bench by Mitra and Bell JJ. was as follows:—

Mitra J. There is now no doubt as to the facts. Umesh Chandra Lahiri died on the 28th of June 1890, having made his last will on the 26th June 1890. He left him surviving his widow Braja Kumaree, his mother Anaudamayee, a sister Iswamba and a cousin-sister Bhagabatee. They are now dead. Braja Kumaree died on the 27th of January 1894. Her husband had, by his will, given her authority to adopt three sons in succession, one in default of the other, but she did not exercise her authority. The seventh defendant, Hem Chandra Lahiri, is now admittedly the testator's heir-at-law, if the true construction of his will leads to a conclusion of intestacy after the widow's and mother's death. The plaintiffs are the sons of the testator's *guru* (spiritual preceptor) Harinath Bhattacharya, who died either in December 1892 or January 1893, *i.e.*, about a year before the widow's death.

One of the provisions made by the testator in this will was that, if at the death of his widow no son or adopted son existed capable of taking his property, the executors named in his will would establish an image of the goddess Kalee in the name of his mother Anandamayee, and the surplus income left after the worships of the family deities, Iswar Gopal Dev, Saligram Narain and Iswar Mahadev, should be devoted to the worship of the goddess to be called Anandamoyee Kalee. In accordance with this direction, the executors established and consecrated in the month of October or November 1894, an

* Reference to Full Bench in Appeal from Original Decree, No. 25 of 1906.

(1) (1897) I. L. R. 25 Calc. 405. (2) (1901) I. L. R. 29 Calc. 260.
(3) (1902) I. L. R. 30 Calc. 521.

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image of the goddess made of earth, and later on, in the year 1899, replaced the image by one made of stone and had a temple built for its location. They thus carried out the directions in the will, and the worship has ever since been duly carried on.

The testator, however, added a direction in his will that "if, for any reason, the image of Iswar Kalee Devi is not established and if the income of my properties is not used for her *sheba* and worship, then my *gurudev* and his sons, grandsons, etc., in succession shall get my Rangpur properties and possess the same, in absolute right from generation to generation with right to sell or make a gift thereof." A similar provision was made with respect to some other properties in favour of the testator's *purohit* (priest).

The present suit was instituted by the sons of the *guru* on the 4th July 1904, for a construction of the testator's will, for a declaration that the trust for the establishment and consecration of the image of the Goddess Kalee and her worship was void for possession of the Rangpur properties and for an account and mesne profits. Some of the defendants are the surviving executors and trustees. The defendant Sarat Chandra Maitra was entitled to an annuity under the will. Hem Chandra Lahiri and the legal representatives of some of the deceased executors and trustees are also parties to the suit. The suit was defended by the surviving executors and trustees.

On the question of the validity or otherwise of the bequest relating to the Goddess Kalee, the lower Court was of opinion it was valid, and it accordingly dismissed the suit. The plaintiffs have appealed from the decision of the lower Court, and the first and the most important question raised for our consideration refers to the validity of this bequest. The question is one of some difficulty as it involves the consideration of the wider question. Does the text or phrase "relinquishment in favour of the donee who is a sentient person" in Chapter I, paragraph 21 of the Dayabhaga of Jimutavahana, the text which is the foundation of the doctrine of Hindu law that a gift to an unborn is invalid, render a bequest for a religious purpose invalid, when the physical manifestation of the Hindu deity for whose worship the bequest is made was not in existence at the time of the testator's death?

In the *Tagore case* (1), the Judicial Committee of the Privy Council was dealing with the case of gifts to human beings, and applying the rule laid down in Dayabhaga, Chapter I, paragraph 21, their Lordships came to the conclusion that in order to make a gift under a will valid, the donee, except in the case of an adopted child or a child *en ventre sa mere*, must be a person in existence capable of taking at the time the gift takes effect. The reason for the exception in favour of child in embryo, as given by Willes J., who delivered the judgment of the Judicial Committee, was that by a rule generally adopted in jurisprudence, children in embryo who afterwards come into separate existence are included in the class of sentient beings. The reason given for the inclusion of an adopted son was that, in contemplation of Hindu law, such a child is begotten by the father on behalf of whom he is adopted and is by a fiction of law supposed to be in embryo at the time of the death of the person who has given an

(1) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.

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authority to adopt either by a deed of adoption, or by a will. A Hindu deity is, in the contemplation of Hindus, always in existence; the establishment and consecration of a visible image is merely a physical manifestation. The idea of the birth of any of the deities of the Hindu pantheon at the present age or of any deity being *non-sentient* is utterly opposed to the Hindu *shastras* and Hindu religious notions. I do not, therefore, see why a gift to a Hindu deity should not be an exception in the same way as to a child in embryo or an adopted son.

Bequests for charitable purposes, such as bequests for feeding the poor, for the establishment and maintenance of schools, and for medical help to the sick, are much of the same character. The exact objects of charity are not ascertainable at the time of the testator's death and the objects themselves must always be fluctuating. Trustees hold property for charitable purposes. The objects of charity, though not definitely ascertainable at any time, are always in existence, and bequests for charitable purposes have always been held to be valid.

In *Upendra Lal Boral* v. *Hem Chundra Boral* (1), however, a bequest or dedication of property to a Hindu deity whose image was to be established and consecrated after the death of the testator by his executors or trustees was declared to be void. The learned Judges who decided the case were of opinion, that although there could be no doubt that the deity was always in existence, there could be no deity as such capable of accepting gifts until the deity was personified and they relied on the *Tagore case* (2) and *Bai Motivahu* v. *Bai Mamubai* (3). Neither of these cases, however, refers directly to gifts to deities. The decision in *Upendra Lal Boral* v. *Hem Chandra Boral* (1) was followed by Stanley J. in *Rojomoyeee Dassee* v. *Troylukho Mohiney Dassee* (4) and by Stephen J. in *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (5), and in *Promotha Nath Roy* v. *Nagendrabala Chaudhrani* (6), the learned Judges (Caspersz and Coxe JJ.) were inclined to follow these decisions.

A different view, however, appears to have been taken by Sale J. in *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (7). It was held in that case that a bequest of property to trustees for the performance of the worship of deities to be established and consecrated periodically was valid. In a large number of cases cited before us, the validity of bequests for the performance of worships after the periodical establishment and consecration of images of deities such as Durga and Kalee and for the construction of temples and establishment of images was not questioned, and Sale J. had himself followed the practice without question in a previous case: *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (8). The validity of bequests for the performance of periodical worships of deities like Durga, Kalee, etc., has in fact never been questioned, though it is well known that their worships are performed, after

(1) (1897) I. L. R. 25 Calc. 405.
(2) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.
(3) (1897) I. L. R. 21 Bom. 709; L. R. 24 I. A. 93.
(4) (1901) I. L. R. 29 Calc. 260.
(5) (1902) I. L. R. 30 Calc. 521.
(6) (1908) 12 C. W. N. 808.
(7) (1905) 9 C. W. N. 528.
(8) (1897) I. L. R. Calc. 25, 112.

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images are made and consecrated. I do not see my way to make any distinction in principle between an image of a deity to be permanently established and an image to be established and consecrated and worshipped for a time and then submerged in water.

An image of a deity may be broken or destroyed, and it is often necessary to replace it by another image and then to consecrate it. Notwithstanding the establishment of a new image, the essence of the deity which in contemplation of law is a juristical person in eternal existence is supposed to be the same as it was in the old image. It will be difficult to hold at the present day that on the mutilation or destruction of an image, an endowment lapses. A change in physical manifestation does not destroy the personality of a Hindu deity, neither does the establishment and consecration of an image bring, in the contemplation of Hindu *shastras*, a juristical person into fresh existence capable of accepting a gift.

As a matter of fact, no Hindu deity is supposed, except by a fiction, to actually accept or enjoy the benefits arising out of use of property, in the sense that these words may be used with respect to human beings. A gift to a deity is in substance a gift for charity, for the use generally of Brahmans or a particular Brahman or his family, and the idea attached to such a gift is a charitable use coupled with spiritual benefit to the donor. An image is supposed to be necessary for worship, as the conception by man of a deity without a physical representation is psychologically impossible.

The correctness of the decision in *Upendra Lal Boral* v. *Hem Chundra Boral* (1), which has been followed in some of the later cases, has been questioned before us. There is also a want of harmony in the reported cases as to the application of the principle on which a gift to an unborn has been declared to be invalid. I have also grave doubts as to the correctness of the proposition of Hindu law laid down in *Upendra Lal Boral* v. *Hem Chundra Boral* (1) and followed in the later cases. I, therefore, refer the following questions for decision by a Full Bench :—

(*i*) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void ?

(*ii*) Whether the cases of *Upendra Lal Boral* v. *Hem Chundra Boral* (1), *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2) and *Nogenara-Nandini Dassi* v. *Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void ?

Bell J. I concur in the statement of the acts of the present case made by Mr. Justice Mitra, and I agree with him that the question of law set out by him should be referred to a Full Bench for decision.

(1) (1897) I. L. R. 25 Calc. 405. (2) (1901) I. L. R. 29 Calc. 260.
(3) (1902) I. L. R. 30 Calc. 521.

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Mr. H. D. Bose (with him *Babu Manmathanath Mukherji* and *Babu Ramakanta Bhattacharya*), for the appellants. The testator himself contemplated that the worship was to be to a *Thakur* after establishment. It was not done in his lifetime.

[JENKINS C.J. *Attorney-General* v. *Pearson* (1), an English case, is very much similar to this.]

But it is held in this country in *Sibchunder Mullick* v. *Treepoorah Soondry Dossee* (2) that a gift to Kalee or Durga without any *bigraha* is bad.

[JENKINS C.J. The decision is vague, and I doubt whether that case would be accepted as a correct exposition of law.]

A gift to a *Thakur* is not necessarily a gift for charity, nor is a gift for the worship of a deity so.

[JENKINS C.J. Every gift for religious purpose is a gift for charity.]

But the gift is only to the image.

[JENKINS C.J. But to succeed you must establish: (i) that gift for worship is bad; (ii) that gift to an image is so connected with worship that they cannot be separated, the one from the other, and is therefore also bad.]

According to Hindu ideas, you cannot worship a deity except in the form of an image. In this case the dedication of the surplus income to Kalee is so connected with the establishment of the image that you cannot give effect to the gift without the establishment and consecration of the image. The image is in the eye of law a juristic person, and not the deity: *Doorga Proshad Dass* v. *Sheo Proshad Pandah* (3) and *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (4). The case of *Upendra Lal Boral* v. *Hem Chundra Boral* (5) is on all fours with this case and should be followed.

Babu Golap Chandra Sarkar (with him *Babu Mahinimohan Chakravarti* and *Babu Shib Chandra Palit*), for the respondents. It is only in the ideal sense that property vests in

(1) (1817) 3 Mer. 353.
(2) (1842) 1 Fulton 98.
(3) (1880) 7 C. L. R. 278.
(4) (1904) I. L. R. 27 Mad. 435.
(5) (1897) I. L. R. 25 Calc. 405.

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the deity: *Shibessouree Debia* v. *Mothooranath Acharjo* (1), *Prosunno Kumari Debya* v. *Golap Chand Baboo* (2) and *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (3). The property is practically held by the trustee. A deity or image cannot have the right of ownership: see Manu, Chapter XI, v. 26, and Medhatithi's Commentary on it. No Hindu professes to give to God. He only dedicates to the worship of God: see Raghunandan's '*Prana Pratistha*' quoted in Sarkar's Hindu law, 3rd Edition, page 420. The image is only the means of worship. The testator distinguishes between Kalee and image of Kalee. There is no gift to the God or the image. Then the question is who is to accept the gift? Does the consecrated image or the deity accept the gift? No, the idea is repugnant to the Hindu mind that a God enjoys a property. Gods are not benefited by dedication. Secular benefit is derived by learned Brahmans; the donor enjoys spiritual benefit. The law against perpetuity does not apply to gifts for religious and charitable purposes: see Act IV of 1882, section 17. On principle there cannot be any difference between periodic worships (*e.g.*, Durga Puja, etc.) and permanent *sheba*. All such gifts are valid: *Ramtonoo Mullick* v. *Ram Gopal Mullick* (4), *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (5), *Gokool Nath Guha* v. *Issur Lochun Roy* (6), *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (7), the same case on appeal in *Bisseswar Prasanna Sen* v. *Bhagabati Prasanna Sen* (8), *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (9) which is not quite in my favour, *Parbati Bibee* v. *Ram Barun Upadhya* (10) and *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (11). The question in this appeal was not exactly raised in most of the cases cited.

(1) (1869) 13 Moo. I. A. 270; 13 W. R. P. C. 18.
(2) (1875) 14 B. L. R. 450; 23 W. R. 253; L. R. 2 I. A. 145.
(3) (1904) I. L. R. 32 Calc. 129; L. R. 31 I. A. 203.
(4) (1829) 1 Knapp. 245.
(5) (1879) I. L. R. 5 Calc. 438, 442
(6) (1886) I. L. R. 14 Calc. 222, 223.
(7) (1897) I. L. R. 25 Calc. 112, 124.
(8) (1906) 3 C. L. J. 606, 613.
(9) (1901) I. L. R. 29 Calc. 260, 275.
(10) (1904) I. L. R. 31 Calc. 895, 896. 899.
(11) (1905) 9 C. W. N. 528, 534.

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[JENKINS C.J. That a gift for religious purposes is bad cannot be contended. The only question following the case of *Runchordas* (1) would be about uncertainty.]

Manohar Ganesh Tambekar v. *Lakhmiram Govindram* (2) is in my favour: see also *Doorga Proshad Dass* v. *Sheo Proshad Pandah* (3).

An endowment cannot lapse for image being broken: see Sarkar's Hindu law, 3rd Edition, page 422, Medhatithi referred to in Mitakshara, Chapter I, para. 7, section 17, and *Hayasirshapancharatna*. In *Upendra Lal Boral* v. *Hem Chundra Boral* (4) it was held for the first time that a provision for reconsecration of broken image cannot be validly made. Consecration of image is not its birth. The deity is always in existence. In *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (5) it was contended successfully that such a gift would be void. The case of *Upendra Lal Boral* (4) is directly opposed to it. God can neither be a donee nor a beneficiary.

Mr. H. D. Bose, in reply. Consecration is प्राणप्रतिष्ठा, *i.e.*, giving life. It is capable of accepting a gift only on consecration. God comes and resides in that image. *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (6) is distinguishable. The dedication was incomplete in that case and the beneficiary got the legal estate. In all cases, except that of *Gokool Nath Guha* (7), the dedications were to existing *Thakurs*.

Cur. adv. vult.

JENKINS C.J. The questions referred for our determination are:—

(i) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void?

(1) (1899) I. L. R. 23 Bom. 725; L. R. 26 I. A. 71.
(2) (1887) I. L. R. 12 Bom. 247.
(3) (1880) 7 C. L. R. 278.
(4) (1897) I. L. R. 25 Calc. 405.
(5) (1902) I. L. R. 30 Calc. 521.
(6) (1904) I. L. R. 32 Calc. 129; L. R. 31 I. A. 203.
(7) (1886) I. L. R. 14 Calc. 222.

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(ii) Whether the cases of *Upendra Lal Boral* v. *Hem Chundra Boral* (1), *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2) and *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void?

The disposition which has led to this reference is contained in the will of Umesh Chandra Lahiri, and is in these terms :—

"(*Ka*) All my properties shall be placed in the hands of Babu Ram Lal Maitra, son of late Ram Chandra Maitra of Haripur, and the grandsons of my father-in-law, Sriman Kali Prasanna Maitra, Sriman Chandra Maitra, Sriman Pratap Chandra Maitra, Sriman Abhay Govinda Maitra, etc., as trustees. They shall according to the provisions made in para. 4 pay to the persons mentioned in that para., their monthly allowances, as fixed by me: and shall defray the expenses for the performance of rites for the spiritual welfare of my mother, full sister and cousin (father's sister's daughter): and shall pay to my *gurudev* Srijukta Hari Nath Bhattacharya of village Purbasthali in the district of Burdwan Rs. 10 as *barshik* and to my *purohit* Srijukta Srish Chandra Chakrabarty of Salkeah Rs. 5 as *barshik*, and after defraying the expenses for the *sheba* and worship, during my turn of the ancestral *ijmali bighaha*, Iswar Gopal Dev Thakur, Saligram Narain and Iswar Mahadev *Thakur*, they shall spend the surplus income which may be left in the *sheba* and worship of Kalee after the name of my mother, *i.e.*, in the name of Iswar Anandamoyee Kalee. The image of the deity shall be established and consecrated at my dwelling-house or at Kashee, and in case any of the persons mentioned in para. 4 dies, then the allowance which I have fixed for him or her, during his or her lifetime, shall, after his or her death, be spent for the worship of the said Iswar Anandamoyee Kalee.

"(*Kha*) If the said Ram Lal Maitra or any of the grandsons of my father-in-law dies, his heirs shall be appointed in

(1) (1897) I. L. R. 25 Calc. 405. (2) (1901) I. L. R. 29 Calc. 260.
(3) (1902) I. L. R. 30 Calc. 521.

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his place, in order of seniority and act according to the provisions made in para. (*ka*) and hold the estate as trustees. If any of those heirs be a minor, then his lawful guardian shall hold the estate during his minority, and when he will have attained his majority then the estate shall pass into his hands as a trustee."

The will then goes on to provide that if for any reason the image of Iswar Kalee Debee is not established and if the income of the testator's properties is not used for her *sheba* and worship, then the testator's *gurudev* and his sons, grandsons, etc., in succession should get his Rangpur properties and possess the same in absolute right from generation to generation

The facts as found by the referring Bench are briefly these: Umesh Chanda Lahiri died on the 28th June 1890, and in the events which have happened Hem Chandra Lahiri became and now is his heir-at-law. It was not until 1894 either in the month of October or November, that the executors for the first time established and consecrated an image of the Kalee. The image so established was in the first instance of earth, but in 1899 it was replaced by one of stone and a temple was built for its location. The worship has ever since been duly carried on as provided in the will. All we have to consider is whether the fact that the image was established and consecrated for the first time after the testator's death invalidates the provision in the will.

It is necessary to observe the precise character of this provision. It does not purport to be a simple gift of property to an image to be consecrated as was to some extent the basis of the appellant's argument before us; but the testator directed all his property to be placed in the hands of persons named by him and subject to certain payments these persons were directed to spend the surplus income which might be left in the *sheba* and worship of Kalee after establishing the image of the Kalee after the name of the testator's mother. Now this manifestly was a disposition for religious purposes and such dispositions are favoured by Hindu law. Thus it is said by Katyayana: "If a gift be promised by a person whether in health

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or sickness for a religious purpose, and he dies without making it, his son should be compelled to make it: Of this there is no doubt" (see Mandlik's Hindu law, page 124). Again in the Chapter of the Mitakshara which deals with gifts it is said "whatever has been promised to any body for religious purposes should be given to him without fail": see Mitakshara, Vyavahara Adhyay, Part III, Chapter IV, section 14 (translated by the late Girish Chandra Tarkalankar). "Property," it is said, "thus given by a man or appropriated (by him) to religious uses cannot be set aside by his son and the rest. The giver is competent to take care of the wealth or property endowed for religious purposes. He can no longer resume it, because *Dharma* is the then master or owner of such property. Let the owner himself or his representative, O Goddess! appropriate to pious purposes the corpus of a property or its income according as it may have been resolved": Mahanirvana Tantra, section 12, vv. 92—94. Other texts might be cited in support of this view, but it is unnecessary to elaborate this point.

And it is not in the texts alone that sanction is to be found for the view that dispositions for religious or charitable purposes are favoured: the leaning of the Courts too is in the same direction. Thus in the *Mayor of Lyons* v. *E. I. Co.* (1), it was said "Their Lordships are well aware that in pursuing this course they are sanctioning a proceeding for which there is no exact and complete precedent in the administration of charitable funds in this country; but in one respect there is sufficient authority, *viz.*, as far as regards a postponement of distributions and the not declaring the gift void on account of any present difficulty in giving it effect: the case of *A.-G.* v. *Bishop of Chester* (2) furnishes a direct authority for not declaring a legacy void, because it was for an object which could not at the time be accomplished and for retaining the fund in Court until it should be possible to apply it."

Now, had the direction in the testator's will simply been that the surplus income should be spent "in the *sheba* and worship

(1) (1836) 1 Moo. I. A. 175.

(2) (1785) 1 Bro. Ch. 444; 28 E. R. 1229.

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of Kalee," it would, I think, clearly have been good, for the purpose would have been religious and the direction would not have been bad for uncertainty.

On the question of uncertainty we may look for assistance to the English decisions [*Ranchordas Vandravandas* v. *Parvati Bai* (1)], and in England it has been held that gifts "for the worship of God" or "to be employed in the service of my Lord and Master" are good: [*A. G.* v. *Pearson* (2), *Powerscourt* v. *Powerscourt* (3), and *Re Darling* (4). Then does it invalidate the disposition that the discretion is for the spending of the surplus income in the *sheba* and worship of the Kalee "after establishing the image of the Kalee after the name of my mother?" I think not: the pious purpose is still the legatee, the establishment of the image is merely the mode in which the pious purpose is to be effected: see *Mills* v. *Farmer* (5). And the decision in *Ramtonoo Mullick* v. *Ram Gopaul Mullick* (6) shows that the pious purpose does not fail merely because the testator directs as a means of carrying it into effect, that something should be done after his death: [see too *Mayor of Lyons* v. *E. I. Co.* (7) and *Parmanandas Jivandas* v. *Vinayek Rao Wassudeo* (8)]. But then it is urged that the decision in *Upendra Lal Boral* v. *Hem Chundra Boral* (9) is against the validity of the disposition now under consideration. There, apparently, power was given by a testator to his wife to establish the service of an idol and by making a will in favour of it to manage the properties, construct a temple and perform the *sheba*.

In relation to those dispositions it was said, "if there was a gift to the idol it was bad because there was no idol in existence at the time of his death." In the first place, it is this decision that has principally led to the present reference, so that it cannot be regarded as in itself an authority binding on us. Next it is to be noticed that the learned Judges did not consider the aspect of the case which I have been discussing,

(1) (1899) I. L. R. 23 Bom. 725; L. R. 26 I. A. 71.
(2) (1817) 3 Mer. 353.
(3) (1824) 1 Mol. 616.
(4) [1896] 1 Ch. 50.
(5) (1815) 19 Ves. Jun. 482, 486.
(6) (1829) 1 Knapp. 245.
(7) (1836) 1 Moo. I. A. 175.
(8) (1878) I. L. R. 7 Bom. 32.
(9) (1897) I. L. R. 25 Calc. 405.

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but treated the disposition with which they were concerned, as though it were a simple gift to a non-existent idol.

I have shown that the disposition with which we have to deal in this case is something different from that.

But apart from that I think we should not regard the decision in *Upendra Lal Boral's case* (1) as affording any sufficient reason for holding the direction now under consideration as invalid.

That decision purports to rest on the authority of *Bai Motivahu* v. *Bai Mamubai* (2) where their Lordships after referring to the *Tagore case* (3) say, "Two rules applicable to the will now under consideration are laid down in the judgment of the Committee": one is "that a person capable of taking under a will must be such a person as would take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator," page 70 . . . . . And it is said (page 69): "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect from death they are generally so to be regarded as to the property which they can transfer and the person to whom it can be transferred."

Now, turning to the *Tagore case* (3), we find that the rule against a gift to a person not in existence and capable of taking from the donor at the time when the gift is to take effect, rests on the principle expressed in Dayabhaga, Chapter 1, ver. 21, by the phrase "relinquishment in favour of the donee who is a sentient person."

This passage in the Dayabhaga is used to illustrate the proposition that the "right of one may consistently arise from the act of another," and it is there pointed out in proof of this that in the case of donation the donee's right to the thing arises from the act of the giver; *namely, from his relinquishment in favour of the donee who is a sentient person.*

(1) 1897) I. L. R. 25 Calc. 405.
(2) (1897) I. L. R. 21 Bom. 709; L. R. 24 I. A. 93.
(3) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.

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The Privy Council evidently considered the later of these two cases was governed by the earlier, notwithstanding that to the one the Mitakshara and to the other the Dayabhaga applied, and that in relation to the question involved in the text cited the contentions of the two schools are not in complete harmony. So it is immaterial that the referring Bench does not state which school of law applies in the circumstances of this case. It is, no doubt, true that an idol has been frequently described as a juridical person and even as owning property [*Shibessouree Debia's case* (1)], but it has since been explained that it is only in an ideal sense property can be said to belong to an idol: [*Prasunno Kumari Debia's case* (2) and *Jagadindra Nath Roy's case* (3)]. Whether this ideal sense means more than that the dedication to a deity is a compendious expression of the pious purposes for which the dedication is designed, may be a question.

In favour of this view we have the doctrine of Medhatithi cited to us in the course of the argument that the primary meaning of property and ownership is not applicable to God, and the train of reasoning that is suggested by the teaching of the Aditya Purana that the Gods cease to reside in images which are mutilated, broken, burnt, and so forth. (Saraswati's Hindu Law of Endowment, page 129).

But whatever may be the true view on this obscure and complex question, this at least seems clear that the rule which requires relinquishment should be to a sentient person does not forbid the gift of property to trustees for a religious purpose, though that purpose cannot in strictness be called a sentient person: [*Ramtonoo Mullick's case* (4)]. It would seem that the rule propounded by Jimutavahana had regard rather to the general proposition for which he was contending, *i.e.*, that the act of the giver is the cause of property, than to its application to particular objects of benevolence. The fiction that an idol is a person capable of holding property must be kept within its proper limits, and were we to accede to the

(1) (1869) 13 M. I. A. 170.
(2) (1875) 14 B. L. R. 450; L. R. 2 I. A. 145, 152.
(3) (1904) I. L. R. 32 Calc. 129; L. R. 31 I. A. 209.
(4) (1829) 1 Knapp. 245.

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argument that has been advanced before us, we should be allowing fiction to be built on fiction to the hinderance and not for the furtherance of justice.

In my opinion, therefore, the reference should be answered by saying that the principle expressed by the phrase "relinquishment in favour of the donee who is a sentient person," does not apply to the direction contained in the testator's will that the persons indicated by him shall spend the surplus income in the *sheba* and worship of Kalee after establishing the image of the Kalee after the name of the testator's mother, and that if and so far as the cases cited in the reference conflict with this view they have not been correctly decided.

STEPHEN J. In this case I have had the advantage of reading the judgments of my colleagues before writing my own. I agree with their conclusions and concur in their reasons and have in fact nothing to add to what they have said. But by reason of the importance of the case I wish to explain briefly how the matter presents itself to me, relying on my brothers Mookerjee and Chatterjee for the contents of Hindu texts, which are of prime importance in the decision of the question before us.

There is no doubt, in the first place, that dedication by a Hindu of property to a deity is not only lawful, but commendable in a high decree. But the question arises what is the legal effect of such a dedication. A gift consists of two parts, abandonment of rights over the subject-matter of the gift by the donor, and acceptance of those rights by the donee. In a dedication to a deity, the abandonment by the donor takes place according to the ordinary law, but there can be no acceptance by the deity. Why this should be so may be a matter that we need not enquire into; but the fact appears to me to be explained by two self-evident propositions, namely, that it is a contradiction in terms, to talk of the Creator accepting anything, in the legal sense of the word, from a creature, and that it is inconceivable that laws which were made for, if not by, men should be applicable to a deity.

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But though a dedication to a deity does not constitute a gift, it has a legal effect. The intention of the donor is that the subject-matter of the gift shall be used for doing honour to the deity by worship and for conferring benefit on the worshippers and the ministers of the deity who conduct it. This worship is properly and, I understand, necessarily carried out by having recourse to an image or other physical object; but the image is nothing till inspired by the deity. It is the duty of the Sovereign to see that the purposes of the dedication are carried out.

On, and consistently with, this basis of general principles, modern law has arrived at certain conclusions. Of these the most important, for present purposes, is that an idol after it has been duly constituted is a juridical person in an ideal sense. The practical meaning of this somewhat elusive expression is that the ministers of an idol have over the property dedicated to the idol, which is the same thing as the deity inspiring the idol, the same rights that they would have if they were trustees for his benefit, or if he was an infant and they managers on his behalf, being at the same time liable to corresponding duties legally enforceable. This seems to me to show that such a dedication as the present is a devise for a religious purpose, such as, on the authorities referred to by my learned brothers, would be recognised as valid by English law, and not considered as bad for uncertainty.

The above considerations leave no room in the case of a dedication to a deity for the application of the rule as to the invalidity of gifts other than to sentient being laid down in the *Tagore case* (1), and it follows that the present case and the subsequent cases quoted in the reference before us must be held to have been wrongly decided.

MOOKERJEE J. The two questions of law which have been referred for decision by the Full Bench have been formulated in the order of reference in the following terms:

(*i*) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it,

(1) (1872) 9 B. L. R. 377.

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apply to bequests to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, and make such a bequest void ?

(*ii*) Whether the cases of *Upendra Lal Boral* v. *Hem Chundra Boral* (1), *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2) and *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void ?

The will of the testator, upon the construction of which these questions have arisen for consideration, directed that, in the event of the failure of a son or adopted son to the testator, after provision made for certain bequests, the executors were "to spend the surplus income which may be left, in the *sheba* and worship of Kalee, after establishing the image of Kalee after the name of my mother, *i.e.*, in the name of *Iswar* Anandamayee Kalee ; the image of the deity shall be established and consecrated at my dwelling-house or at Kasee."

The plaintiffs commenced the present action for construction of the will and for a declaration that the trust for the establishment and consecration of the image of the Goddess Kalee and her worship was void, inasmuch as the deity had not been established in the lifetime of the testator.

We have been invited by the learned counsel for the appellants to answer the questions stated in the order of reference in the affirmative. It has been argued upon the authority of the decisions of the Judicial Committee in the cases of *Tagore* v. *Tagore* (4) and *Bai Motivahu* v. *Bai Mamubai* (5), that a person capable of taking under a will must be such a person as can take a gift *inter vivos*, and, therefore, must either in fact or in contemplation of law be in existence at the time of death of the testator. It has been assumed that this rule is applicable to a bequest to trustees for the establishment of a

(1) (1897) I. L. R. 25 Calc. 405.
(2) (1901) I. L. R. 29 Calc. 260.
(3) (1902) I. L. R. 30 Calc. 521.
(4) (1872) 9 B. L. R. 377 ; L. R. I. A. Sup. Vol. 47.
(5) (1897) I. L. R. 21 Bom. 709 ; L. R. 24 I. A. 93.

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Hindu deity, and the inference has been drawn that the manifestation of the deity in the form of an image must be in existence at the time of the death of the testator. As reliance has been placed upon two decisions of the Judicial Committee, which, in so far as they decide any questions of law, are binding upon this Court, it is essential to examine closely the decisions themselves, and to determine whether they are really applicable to the matter now under discussion. In this connection, it is useful to bear in mind the well known observation of Lord Halsbury in *Quinn* v. *Leathem* (1), that a case is only an authority for what it actully decides, and cannot be quoted for a proposition that may seem to follow logically from it.

In the case of *Tagore* v. *Tagore* (2) the question which arose for consideration was as to the validity of testamentary bequests and gifts *inter vivos* in favour of human beings. With reference to this subject, their Lordships of the Judicial Committee observed that the legal power of transfer under the Bengal School of Hindu law applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the Dayabhaga, Chapter I, para. 21, by the phrase "relinquishment in favour of the donee who is a sentient person." They then went on to add that, by a rule generally adopted in jurisprudence, this class will include children in embryo, who afterwards might come into separate existence, and also by legal fiction, an adopted son, who, in contemplation of law, is begotten by the father who adopts him, or for and on behalf of whom he is adopted; apart from this exceptional case which serves to prove the rule, the law was plain that the donee must be a person in existence capable at the time when the gift takes effect. It is not necessary for my purpose to investigate the precise scope of the passage of the Dayabhaga upon which reliance has been placed in support of the proposition that a gift to be valid must be in favour of a sentient person in existence

(1) [1901] App. Cas. 495, 506.

(2) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.

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and capable of taking from the donor at the time when the gift is to take effect. I shall assume this was the view adopted by Jimutavahana. The question, however, necessarily arises whether this doctrine is applicable to the case of bequests for the establishment of images of the deity and for their worship. To secure an answer in the affirmative to this question, it is argued that, by a fiction of law, an idol is a juridical person, and in support of this view reliance is placed upon the cases of *Shibessouree Debia* v. *Mothooranath Acharyo* (1) and *Prosunno Kumari Debia* v. *Golap Chand Baboo* (2). The later decision of the Judicial Committee in the case of *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (3), however, tends to indicate that this fiction must be employed cautiously and subject to many limitations. We must not, therefore, assume too readily that a Hindu deity is a juridical person for all purposes, and stands on precisely the same footing, capable of the same rights, and subject to the same liabilities, as an ordinary sentient being, and we must closely examine the scope of the applicability of the passage in the Dayabhaga, which is the foundation of the argument that a bequest for the establishment of an image of a Hindu deity and for its worship is subject to the same rules as a bequest in favour of a human being.

The passage in the Dayabhaga, which is supposed to go to the root of the matter, is as follows :

दृष्टं च लोकेऽपि दाने हि चेतनोद्देशविशिष्टत्यागादेव दातव्यापारात् सम्प्रदानस्य द्रव्ये स्वामित्वम्। (Bharat Shiromani's Edition, 1863, page 25.)

This is translated by Colebrooke as follows : "That is actually seen in the world, since, in the case of donation, the donee's right to the thing arises from the act of the giver, *viz.*, from his relinquishment in favour of the donee who is a sentient person." (Chapter I, para. 21.)

In the very next passage Jimutavahana proceeds as follows :

परस्वत्वापत्तिफलेन हि दानरूपता, तच्च फलं सम्प्रदानाधीनम्। (Page 27.)

(1) (1869) 13 Moo. I. A. 270.
(2) (1875) 14 B. L. R. 450 ; 23 W. R. 253 ; L. R. 2 I. A. 145.
(3) (1904) I. L. R. 32 Calc. 129 ; L. R. 31 I. A. 203.

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This is translated by Colebrooke as follows: "Gift consists in the effect of raising another's property; and that effect would here depend on the donee." (Chapter I, para. 22.)

On the first of these passages Rambhadra comments as follows:

एतेन स्वामिवस्तूपहितत्यागोदानमिति दानलक्षणं सूचितम्।

"By this, 'gift is abandonment characterised by the result of ownership'—this definition of gift is indicated."

Sreenath comments as follows:

एतेन स्वामिव-वस्तूपहितं त्यागरूपं दानलक्षणमित्युक्तम्।

"It is said hereby that the definition of donation is abandonment characterised by the result of ownership."

Sreekrishna comments on the passage as follows:

त्यागमात्रात् हवीत्सर्गादिव्यपात् स्वामिव्यजननात् आह "चेतोनद्देशेति"। "उद्देशः स्वामिवेन विषयता। सा च त्यागक्रियाया इच्छाया एव इति"।

"As ownership does not arise from every act of abandonment *like the offering of a bull*, etc., he (the author) adds 'intended for some conscious being.' The intention must have for its object the ownership (of another) and this object is the object of the desire of abandonment."

On the second passage, Rambhadra comments as follows:

अनीद्देश्यकत्यागविषयस्य अस्वामिकस्य ग्रहणे देवस्व ग्रहणवत् प्रत्यवायात्। एतद्विषयकमेव देवस्व ब्राह्मणस्वं वा ये हरन्तीत्यादि वचनम्। अन्यथा चौर्यस्य पापहेतुत्वसिद्धौ ब्राह्मणस्व-हरणनिषेधानर्थक्यम। एवञ्चान्यथानुपपत्त्या स्वपद-हरणपदे लाक्षणिके।

"Since sin arises from the taking of property without any owner, which is the object of an abandonment intended for another as from the taking of the property of the Gods. The passage of Manu 'Those who steal the property of the Gods or the property of the Brahmans, etc.,' refers to this subject. Otherwise, as theft is already admitted as a case of sin, the prohibition of the stealing of a Brahman's property becomes superfluous. Thus, there being no other way to avoid this inconsistency, the terms 'property' (स्व) and 'stealing' (हरण) must be taken in a figurative or secondary sense."

It is clear from these passages, as well as from other passages from Sreenath, Achyutananda, and other commentators on the Dayabhaga, that they understood the rule about

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the acceptance of a gift as a necessary condition for its validity as applicable to secular gifts alone. There is no foundation for the assumption that dedication to the deity or for religious purposes stands on the same footing. In fact, as Sreenath points out, an abandonment in favour of the deity is not comprehended within the term 'gift.' It is obvious from this that in the case of donation, after the owner has parted with his rights and before the subject-matter has been accepted, the property is in a peculiar position, so that when the term "property" is used in relation to what has been dedicated to the deity, it has a secondary sense different from what it bears when used in relation to persons.

Again, Shoolapani in his Sraddhabibeka discusses whether a *sradh* can be called a gift, and in that connection observes as follows :—

न च दानरूपता, उद्देश्यपित्रादि-गतस्वामित्वाजनकत्वात्। अस्वामित्वञ्च पित्रादीनां ममेदमिति स्वीकाराभावात्। आदित्यादिदेवतासम्प्रदानकदाने तु दानशब्दो गौणः, तद्धर्मे-दक्षिणादानाद्यतिदेशार्थः। देवग्रामीहस्तियाम इत्यादि प्रयोगस्तु गौण एव इत्युक्तम् तिर्यगधिकरणे। (Calcutta Edition, 1892, page 25.)

Of this passage, the following version will give a fairly accurate idea :

"*Sradh* has not the nature of a donation, as it does not generate ownership in the *manes*, etc., for whom it is intended. The absence of ownership of *manes*, etc., is due to the absence of acceptance on their part by the words 'this is mine.' In 'donation,' having for its dative case the Gods like the Sun, etc., the term 'donation' has a secondary sense. The object of this figurative use being extension to it of the inseparable accompaniment of that (*gift* in its primary sense), *viz.*, the offer of the sacrificial fee, etc. It has already been remarked in the Chapter on the *bratis* that such usage as *devagram*, *hastigram*, etc., are secondary."

Upon this passage Sree Krishna comments as follows :—

देवानां च इन्द्रादीनां अचेतनतया द्रव्यस्वाम्यभावात्। तर्हि कथं देवग्राम इति प्रयोगः, गौण इत्युक्तं तिर्यगधिकरणे।

"The Gods Indra, etc., being devoid of consciousness, cannot have ownership in any object. Then how can the

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expression *devagram* (village of the Gods) be used? It has been remarked in the chapter on *bratis* that the sense here is secondary."

Sree, Krishna in his explanation of the term *devagram*, makes the following comments:

तथाचात्र स्वस्वामिभावरूपसम्बन्धबाधात् मुख्यप्रयोगो न भवत्येव। किन्तु तदुद्देश्यक-त्यागे षष्ठीलाक्षणिकी, तेन देवोद्देश्यकत्यागविषयो ग्राम इत्यर्थे गौण इत्यर्थः।

"Moreover, the expression cannot be used here in its primary sense. The relation of one's ownership being excluded, the possessive case affix in *devas* (in the term of *devagram*) figuratively means abandonment for them (the Gods). Therefore, the expression is used in the sense of 'a village, which is the object of abandonment intended for the Gods.' This is the purport."

When we turn to the Suddhitatwa of Raghunandan, we find the subject of donation discussed. Thus in one passage he observes as follows:

तेन शास्त्रीयसम्प्रदाणस्वत्वापादक द्रव्यत्यागो दानम्। (Calcutta Edition, 1891, page 308).

"Thus donation is the abandonment of an object productive of the ownership of a person to whom it is given as prescribed in the shastras."

In another passage he says again:

एवञ्च त्यागात् निवृत्तमपि दातुः स्वत्वं सम्प्रदानागृहणात् असम्यक्त्वेन तस्य अदानत्वयुतेः। (Page 314.)

"Thus, though the ownership of the donor ceases to exist in consequence of abandonment on account of the non-acceptance by the person to whom it is given, it is incomplete and consequently it is not regarded as a donation in the Vedas."

In a third passage Raghunandan makes the following remarks:

ततश्च उद्देश्य पात्रविशेषो यदि न स्वीकरोति, तदा सोपाधित्यागविशेषस्य अनिर्वाहात् दातुः स्वत्वं निवर्त्तते इति रत्नाकरप्रभृतयः। (Page 308.)

"Thus, if the particular person for whom a gift is intended does not accept it, then as the abandonment with all its conditions is not fulfilled, the ownership does not terminate. Such is the view of Ratnakar and others."

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This indicates that in the case of dedication to the deity, the term "gift" or "donation" has properly no application at all. This is also supported by the following observations of Sree Krishna in a passage of his commentary on the Sradhabibeka :

अत्र द्रव्यत्यागेन स्वत्वजनने सम्प्रदानस्वीकार-प्रागभावोऽपि सहकारी कल्प्यते। . . . . अतएव उद्देश्य पात्रविशेषो यदि पश्चात् न स्वीकरोति, तदा सोपाधित्यागविशेषस्य अनिर्व्वाहात् न दातुः स्वत्वं निवर्त्तते इति रत्नाकर प्रभृतयोऽपि वदन्ति। (Calcutta Edition, 1892, page 16.)

The following rendering gives a fair idea of the above passage :

"Here, in the generation of ownership by the abandonment of an object, the pre-existence of acceptance by the person to whom the object is given is regarded as an auxiliary case . . . . . Therefore, if the particular person for whom a gift is intended does not accept it afterwards, then, as donation with all its conditions is not accomplished, the ownership of the donor does not cease to exist. This is maintained by Ratnakar and others."

To the same effect is the following passage from the Mitakshara, in which Vijnaneswara, commenting on verse 27 of the Vyavaharadhyay of the Institutes of Yajnavalkya, observes :

अयमभिसन्धिः स्वस्वत्वनिवृत्तिः परस्वत्वापादनं च दानम्। परस्वत्वापादनं च परो यदि स्वीकरोति तदा सम्पद्यते, नान्यथा। स्वीकारश्च त्रिविधः। मानसो वाचिकः कायिकश्चेति। (Bombay Edition, 1813 Saka, page 129.)

"Gift consists in the relinquishment of one's own right and the creation of the right of another, and the creation of the right of another man is completed on that other's acceptance of the gift and not otherwise. Acceptance is made by three things—mental, verbal or corporeal."

This is also amply borne out by passages from the Bhasya of Savaraswami on the Purvamimansa. In one passage Savara defines the characteristics of a gift as follows :

दान मित्युच्यते स्वत्व निवृत्तिः परस्वत्वापादनञ्च। (Adhyaya VI, Pada 1, Asiatic Society's Edition, Volume I, page 742.)

"A gift is the cessation of the ownership of one and the generation of the ownership of another."

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Savara in another passage observes as follows :

देवग्रामो देवक्षेत्रम् इति उपचार मात्रं, यो यदभिप्रेतं विनियोक्तुमर्हति, तत् तस्य स्वं न च ग्रामं क्षेत्रं वा यथाभिप्रायं विनियुङ्क्ते देवता, तस्मात् न सम्प्रयच्छति इति, देवपरिचारकानांतु ततो भूतिर्भवति, देवतां उद्दिश्य यत् त्यक्तम्। (Adhyaya IX, Pada 1, Asiatic Society's Edition, Volume II, page 145.)

"Devagram (village of the Gods), Deva-kshetram (land of the Gods). These are figurative terms. What one is able to employ according to one's desire is one's property. The Gods, however, do not employ a village or land according to their use. Therefore, no (body) gives (to the Gods). Whatever is abandoned with reference to the Gods becomes a source of prosperity of the servants of the Gods."

Savara amplifies this view in the passage which follows and which need not be quoted at length for our present purpose, and he repeats the same opinion -in Chapter 6, Section I, Volume I, page 606, when he speaks of the Gods as अनीशानाधनस्य, that is, not capable of possessing wealth, and explains the expressions *dhanagram* and *hastigram* as उपचरितम्, that is as merely figurative terms. See also Adhyaya IX, Pada 1 (Volume II, page 141), where Savara asserts that there can be no gift to Gods, as they have not body and are incapable of enjoyment. (नहि अविग्रहाय अभुञ्जनाये च दानं भोजनं वा सम्भवति)।

This view is supported by Medhatithi, the oldest and most authoritative of the commentators of Manu. Shastri Golap Chandra Sarkar on behalf of the respondent relied upon the following verse of Manu and the commentary of Medhatithi thereupon. (Mandalik's Edition, page 1354.)

देवस्वं ब्राह्मणस्वं वा लोभेनोपहिनस्ति यः।
स पापात्मा परेलोके गृध्रोच्छिष्टेन जीवति ॥ ११, २६ ॥

That wicked man who misappropriates God-property (God's property) and Brahmana-property lives in the next world by the leavings of vultures. *Manu, XI, 26.*

मेधातिथि।

१। यागशीलाणां त्रयाणां वर्णानां यद्वित्तं तद्देवस्वं ब्राह्मणस्यायागशीलस्यापि यत् स्वं तदब्राह्मणस्वमिति।

MEDHATITHI'S COMMENTARY.

1. The property of persons of the three regenerate tribes that are in the habit of performing sacrifices is (to be under-

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stood by the term) "God-property" (in this text, it is a compound word in the original, in which the word God is not inflected); and the property of a Brahman who is not in the habit of performing sacrifices is "Brahman-property."

२। एवमपि श्लोको गच्छत्येव। अर्थवादश्लोकोऽसौ।

2. Even in this manner this verse may certainly be explained. This sloka (verse) becomes (then) a laudatory one.

। धनं यज्ञशीलानामिति न चौर्यादिशब्दवच्छब्दार्थपरिभाषापरः।

3. For the property of persons habitually performing sacrifices (explained by us as the import of the term "God's property") is not (the meaning) derived from the primary meaning of the words (composing the term, namely, God and property) like (the meaning of) the term stealing and the like (but a figurative meaning).

४। अतोऽन्यथा व्याख्यायते देवानुद्दिश्य यागादिक्रियार्थं धनं यदुत्सृष्टं तद्देवस्वं, मुख्यस्य स्वस्वामिसम्बन्धस्यदेवानाम् सम्भवात्।

4. Hence (the term) is explained in another manner (thus)—Property that is set apart or relinquished for the purpose of performance of sacrifies and the like in honour of Gods is (to be taken as intended by the term) "God's property" by reason of the impossibility of the application to Gods of the primary meaning, namely, the relation of property and owner (a thing is property in relation to a person having proprietary rights over it, and a person is owner in relation to a thing over which he can exercise proprietary rights).

५। नहि देवता इच्छया धनं नियुङ्क्ते न च परिपालनव्यापारवत्सां दृश्यते, स्वर्गलोके तादृशमुच्यते तस्माद्देवोद्देशेन यदुक्तं नेदं मम देवताया इदमिति—तद्देवस्वं तच्चदर्शपूर्णमासादियागेष्वग्न्यादिदेवताभ्यश्चोदितं श्रिष्टसमाचारप्रसिद्धिं च गौणोपायदुर्गायागादिषु।

5. For the Gods do not use the property according to pleasure, nor is their found exertion for the protection (of the property): and property is described to be of that character in popular view. Accordingly, when by referring or pointing to Gods, it is stated—This is not mine, this is God's—that is God's property—and that property is enjoined (by the Vedas) for the Fire-God and the like in the Darsa-purnamassa sacrifice and the like—(and also enjoined) by the well-known practice of the learned (not by the Vedas, for Gods worshipped) in the Durga sacrifice and the like secondary means (of attaining

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spiritual benefit, but not primary, inasmuch as these are not enjoined by the Vedas).

ननु चतुर्भुजादिप्रतिमासम्बन्धि लोके देवस्वमुच्यते लोकप्रसिद्धस्य शब्दार्थः शास्त्रे ग्रहीतुं न्याय्यः ।

6. It cannot be argued that in popular view (property) relating to the four-armed or the like image (of Gods) is called "God's property," and it is proper to put the popular meaning on words (employed) in the Shastras.

७। स्यादेवं यदि देवस्वशब्दो निर्भागः प्रसिद्धिमुपेयात्, देवानां स्वं देवस्वमित्यवयवप्रसिद्ध्या समुदायार्थः प्रक्लृप्तः, न च वाक्यान्तरप्रकल्पनाप्रमाणेनाप्यस्ति ।

7. It would be so if the term "God-property" acquired notoriety (in that sense), undivided (into, or without reference to, its component parts)—God and property; but by reason of the notoriety of the component parts, namely, God's property is God-property, the meaning of the whole (as consisting of the meanings of the component parts) is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning.

८। मुख्यं चतुर्भुजादीनां देवत्वं प्रतिमाव्यवहारेणैवापहृतं ।

8. The assumption that the four-armed and the like have the status of God in the primary sense, is removed by the very use of (the term) image (in para. 6).

९। न च यदुक्तलक्षणमस्ति अथ समाचारतो देवस्वं भवतु स्वस्वामिभावस्तावन्नास्ति यथोक्तेन च प्रकारेण स्वव्यवहारोपपत्तिरिति शिष्टं द्वितीये ॥

9. Nor can it be argued that although there is no God in the primary sense, still let such property be God's property by usage. Be it so; but there cannot be the relation and owner. The use of the term property (as God's) may be reconciled in the manner stated (above by us). This is discussed in the second.

The concluding reference is to the commentary of Medhatithi himself on the Second Book of the Institutes of Manu, where he observes as follows on verse 189:

एवं देवस्वं देवपशवो-देवद्रव्यं इत्यादयोऽव्यवहाराः तादर्थ्येन उपकल्पितेषु पश्वादिषु द्रष्टव्याः । दण्डाधिकारितु प्रतिकृतिविषयम् एव देवताव्यवहारंदर्शयन्ति । अन्यथा व्यवस्थाभङ्गःस्यात् । कल्पितदेवतारूपाणां प्रतिकृतिनां कल्पितेनैव स्व स्वामिभावेन यत् सम्बन्धिदेवब्राह्मणराज्ञां तु द्रव्यं विज्ञेयमुत्तममित्यादिषु—देवद्रव्यं नहि देवतानां स्वस्वामिभावोऽस्ति मुख्यार्थासम्भवात् गौण एवार्थः याज्ञः (Mandalik's Edition, page 237.)

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It should be noticed that such expressions as property of the Gods, animals of the Gods, thing of the Gods, etc., mean animals, etc., supposed to be intended for the Gods. In the section on punishment, the term (देवता) 'God' is desired to be used in the sense of images only; otherwise there would be an upsetting of the established order. In such texts as "anything good belonging to the Gods, Brahmans and Kings should be known, etc., *i.e.*, a thing belonging to the Gods which is connected with an imaginary ownership of the images or likenesses imagined to be Gods. *The Gods have no ownership of their own*, and so the primary sense being inadmissible here, the secondary sense alone should be accepted."

It is conclusively established from these authorities that according to strict Hindu juridical notions there can be no gift in favour of the Gods. We are not concerned now with the philosophical reason for this position, and it is needless to enquire whether it is due to the fact that in the earliest times physical objects were deified, and could not, therefore, be very well supposed to be capable of acceptance of a gift, or to the fact that the deity was conceived as a being to whom a mortal could not aspire to make a gift, but could only content himself with a dedication of things for acceptance. Durgacharyya, however, in his commentary on the following passages of the Nirukta, seems inclined to adopt the view that as the Gods were originally physical objects deified, they could not very well be regarded as sentient beings capable of acceptance of gifts in the strict sense of the terms.

अथाकार चिन्तनं देवतानां पुरुषविधाः स्तुरित्येकं चेतनावदचेतनवदुभयतोभवन्ति तथाभिधानान्यथापि पौरुषविधिकैरङ्गैः संस्तुयन्ते। "चष्टे वा तं इन्द्रस्य विरस्य वाङ्" (ऋग्वेद ४।७।३१।३)। "यत् संगृभ्णा मघवन् काशिरित्ते" (१।२।१।५) तथापि पौरुष विधिकैः द्रव्यसंयोगैः। आ द्वाभ्यां हरिभ्यामिन्द्र याहि (२।६।२१।४) "कल्याणीर्जाया सुरणं गृहेते" (३।३।१९।६) अथापि पौरुष विधिकैः कर्मभिः। "अद्वीन्द्र पिबच प्रस्थितस्य"। (८।६।२१।८) "आशुत् कर्ण शुधी हवम् (१।१२०।६) * * * अपुरुष विधा स्तुरित्यपरमपि तु यद्दृश्यतेऽपुरुषैर्विधं तद्दृ यथाग्निर्वायुरादित्यः पृथिवी चन्द्रमा इति यथो एतच्चेतनावदचेतनवदुभयतो भवन्ति इत्यचेतनान्यप्येवं स्तुयन्ते यथाचप्रभृती-न्योषधि पर्य्यन्तानि यथो एतत् पौरुष विधिकैरङ्गैः सं स्तूयन्त इत्य चेतनेष्वप्येतद्भवत्यभिक्रन्दन्ति "हरितेभिरासभिरिति" (८।४।२९।२) गावस्तु निर्यथा एतत् पौरुषविधिकैः द्रव्यसंयोगैरित्येतदपि तादृशमेव सुखं रथं ययु ज

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सिन्धुरश्विनं (८।१०।४) इति नदीस्तुति र्यथा एतत् पौरुषविधिके: कर्म्मभिरित्येतदपि तादृशमेव: "होतु श्चित् पूर्व्वे हविरद्य माशतेति (८।४।२८।२) यावत्स्तुतिरेव । (निरुक्त उत्तरषट्क् दैवत काण्ड; अध्याय ३, पाद २, खण्ड ३) ।

The following version will give a fairly accurate idea of the passage which deals with the subject of the anthropomorphic and physical conception of the Gods :—

" One conception of the shapes of the Gods is that (they are) like human beings, inasmuch as the praises (of the Gods) speak of them like conscious beings. So also are their designations. They are praised with man-like limbs. As in Rigveda, 4, 7, 31, 3: 'Oh Indra! Thou art bulky in thy graceful arms.' Rigveda, 3, 2, 1, 5: 'Oh Maghaban! As thou joinest together the two worlds (earth and heaven) large as thy fist.' (They are praised also) as possessed of things used by men. Rigveda, 2, 6, 21, 4: 'Come Indra! with a pair of horses.' Rigveda, 3, 3, 19, 6: 'In thy house is an auspicious wife [Sachi]; they are praised also with acts of human beings.' Rigveda, 8, 6, 21, 8: 'Eat, Oh Indra! and drink of (these) lying before.' Rigveda, 1, 1, 20, 9: 'Oh Indra! having ears, hearing all around, listen to our invocation quickly.' The other (conception of the shapes of the Gods) is found to be that (the Gods) are not like human beings, as the fire, the air, the sun, the earth, the moon. The hymns represent them like conscious beings, and for this reason even unconscious objects are so praised, such as dice and things like these down to plants that yield only a single harvest. Thus, they are praised as if possessed of limbs like human beings. So it is even with unconscious things. Rigveda, 8, 4, 29, 2: 'These stones used for pressing out (*soma* juice) with their green mouths are crying after (the Gods).' As this is a praise of the stones, so is the following a praise by connecting with things that are used by human beings. Rigveda, 8, 3, 7, 4: 'Sindhu river joined a comfortable chariot furnished with horses.' As this is a praise of the river, so is the (following) nothing but a praise of stones by attributing actions like those of human beings. Rigveda, 8, 4, 29, 2: 'Let the stones eat clarified butter fit for eating before the invoker of the Gods (Agni).'"

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The same view is supported by Rigveda, 1, 1, 11, 1, and Atharvaveda, Book XX, Hymn 26, 4 and 5. It is not necessary, however, to pursue this line of investigation further. We start with the position that in the case of deities there cannot be any acceptance and, therefore, necessarily, any gift. If, therefore, a dedication is made in favour of the deity, what is the position ? The owner is divested of his rights. The deity cannot accept. In whom does the property vest ? The answer is that the King is the custodian of all such property. This is sufficiently indicated by the following passages : Vijnaneswar in the Mitakshara (Vyavahara Adhaya, verse 186) lays it down that one of the duties of the King is the protection of the Devagriha, and Aparaditya and Mitramisra in their commentaries on the same subject lay down the rule in the same manner. In the Sukraneeti, Chapter IV, verse 19, stress is laid upon this as one of the primary duties of Kings. The true Hindu conception of dedication for the establishment of the image of the deity and for the maintenance thereof is that the owner divests himself of all rights in the property ; the King, as the ultimate protector of the State, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but from the dedication, religious merit and spiritual benefit accrue to the founder and material benefit accrues to the person in charge of the worship and to the creatures of God.

It may further be observed that it is indisputable that the Hindu law encourages dedication of property for religious purposes. It is sufficient to refer to the following passage from Katyayana :

मुखेनार्त्तेन वा दत्तं श्राद्धितं धर्म्मकारणात्। अदत्वा तु मृते दाप्यस्तत्सुतैनाविचारयेत्॥

which is rendered by Mandalik as follows (page 124, Edition Yajnavalkya) :

"If a gift be promised by a person, whether in health or in sickness and for a religious purpose, and he dies without making it, his son should be compelled to make it. Of this there is no doubt."

There can be no question as to the genuineness of the passage, because it is quoted with approval in the Mitakshara,

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Viramitrodoya, Vyavaharamadhaba, Vyvaharamayukha, Kamalakar's Vivadatandab, Raghunandan's Suddhitattwa, Vivadaratnakar, and in Jagannath's Vivadabhangarnaba translated by Colebrooke. The spirit, if not the letter, of this text is entirely inconsistent with the position that a direction given by a Hindu that an image of a deity should be established, and that his property should be applied for the maintenance of the worship, is inoperative, because the image was not established by himself. Jagannath in Book II, Chapter IV, Section I, verse 3, touches upon this matter, and points out that the text of Narada relating to the recovery of objects of gifts not duly given (Asiatic Society's Edition 137) has no application to religious gifts. The conclusion, therefore, is irresistible that the doctrine laid down by the Judicial Committee in the cases of *Tagore* v. *Tagore* (1) and *Bai Motivahu* v. *Bai Mamubai* (2), as to gifts in favour of sentient beings, has no application to directions for the dedication of property for the establishment of images and for the worship thereof.

It has been argued before us that even if it be assumed that the rule about acceptance applies in the case of the deity as in the case of sentient beings, the validity of the testamentary disposition may be upheld, inasmuch as the deity is always existent, and it is immaterial whether the image is established or not. The argument in substance is that, to take a concrete example, whether a particular image of Kalee is established or not, the Goddess Kalee is ever existent, and a gift for the purpose of her worship is valid, although at the time of the death of the testator there is no image in existence. In support of this view reliance has been placed upon the following passage quoted by Raghunandan:

चिन्मद्स्यातीयस्य निष्कलस्याशरीरिणः।
उपासकानां कार्य्यार्थं ब्रह्मनो रूपकल्पना॥

"It is for the benefit of the worshippers or devotees that there is manifestation in male and female forms of the supreme being, which is bodiless, which has no attribute,

(1) (1872) 9 B. L. R. 377; 18 W. R. 359; L. R. I. A. Sup. Vol. 47.

(2) (1897) I. L. R. 21 Bom. 709; L. R. 24 I. A. 93.

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which consists of pure spirit, and which is without a second being."

Various passages of the same import are to be found in other authorities, for instance, Haratatwadidheeti and Mahanirvantantra (4, 16), the latter of which quotes a passage from Mundamalatantra and gives other texts of similar import from Kularnabtantra and Agastya Sanhita. From this point of view also, the position of the appellant may be undoubtedly supported; but it is not necessary to base my opinion upon this ground, for it is established beyond the possibility of dispute that the ordinary conception of a gift is not applicable to the case of dedication to the deity.

Let us now consider the decided cases from the point of view of the principles already explained. The cases of *Upendra Lal Boral* v. *Hem Chundra Boral* (1), *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2) and *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (3) proceeded on the assumption that the rule in the case of *Tagore* v. *Tagore* (4) and *Bai Motivahu* v. *Bai Mamubai* (5) is applicable to cases of dedication of property for the establishment of images of deities and for their worship. The case of *Promotha Nath Roy* v. *Nagendrabala Chaudhrani* (6) rests on the same assumption. The case of *Doorga Proshad Dass* v. *Sheo Proshad Pandah* (7) does not directly touch the point, though it appears to have been held that an idol cannot be said to have juridical existence, unless it has been consecrated by proper ceremonies and so has become spiritualised. Nor does the earlier case of *Sibchunder Mullick* v. *Treepoorah Soondry Dossee* (8) really affect the question now under consideration. The Court proceeded on the ground that it would not require trustees to carry out trusts for religious purposes under the will of a Hindu, unless those purposes were defined. On the other hand the cases of *Ramtonoo*

(1) (1897) I. L. R. 25 Calc. 405.
(2) (1901) I. L. R. 29 Calc. 260.
(3) (1902) I. L. R. 30 Calc. 521.
(4) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.
(5) (1897) I. L. R. 21 Bom. 790; L. R. 24 I. A. 93.
(6) (1908) 12 C. W. N. 808
(7) (1880) 7 C. L. R. 278.
(8) (1842) Fulton 98.

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Mullick v. *Ramgopaul Mullick* (1), *Gokool Nath Guha* v. *Issur Lochun Roy* (2), *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (3), *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (4), *Hemangini Dasi* v. *Nobin Chand Ghose* (5), *Parbati Bibee* v. *Ram Barun Upadhya* (6), *Jairam Narronji* v. *Kuverbai* (7), *Manohar* v. *Keshavram* (8), *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (9) are all based on the contrary assumption that a trust for a religious purpose is not invalid, because the image to be established is not in existence at the time of the death of the testator, and I may add that this latter view undoubtedly represents what was regarded as the law from the time of the decision of the Judicial Committee in 1829 down to 1897. These decisions appear to me to be consistent with the true rule of Hindu law as deducible from the authorities I have already examined. It is, however, I think, possible to show that the view indicated above not only represents the true rule of Hindu law, but is consistent with the rules of English law in similar matters.

Under the English law it is well-settled that a gift for the advancement of religion in general terms, as for instance, a gift to be employed "in the service of My Lord and Master" or "for the worship of God" are valid. In support of this proposition, reference may be made to the decisions in *In re Darling* (10) and *Attorney General* v. *Pearson* (11). In the former of these cases, reference is made to the decision of Lord Manners in *Powerscourt* v. *Powerscourt* (12), the decision in which was followed in *Felan* v. *Russell* (13). In the second case, Lord Eldon observed that if lands or money were given in such a way as would be legal, notwithstanding the statutes concerning disposition of charitable uses, for the purposes of building

(1) (1829) 1 Knapp. 245.
(2) (1886) I. L. R. 14 Calc. 222.
(3) (1905) 9 C. W. N. 528.
(4) (1879) I. L. R. 5 Calc. 438; L. R. 6 I. A. 182.
(5) (1882) I. L. R. 8 Calc. 788.
(6) (1904) I. L. R. 31 Calc. 895.
(7) (1883) I. L. R. 9 Bom. 491.
(8) (1878) I. L. R. 12 Bom. 267*n*.
(9) (1897) I. L. R. 25 Calc. 112.
(10) [1896] 1 Ch. 50.
(11) (1817) 3 Mer. 353, 409; 17 R. R. 100.
(12) (1824) 1 Molloy 616.
(13) (1842) 4 Ir. Eq. Rep. 701.

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a church or a house or otherwise for the maintaining and propagating the worship of God, and if there were nothing more precise in the case, the Court of Chancery would execute such a trust by making a provision for maintaining and propagating the established religion of the country. This is in agreement with the view previously indicated by the Lord Chanceller in *Mills* v. *Farmer* (1), namely, that it is quite impossible to maintain the proposition that a gift to charity is to be construed as a legacy to an ordinary legatee who must be sufficiently pointed out and described. The case before us, in which no question of indefiniteness can possibly arise, consequently occupies a much stronger position.

It is further clear that, under the English law, a valid gift may be made to a charity not *in esse* at the time, but to come into existence at some uncertain time in the future, provided there is no gift of the property in the first instance, for the benefit of any private corporation or person, or perpetuity in a prior taker. One of the most recent decisions on the subject is that of *Wallis* v. *Solicitor-General for New Zealand* (2) which was heard on appeal by the Judicial Committee from New Zealand. In that case, certain Maori chiefs had in 1848 given 500 acres of land to the Bishop of New Zealand for a college to be erected thereon for the general purpose of promoting religion. Up to 1898, no college had been erected, and it was found that the land had in course of time become an unsuitable site, while the accumulation of its rent had amounted to a considerable sum. It was ruled that there was an express gift of land and money for charitable purposes, and that such a gift was not invalidated by the fact that the particular application directed could not immediately take effect or would not of necessity take effect within any defined limit of time and might never take effect at all. It was further held that the doctrine of *cy-pres* was applicable. Lord Macnaghten in his judgment relied in support of this proposition upon the decision of Lord Selborne in *Chamberlayne* v. *Brockett* (3). This,

(1) (1815) 19 Ves. 482 : 1 Mer. 55. (2) [1903] App. Cas. 173.
(3) (1872) L. R. 8 Ch. App. 206.

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however, is only one of many instances in which the English Courts have affirmed this doctrine, and the cases where charitable gifts to non-existent corporations or societies have been sustained are really numerous. The leading case on the subject is that of the Downing College reported under the name of *Attorney General* v. *Downing* (1) and under the name of *Attorney General* v. *Bowyer* (2). Other cases in which the same rule has been affirmed are those of *Attorney General* v. *Bishop of Chester* (3), *Loscombe* v. *Wintringham* (4), *Attorney General* v. *Craven* (5), *Martin* v. *Maugham* (6), *Henshaw* v. *Atkinson* (7), *In re Clergy Society* (8), *In re Maguire* (9) and *Sinnett* v. *Herbert* (10). The Supreme Court of the United States has on several occasions affirmed the same doctrine after an elaborate review of the English decisions on the subject. *Inglis* v. *Sailors Snug Harbour* (11), *Trustees* v. *State* (12), *Ould* v. *Washington Hospital* (13), *Russell* v. *Allen* (14) and *Jones* v. *Habersham* (15). In the third and fourth of these cases, many of the decisions in England to which we have referred are minutely examined, and the rule is laid down that a gift for charitable uses is valid, even though it is in favour of a non-existent corporation or society. I refer to these English and American decisions not as authorities in any way binding upon this Court, but solely to illustrate the position that the conclusion at which we arrive upon a strict interpretation of the texts of Hindu law, is consonant with the principles which have been adopted independently in other systems of jurisprudence. We cannot overlook the fact that as pointed out in the case of *Trikam-*

(1) (1766) 2 Amb. 550, 571; Wilm. 1; Dick 414.
(2) (1798) 3 Ves. Jun. 714; (1800) 5 Ves. Jun. 300; (1803) 8 Ves. 256.
(3) (1785) 1 Bro. C. R. 444.
(4) (1850) 13 Beav. 87; 51 E. R. 34.
(5) (1856) 21 Beav. 392; 52 E. R. 910.
(6) (1844) 14 Sim. 230; 60 E. R. 346.
(7) (1818) 3 Madd. 306.
(8) (1856) 2 Kay & J. 615; 69 E. R. 928.
(9) (1870) L. R. 9 Eq. 632.
(10) (1872) L. R. 7 Ch. App. 232
(11) (1830) 3 Peters 99, 114.
(12) (1852) 14 Howard 274.
(13) (1877) 95 U. S. 313.
(14) (1882) 107 U. S. 168.
(15) (1882) 107 U. S. 191.

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das Damodhar v. *Haridas Morarji* (1), their Lordships of the Judicial Committee, when called upon to decide an analogous question in *Ranchordas Vandravandas* v. *Parvatibai* (2), placed considerable reliance upon the decisions of the English Courts in similar matters, although in that particular instance there is room for doubt whether the actual decision was, in view of the texts to which attention was invited by Sir Subrahmanya Ayyar in *Parthasarathy Pillai* v. *Thiruvengada Pillai* (3) quite in harmony with the true doctrine of Hindu jurisprudence.

To sum up :

(*i*) The view that no valid dedication of property can be made by a will to a deity, the image of which is not in existence at the time of death of the testator, is based upon a double fiction, namely, first, that a Hindu deity is for all purposes a juridical person, and secondly, that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of these propositions is too broadly stated, and the second is inconsistent with the first principles of Hindu jurisprudence.

(*ii*) The Hindu law recognises dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed *extra-commercium* and is entitled to special protection at the hands of the Sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments : *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (4) affirmed, on appeal, by the Judicial Committee in *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (5). It is immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in the course of the year.

On these grounds, I agree with the learned Chief Justice that both the questions referred to the Full Bench ought to be answered in the negative.

(1) (1907) I. L. R. 31 Bom. 583.
(2) (1899) I L. R. 23 Bom. 725; L. R. 26 I. A. 71.
(3) (1907) I. L. R. 30 Mad. 340.
(4) (1887) I. L. R. 12 Bom. 247.
(5) (1899) I. L. R. 24 Bom. 50, L. R. 26 I. A. 199.

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COXE J. I agree with the learned Chief Justice.

CHATTERJEE J. The testator Umesh Chandra Lahiri died on the 28th June 1890 after having made a will on the 26th of June 1890. Amongst other matters the will provided,—"All my properties shall be placed in the hands of" Babus so and so "as trustees." They were to give certain annuities, to defray the expenses of certain named relatives, to pay Rs. 10 per annum to his *guru* Hari Nath Bhattacharya and Rs. 5 to his *purohit* Sreesh Chandra Chakrabarti, to defray the cost of the worship of the family *Thakurs*. It also directed that "they shall spend the surplus income which may be left, in the *sheba* and worship of Kalee, after establishing the image of the Kalee after the name of my mother, *i.e.*, in the name of *Iswar* Anandamoyee Kalee." "I further provide that if for any reason, the image of *Iswar* Kalee Debee is not established and if the income of my properties is not used for her *sheba* and worship, then my *gurudeb* and his sons, grandsons, etc., in succession, shall get my Rangpur properties and possess the same in absolute right from generation to generation with right to sell, etc."

In accordance with the above direction, the executors established and consecrated, in the month of October or November 1894, an image of the Goddess made of earth, and later on, in the year 1894, replaced the same by one made of stone, and had a temple built for its location. They thus carried out the direction in the will, and the worship has ever since been carried on. On the 4th July 1904, the plaintiffs, who are the sons of the *guru* of the testator, brought the present suit for the construction of the will, for a declaration that the trust for the establishment and consecration of the image of Goddess Kalee and her worship was void, for possession of the Rangpur properties and for an account and mesne profits. The Court of first instance held that the bequest in favour of the Goddess Kalee was valid, and dismissed the suit. On appeal by the plaintiffs the Division Bench, disagreeing with

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the case of *Upendra Lal Boral* v. *Hem Chundra Boral* (1) and some later cases which followed the same, referred the following questions for the decision of the Full Bench :—

(*i*) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void ?

(*ii*) Whether the cases of *Upendra Lal Boral* v. *Hem Chundra Boral* (1), *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2) and *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void ?

The cases mentioned in the order of reference are all, more or less, based on the decision of the Privy Council in the great *Tagore case* (4). The said case was in respect of a gift to a human being and was based on a passage in the Dayabhaga, Chapter I, para. 21, which is to the following effect :—

२१। अन्य व्यापरिणात्मस्य स्वत्वनिवृत्तिः शास्त्रमुलत्वादस्य। दृष्टञ्च लोकेपि दानेहि चेतनोद्देशविशिष्टत्यागादेव दातृव्यापारात् सम्प्रदानस्य द्रव्ये स्वामित्वं।

"The right of one may consistently arise from the act of another; for an express passage of law is authority for it; and that is actually seen in the world, since, in the case of donation, the donee's right to the thing arises from the act of the giver, namely, from his relinquishment in favour of the donee who is a sentient person." *Colebrooke's translation.*

The next paras. 22 and 23 go on to say that the title of the donee accrues before the acceptance and para. 24 says that the acceptance makes the title which has already accrued capable of full enjoyment, thus differing from the Mitakshara which holds that title does not accrue before acceptance. The author is here incidentally dealing with the meaning of the word gift and does not make any further refer-

(1) (1897) I. L. R. 25 Calc. 405.
(2) (1901) I. L. R. 29 Calc. 260.
(3) (1902) I. L. R. 30 Calc. 521.
(4) (1872) 9 B. L. R. 377 ; 18 W. R. 353 ; L. R. I. A. Sup. Vol. 47.

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ence to the subject. Of the commentators on the Dayabhaga, Sreenath says चेतनपदं चेतनविशेषपरं अतो न यागे गवादि पुजायाञ्चाति प्रसक्तिः "the word 'sentient' is spoken of, of some particular sentient being and the definition of gift is not wide enough to include *jaga* (or gift in favour of a deity) or the worship of a cow, etc. (to which things are given)." Achyutananda says त्यागमात्रं हषोत्सर्गादावति प्रसक्तमत आह चेतनेति : "simple त्याग or relinquishment would be wide enough to include the dedication of the sacred bull, etc., and therefore the word 'sentient' is used." Sreekrishna Tarkalankar also says त्यागमात्रात् हषोत्सर्गादि रूपात् स्वामित्वाजनकादाह चेतनोद्देशेति : "as in the dedication of the sacred bull no title to the same accrues to any one, the word *tyaga* or relinquishment is spoken of in reference to a sentient being."

All these commentators, therefore, understand the definition as limited to secular gifts as contradistinguished from gifts of the nature of *jaga*, which is a technical word meaning देवतोद्देशेन द्रव्यत्यागः (1) "or relinquishment of property intended for a deity or other religious dedications, such as that of the sacred bull at a *sradh*." The subject of *dana* or gift, however, is dealt with in some detail by Narada in the chapter on the subtraction of gifts, and in making a subdivision he says :— "In civil affairs the law of gift is fourfold—(i) what may be given, (ii) what may not be given, (iii) what is given or a valid gift, (iv) what is not given or invalid gifts. Colebrooke's Dig., Vol. I, page 401. In commenting on the above, Jagannath Tarkapanchanan says :—"the rule to be established that gifts made by a man afflicted with disease and the like are void, regards civil gifts not donations for a religious purpose. This title of law does not extend to a gift made for a religious purpose : the donation is valid if it be made by the owner of the thing." Jagannath then quotes the text of कात्यायन (Katyayana) :—

सुस्थेनार्त्तेन यद्दत्तं श्रावितं धर्मकारणात् अदत्त्वातु मृतेदाप्यस्तत्सुतेनापि संशयः

"What a man has promised in health or in sickness for a religious purpose must be given ; and if he die without giving it, his son shall doubtless be compelled to deliver it."

(1) Sradhabibeka, Chandi Charan's Ed. p. 18.

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The same text is quoted with approval by the Vivada Ratnakar: see page 136, Bibliothica Indica Series, where the author, in commenting upon another text of Katyayana as to invalid gifts, says आर्त्तेन दत्तं धर्मकार्य्यमन्यत्रेण, *i.e.*, "gift by a person affected with disease (being invalid) must apply to gifts other than those made for a religious purpose." Raghunandan in his शुद्धितत्त्व (1) (Shudditatwa) quotes the same text of Katyayana and says एवञ्च मुमूर्षु दत्तस्य यद्दानोपसर्गत्वाभिधानं तद्धर्म्मार्थेतरदानपरं, *i.e.*, "in the same way the inclusion of a gift by a dying person among invalid gifts has reference to gifts made for other than religious purposes." See also Vyavastha Darpan, 3rd Edition—Vyavastha 713, page 623 (Part I), and the authorities quoted.

It appears that the word दान or gift, when spoken of in respect of the deity, is used in a गौण or भाक्त, *i.e.*, secondary or figurative sense. The Sradhabibeka of Shoolapani says आदित्यादि देवता सम्प्रदानकदानेतु दानशब्दो गौणः तद्वर्म्मदक्षिणादानायतिदेशार्थः, *i.e.*, (2) "the use of the word दान or gift in respect of a gift to the Sun and other Gods is secondary or figurative and intended to signify, by analogy, the giving of the fee in either case." Sreekrishna Tarkalankar, the great commentator of the Dayabhaga, in his commentary on the above passage, says तथाचात्र स्वस्वामिभावरूप सम्बन्धबाधात् मुख्यप्रयोगो न भवत्येव, *i.e.*, "here also the use of the word in its primary sense is impossible, as there is no sense of one's own ownership" (like that of the donee in a secular gift).

Medhatithi, the great commentator of Manu, in commenting upon the word *devaswam* (god-property) in Manu, Chapter XI, Section 26, says देवानुद्दिश्य यागादिक्रियार्थं धनं यदुत्सृष्टं तद्देवस्वं मुख्यस्य स्वस्वामि सम्बन्धस्य देवानाम सम्भवात् नहि देवता इच्छया धनं नियुञ्जते न च परिपालनव्यापार लासां दृश्यते, *i.e.*, "Property that is relinquished in favour of Gods for sacrifices in their honour is called god-property, by reason of the impossibility of the application to Gods of the (ordinary) relation of owner and thing owned. For the Gods do not use the property according to their pleasure, nor do we see them exerting for the protection of the same."

(1) Bangabasi Edition, p. 498.
(2) Sradhabibeka, Chandi Charan's Ed. p. 22

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Again नन्‌ चतुर्भुजादि प्रतिमा सम्बन्धि लोके देवस्वमुच्यते, लोक प्रसिद्धय शब्दार्थः शास्त्रे ग्रहीतुं न्याय्यः स्यादेवं यदि देवस्वशब्दोऽविभागः प्रसिद्धिमुपेयात्, देवानां स्वं देवस्वमित्यवयव शक्तिद्वारा समुदायार्थः प्रकृतः न च वाक्यान्तर प्रकल्पना प्रमाणिनाप्यस्ति। मुख्यं चतुर्भुजादीनां देवत्वं प्रतिमाव्यवहारेणैवापहृतं न च यद्युपलक्षणमस्ति; अथ समीचारतो देवस्वं भवतु स्वस्वामि भाव स्तावन्नास्ति यथोक्तेन च प्रकारेण स्वव्यवहारोपपत्तिरिति शिष्टं विलीये "It cannot be argued that in popular view (property relating to the four-armed or the like *image* of God) is called 'god-property,' and it is proper to put the popular meaning on words occurring in the *shastras*. It would be so if the term 'god-property' acquired notoriety (in that sense) as a single undivided word; but by reason of the notorious meaning of the component parts of the word, namely, God and property, the meaning of the whole, that is, God's property is god-property, is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning. The assumption that the four-armed and the like have the status of God in the primary sense is removed by the very use of the term image. Nor can it be argued that although there is no God in the primary sense in such cases, still let such property be god-property by usage. Be it so, but there cannot be the relation of owner and thing owned. The use of the term property (as God's) may be reconciled in the manner stated. This is discussed in the second Chapter of the Mimansa of Jaimini." Kullooka Bhatta, in his commentary on the same words, says: प्रतिमादि देवतार्थमुत्सृष्टं धनं देवस्वं, *i.e.*, "the property dedicated for the images and other deities is called *devaswam*." It would appear sufficiently clear from the authorities that the definition of gift referred to by the Dayabhaga, Chapter I, Section 21, is in respect of a secular gift and not a gift for religious purpose. This disposes of the applicability of the *Tagore case* (1) and also the case of *Bai Motivahu* v. *Bai Mamubai* (2), which latter case may be further distinguished as being governed by the Mitakshara law.

Even if we were to apply the definition, as given in the above text of the Dayabhaga, to such a gift, it would seem

(1) (1872) 9 B. L. R. 377; 18 W. R. 359; L. R. I. A. Sup. Vol. 47.

(2) (1897) I. L. R. 21 Bom. 709; L. R. 24 I. A. 93.

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absurd to say that a deity is not a sentient being. If the deity exists and it manifests itself in the image upon the invocation of the worshipper with certain *mantras*, it cannot be said to be an insentient being. If it answers to the इहागच्छ इहतिष्ठ, *i.e.*, "come here", "stay here" of the votary, it cannot be said to be insentient. The text—

चिन्मयस्याद्वितीयस्य निष्कलस्याशरीरिणः।
उपासकानां कार्य्यार्थं ब्रह्मणो रूपकल्पना॥ रघुनन्दन—प्रतिष्ठातत्व

"For the use or benefit of the votary Brahman or God, although only existing in spirit and without a second, having no attribute and no body, assumes forms." Shastri's Hindu Law, 3rd Ed., page 420, shows the Hindu idea of the forms attributed to God for the convenience of worship. A particular image may be insentient until consecrated, but the deity is not. If the image is broken or lost, another may be substituted in its place and, when so substituted, it is not a new personality, but the same deity and properties previously vested in the lost or mutilated *Thakur* become vested in the substituted *Thakur*. A Hindu does not worship the "idol" or the material body made of clay or gold or other substance, as a mere glance at the *mantras* and prayers will show. They worship the eternal spirit of the deity or certain attributes of the same, in a suggestive form, which is used for the convenience of contemplation as a mere symbol or emblem. It is the incantation of the *mantras* peculiar to a particular deity that causes the manifestation or presence of the deity or, according to some, the gratification of the deity. According to either view, it is the relinquishment of property, in the name of the deity, for securing its gratification, that completes the gift, and such relinquishments are valid according to Hindu law, even if made by a dying man. It may be true that the illiterate Hindu thinks of the consecrated symbol as the deity and has not any clear idea of the particular attribute of the God-head, that is worshipped in a particular form, but it cannot be said with any approach to truth that the great Rishis and their commentators who declared the Hindu law had such a gross idea of the divinity they worshipped. In this view of the

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case also, the text of the Dayabhaga relied on in the *Tagore case* (1) cannot invalidate the gift in favour of a deity whose image is consecrated after the death of the donor.

Then again, their Lordships of the Judicial Committee, in the *Tagore case* (1) say that the object of the donation must be in existence, at least in contemplation of law, and as an instance, the case of an adopted son is mentioned, as, by a fiction of law, he is supposed to have been conceived during the lifetime of the adoptive father. It is contended that Anandamoyee Kalee was not in existence during the lifetime of the testator, although the Goddess Kalee was, is and always will be in existence. Suppose a Hindu gives permission to his wife to adopt a son after his death and to name him by a particular name: 'Ram,' 'Syam' or 'Gopal.' It cannot be contended with any semblance of reason that a son adopted by the widow and named as directed by the adoptive father would not be validly adopted, because a son of that particular name could not be supposed to have been conceived by relation back to the lifetime of the father. It is not necessary to apply the same analogy in the case of a deity, as the reasons hereinbefore enumerated will show, but if it were necessary, there would be no difficulty to the Hindu lawyer to call it in aid in favour of the gift.

I have stated above that in the case of a gift to a God, the relation of an owner to the thing owned in its primary sense is considered to be wanting. Who then is the owner of the property? In a secondary sense, no doubt, the deity is the owner, but the *shastras* lay down देवे देयानि दानानि, देवे दद्याच्च दक्षिणां तत् सर्व्वं ब्राह्मणेदद्यादन्यथा निष्फलं भवेत्, *i.e.*, "Gifts are to be given to the deity and the fee for the acceptance of the gift also is to be given to the deity, but all these are to be (ultimately) given to a Brahman, otherwise the gift would be useless."

Matsya Sooktam quoted by Raghunandan in his Shuddhitatwa (2).

Every gift, therefore, in favour of a deity is a gift for the ultimate benefit of a Brahman or Brahmans, and may, there-

(1) (1872) 9 B. L. R. 377; 18 W. R. 359; L. R. I. A. Sup. Vol. 47.

(2) Suddhitatwa, Bang. Ed. p. 557.

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fore, be looked upon as a charitable gift. It was held by Sir Raymond West in the case of *Monohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1) that a trust for a Hindu God and temple was one created for public charitable purposes. The God and temple, in that case, was a public one and the trust was, therefore, considered to be a public one. There is no reason why the gift in this case, which is expressly vested in trustees for the purpose of building a private temple and setting up a private diety, should not be considered a private charitable trust—'charitable' I say because the ultimate benefit must come to the *pujaris* and *shebaks*. "It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as *shebait* or manager:" *Prosunno Kumari Debia* v. *Golap Chand Baboo* (2). And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the *shebait*, not in the idol: *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (3). Again, bequests for the performance of the periodical *poojas* of Durga, Kalee, etc., or for the celebration of the periodical festivals, called Dolejatra, Rashjatra, etc., have been from very old times given effect to by our Courts. Instances will be found in the following cases:—

Ramtonoo Mullick v. *Ramgopaul Mullick* (4), *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (5), *Hemangini Dasi* v. *Nobin Chand Ghose* (6), *Gokool Nath Guha* v. *Issur Lochun Roy* (7), *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (8), *Bisseswar Prasanna Sen* v. *Bhagabati Prasanna Sen* (9), *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (10),

(1) (1887) I. L. R. 12 Bom. 247, 263.
(2) (1875) 14 B. L. R. 450; 23 W. R. 253; L. R. 2 I. A. 145, 152.
(3) (1904) I. L. R. 32 Calc. 129; L. R. 31 I. A. 203.
(4) (1829) 1 Knapp. 45.
(5) (1879) I. L. R. 5 Calc. 438; L. R. 6 I. A. 182.
(6) (1882) I. L. R. 8 Calc. 788.
(7) (1886) I. L. R. 14 Calc. 222.
(8) (1897) I. L. R. 25 Calc. 112.
(9) (1906) 3 C. L. J. 606.
(10) (1905) 9 C. W. N. 528.

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Jairam Narronji v. *Kuverbai* (1) and *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (2).

If a gift in favour of a deity, whose image has to be prepared and destroyed periodically, is valid, I do not see any reason why a gift in favour of a deity, whose image is to be prepared once for all, except for any reason for reconstruction coming to pass, should be invalid.

In the present case again, the testator does not expressly make a gift to Kalee or Anandamoyee Kalee. He only vests his properties in certain trustees who are to employ the surplus income of his properties in a certain way, by spending the same in the establishment, *sheba* and *pooja* of the Goddess Kalee under the name and style of *Iswar* Anandamoyee Kalee. I do not see how the rules of gift to a deity, even if they were not as I have stated above, can invalidate the bequest in this case. For the reasons stated above, I would answer both the questions referred in the negative.

PER CURIAM. The order of the Court accordingly is that the case be returned to the Division Bench to decide the matter in accordance with the opinion we have expressed.

Case remanded.

S. M.

(1) (1885) I. L. R. 9 Bom. 491. (2) (1887) I. L. R. 12 Bom. 247.

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1951 SCC OnLine Mad 384 : AIR 1952 Mad 613 : (1952) 1 Mad LJ 557

Madras High Court

(BEFORE SATYANARAYANA RAO AND RAJAGOPALAN, JJ.)

Sri Lakshmindra Theertha Swamiar of Sri Shirur Mutt and another ... Petitioners;

Versus

The Commissioner, Hindu Religious Endowments, Madras and others ... Respondents.

Civil Misc. Petn. No. 2591 of 1951 and Writ Petns. Nos. 379 and 380 of 1951

Decided on December 13, 1951

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JUDGMENT

1. (C.M.P. No. 2591 of 1951):— This and the other connected petitions relating to the Guruvayur temple and the Chidambaram temple were heard together as they all raised the question of the validity of the Madras Hindu Religious Endowments Act, 1926, Act II of 1927 (hereinafter called the "earlier Act"). While these petitions were pending, the Madras Hindu Religious and Charitable Endowments Act, 1951 (Act XIX of 1951) (hereinafter called the new Act) which repealed the earlier Act was brought into force by the Madras Government on 30th September 1951 by a notification in the Fort St. George Gazette. Leave to amend the petitions was granted to the petitioners and they have been permitted to canvass the validity of the new Act as well. Mr. M.K. Nambiyar who appeared for the trustee of the Guruvayur temple argued his petition first and Mr. Alladi Krishnaswami Aiyar and the learned Advocate-General replied to that petition after which the petition relating to Guruvayur temple was allowed to be withdrawn as the Government agreed to cancel the decision to notify the temple and to permit the trustee to function. The arguments addressed by Mr. Nambiyar were adopted by the petitioners in the remaining petitions and they further supplemented the arguments addressed by Mr. Nambiyar. It will be convenient to deal with C.M.P. No. 2591 first as it relates to a mutt & covers a wider field than the petition relating to the Chidambaram temple. Some of the arguments are common to both the petitions, particularly the scope of the articles of the Constitution relied on in support of the petitions as having been infringed by the earlier and the later Acts and also the effect of the two Acts on the rights of the petitioners.

2. C.M.P. No. 2591 of 1951 was filed by the Matathipathi of Shirur Mutt in the South Kanara District, praying that this Court should issue a writ of prohibition prohibiting the respondent, viz., the Hindu Religious Endowments Board, Madras by its President from proceeding with O.A. No. 471 of 1950 to frame a scheme for the administration of the mutt. Under Section 103 of the new Act the notifications and orders issued under the earlier Act are treated as notifications or orders made, issued and passed by the appropriate authority under the corresponding provisions of the new Act and as the place of the President, the Hindu Religious Endowments Board, Madras, was taken by the Commissioner appointed under the new Act, the Commissioner, Hindu Religious Endowments Board, Madras was added as a party in place of the Board by C.M.P. No.

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11917 of 1951 with the leave of Court. The relief, therefore, claimed against the Board is treated as a relief against the newly appointed Commissioner of the Hindu Religious and Charitable Endowments, Madras.

3. Acting under S. 62 of the earlier Act, the Board issued the notification dated 6th November 1950 stating that as the Board was satisfied that the endowments of the Mutt were mismanaged and that in the opinion of the Board a scheme for the administration of the Mutt and its endowments should be settled, 8th December 1950 was fixed for further enquiry into the matter and the notice also called upon the trustees and other persons interested in the said Mutt to appear and show cause why a scheme of administration should not be settled. The reasons alleged were:

"1. That the trustees of the Mutt had been borrowing moneys without necessity and spending them without taking the sanction of the Board on major constructions for which there are no approved estimates or plans. He has thus involved the institution into further debts and has utterly disregarded the directions issued to him in Memo No. 75887/46 Adt., dated 13-3-1947.

2. Properties belonging to the Mutt have been leased out on low rents and against the interests of the institution.

3. The trustees of the Mutt have, in many cases, acquiesced in the alienation of Mulgeni transfers containing forfeiture clauses against further alienations; owing to their neglect, properties comprised in

Patta No. 2437 in Uppur have been alienated.

4. The Manager has not been allowed to carry on his duties and the power of attorney granted to him has been cancelled without reference to the Board."

4. On the 24th January 1951 the Board issued a notice under S. 63(1) of the earlier Act to the head of the Mutt intimating that in the interests of the proper administration of the Mutt and its endowments, a scheme of administration should be settled and that further enquiry would be held on 15-2-1951 at 2 p.m. at the office of the Board in Madras, and asking the trustee and other persons having any interest in the said Mutt to make any representations in writing which they might wish to make in the said matter. To this notice a draft scheme was also attached. As the Board had decided to frame a scheme, the petitioner filed two applications on 12-2-1951, the present C.M.P. No. 2591 of 1951 and another C.M.P. No. 2592 of 1951 and obtained stay of further proceedings, and this Court issued a rule nisi in C.M.P. No. 2591 of 1951. C.M.P. No. 2592 of 1951 was filed for the issue of writ of certiorari to call for the records and quash the order of the Board dated 24th January 1951 deciding to frame a scheme. This application was dismissed as there was no order of the Board but there was only a notice and the petitioner was unable to produce a copy of the annexure in which the Board gave its reasons for the decision which they had reached. The petitioner was given an opportunity by this Court to get a copy of the order but the Board somewhat surprisingly seems, to have refused to give a copy of the order on the ground that it was confidential. In support of this view of the Board, however, no rule or notification treating the annexure as confidential was referred to us. The petition was ultimately dismissed as withdrawn on 26-2-1951. The object of the present petition, therefore, is to prohibit the Commissioner of Hindu Religious and Charitable Endowments, Madras, from taking further steps in the matter of settling a scheme for the administration of the Mutt and its endowments.

5. The petitioner's Mutt is known as the Shirur Mutt and is situated in Udipi, a small

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municipal town in the South Kanara District. The town is celebrated for its sanctity as there exists Sri Krishna Mutt with which is associated the name of Sri Madhwacharya, the well known propounder of Pluralistic Theism of the Hindu religion. Sanctity is attached to the idol of Sri Krishna which was made of Saligramam stone as it is reputed to have been made by Arjuna and worshipped by Sri Rukmini Devi at Dwaraka. The image was reputed to have been miraculously obtained by Swamiji from a vessel wrecked on the coast of Tuluva. It was carried by him and later after removing the gobichandana which was wrapped round it, it was installed at Udipi in the 12th century A.D. There are also three Saligrams in the Sri Krishna temple which it is claimed, were presented to Sri Madhavacharya by Vyasa when he took his commentary on Sri Bhagwat Gita for the approval of Vyasa at Badrinath. Besides the Sri Krishna Mutt the Swamiji also established eight mutts at Udipi each presided over by a Sanyasi or Swami. There is no ma-tathipathi for the Sri Krishna Mutt but the Swami of each of the eight mutts in turn presides over the temple of Sri Krishna for a period of two years in every 16 years. At every change of a Swami at the end of two years, a festival known as Paryayam is celebrated on a very grand scale. These eight mutts are Pali-mar, Admar, Krishnapur, Puttige, Shirur, Sode, Kaniyur and Pejavar. The Mutts are linked together into four groups of two each as Dvandva mutts as the two mutts linked together should co-operate in all matters.

6. The South Kanara Manual, Vol. I, page 148 refers to the fact that the periodical change of the Swami presiding over the temple of Sri Krishna is the occasion of a great festival known as Paryayam when Udipi is filled to overflowing by a large concourse of devotees not only from the District but from distant parts especially Mysore State. The Paryaya Swami is under an obligation to feed the Pilgrims at this festival and he has to meet the expenses of feeding from the income of the temple of Sri Krishna, from the income of his Mutt and from contributions. The rest of the expenditure is met either from the accumulations of the income already made or by borrowing funds. It seems to be almost a usage that every Paryayaswami has necessarily to borrow large amounts to meet the expenditure of the Paryaya as he would always be unable to meet it from the income. This information can be gathered from the South Kanara Manual, Vol. I, pages 147 and 148 and from the decision of the Judicial Committee in '*Vibhudapriya* v. *Lakshmindra*', 50 Mad 497 PC, on appeal from '*Lakshmindra* v. *Vibhudapriya*', 44 Mad LJ 187.

7. The present Swami is the 29th disciple in the line of succession starting from the first Head who was a direct disciple of Sri Madhavacharya. Shivalli Brahmins who are the followers of Sri Madhavacharya claim this as their exclusive Mutt. These Brahmins are Tulu speaking Brahmins of the Smartha sect and are followers of Dwaita philosophy founded by Sri Madvacharya. The headquarters of these Brahmins is at Shivalli a few miles away from Udipi though some of them had migrated to other places in and outside the State. Sri Madhavacharya was born at Udipi but he also resided for sometime at Shivalli where he composed his 37 spiritual works — see the Manual at page 148 and also Thurston on Castes and Tribes. Vol. 1 page 378 where he describes the Shivalli Brahmins.

8. The petitioner was installed as Mathadhipathi in the year 1919 during his minority and he assumed management only in 1926 when he attained majority. At that time, the Mutt was heavily indebted, the then income of the Mutt being only Rs. 18,000/- per year as estimated by the petitioner. During 1926-30, the indebtedness was reduced by the efforts of the Swami and also fresh acquisitions of property were made 1931, however, was again a troublesome year. It was a period of his paryayam and he had to meet heavy expenditure of feeding the Brahmins on that occasion, which swelled the debt to about Rs. 85,000. This was followed by a period, 1932 to 1946, when by his efforts there was again a reduction in the debt. Then came the second paryayam at a time when the necessary commodities were controlled by the

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State and the price of food stuffs were very high. The Swamiji naturally was obliged to run into further debts.

9. At this juncture, the Board in exercise of the powers vested in it under S. 61(a) of the earlier Act, required the Swami to appoint a

competent person as manager and to report the name of the person so appointed to the Board. Ultimately, one Sripathachar was appointed as agent under a power of attorney dated 24th December, 1948. The petitioner's complaint is that this action of the Board was instigated and goaded by one Mr. A. Lakshminarayana Rao, an advocate of Udipi who was anxious to obtain a controlling hand in the affairs of the Mutts. The agent, it is alleged, had his own way of management of the affairs of the Mutt without reference to the Swami and he even failed to submit the accounts to the Swami. Paragraph 11 of the affidavit gives particulars of the various charges of the Swamiji against his agent. Finally the Swami by registered notice dated 26th August 1950 terminated the management of the said agent and cancelled his power of attorney. He called upon the agent to submit the accounts and also to return the other documents in his possession and custody. On the 28th September, 1950 the agent sent a reply through his advocate Mr. A. Lakshminarayana Rao stating that the cancellation of the power of attorney was illegal as according to its terms, it could not be cancelled and he declined to hand over to the Swamiji the accounts and other documents. This was followed by a suit instituted by the Swami on 4-10-1950 O.S. No. 280 of 1950 in the Sub-Court, South Kanara for recovering possession of the accounts, documents and other movables.

10. It would appear however that a day prior to the institution of the suit on the 3rd October 1950, the agent perhaps anticipating the contemplated suit by the Swami, filed a petition before the Board under S. 18 of the earlier Act bringing to the notice of the Board the wrongful termination of his appointment and demanding a reply. On the succeeding day, 4th October 1950, the Board immediately issued a notice to the Swami proposing to enquire into the matter on the 24th October 1950 at 2 p.m. at Madras and requesting the Swami to appear either in person or by pleader. To this notice, the Swami filed a reply on 21st October 1950 inviting the attention of the Board. To the fact of the institution of the suit which raised the same questions as before them and enclosing a copy of the plaint for the perusal of the Board. He complained also that on account of the absence of the accounts and the papers which were wrongfully withheld by the agent, he was not in a position to sufficiently answer the charges levelled against him by the agent in the petition. Without proceeding with that enquiry and without even waiting for the result of the suit, the Board 'suo motu' initiated proceedings under S. 62 of the earlier Act on the 6th November, 1950 for framing a scheme and for that end issued a notice to the petitioner to show cause why a scheme should not be framed setting out in the notice the reasons in support of the proposed action which were stated earlier in this judgment.

11. The notice was served by affixture on the Swami and the enquiry into the matter of framing a scheme was posted by the Board at Madras on the 8th December 1950, on which date at the request of the counsel for the Swami it was adjourned to 21st December, 1950. On the 18th December, 1950 an application was filed on behalf of the Swami with a request to the Board to issue a direction to the agent to hand over the accounts and other documents in order to enable the Swami to file his objections. As the counsel for the Swami Mr. K.R. Karanth was ill, the matter was again adjourned to 10th January, 1951. The Swamiji was not ready with his objections even on the

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10th as his advocate was still ill and a telegram was sent on the 9th requesting the Board to adjourn the matter further. This, request was not granted & as no explanation was filed by the Swami, the enquiry was closed and orders reserved on the 10th.

12. Mr. Srinivasan an advocate of Madras filed on behalf of the Swami on 11th January 1951 a memo requesting the Board to re-open the matter which was declined. Thereafter, the Swami sent on the 13th January 1951 his written explanation to the Board which was admittedly received by the Board on the 15th. The notes paper shows that an order was passed directing the framing of a scheme by the Board which does not however bear any date. From the subsequent notice issued bearing date 24th January 1951, it may be assumed that the order was passed on that date. The notice issued thereafter to the Swamiji required him to state his objections for the proposed action of the Board. The order of the Board which was given as an annexure was attacked by the petitioner in these proceedings on the merits and also on the ground that it contravened and infringed and abridged the fundamental rights regarding religious liberty of individuals and denominations guaranateed by the Constitution. It was claimed that the Mutt belongs only to the Madhw section of the Hindu community and particularly of Shivalli Brahmins.

13. A counter affidavit was filed on behalf of the Board by its secretary traversing the-material allegations and justifying the action of the Board on legal grounds and also on merits. A preliminary objection was also raised that the application was premature as the final orders settling the scheme were not passed and that in any event the petitioner had a remedy by way of suit after the scheme was framed and so this application should not be entertained.

14. The Articles of the Constitution relied on by the petitioner as having been contravened by the impugned legislation are Articles 14, 15, 19(1)(f), 25, 26, 27 and 30. In the course of the arguments, the extreme contention that the Mutt was not a public mutt was for the first time raised. On the merits the order was attacked on the grounds:

1. that the Board acted with bias and this was founded on some allegations made in the affidavit supported by other affidavits against the President of the Board and one of the Commissioners who it was alleged were hand in glove with Mr. A. Lashminarayana Rao and Mr. Sripathachar when they visited Udipi on occasions;
2. that no mismanagement was established and indeed could not be established as the Swami was not in management for over 2 years but the management was exclusively with the agent;
3. that the grounds were vague and indefinite and that no reasonable opportunity was given to the petitioner to show cause;
4. that the order was perverse as it was solely based on the fact of removal of the manager Sripathachar without any enquiry into the charges levied against him by the Swamiji and even without waiting till the disposal of the suit in which the charges were bound to be considered;

5. that the order was perverse on various other grounds.

15. To these questions may be added the preliminary objection raised on behalf of the respondent that as there was another remedy open to the petitioner after the scheme was framed by way of suit, this Court should not interfere by issuing a writ of prohibition and that the application was also premature.

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16. It is not possible to determine whether any of the rights of the Mathadhipathi had been infringed, abridged or taken away without first ascertaining what those rights are. The material throwing light on the origin and the history and the functions of these Mutts in the Hindu polity is very meagre. The juristic relationship of the Mathadhipathi to the properties of the Mutt and its income has nowhere been precisely defined as the rights and duties of the Mathadhipathi and the succession to the headship is governed solely by usage and not by any code of legal principles. These rights, therefore, have to be deduced to a large extent from the judicial decisions by no means altogether reconcilable and the opinions of text writers.

17. "Mutt" used as a transitive verb means literally "to dwell" or to inhabit. 'Mata' noun means hut, a small building inhabited by an ascetic or devotee, a monastery, a college.

> "In its original and narrow sense, then, the term Mutt signified the residence of an ascetic or Sanniyasi or Paradesi."

18. See '*Giyana Sambanda Pandara* v. *Kandasami*', 10 Mad 375 at p. 386. From very ancient times, the Sanniyasis had no fixed abode but were wandering from place to place receiving such lodgings and food as were provided by devotees. Even now to a large extent the same practice obtains except in cases where such sanniyasis are attached to a Mutt.

19. When Buddhism was in its ascendancy in India and when Budhistic monks became popular, Sri Jagadguru Adisankaracharya gave a new orientation and infused fresh blood into Hinduism and stemmed the tide of the rapid spread of Buddhism in India. He established the Adwaita or Vedantic system of philosophy with which his name is always associated. He was the first, so far as tradition goes, to establish Mutts for the propagation of his philosophy and the reclamation of Hinduism. Tradition has it that after conquering the rival faiths he established adwaita system of philosophy and founded four Mutts or seats of learning in the four corners of this vast sub-continent — Sringeri (Sharada Peeta) in Mysore in the South, with which, it is familiar knowledge, the name of that great and erudite scholar and philosopher Vidyaranyaswami is associated; Badrinath in the Himalayas in the North: Jagannath or modern Puri in the East and Dwarka in the Bombay Presidency in the West. In each of these Mutts as their heads, he installed his principal disciples and he himself assumed the headship of 'Sarvagna Peeta' or the central seat of knowledge at Kanchi, the modern Conjeevaram. This central peetam was first shifted to Tanjore and then to Kumbakonam from where it continues to function even the present day.

20. Following the lead of Sankara, the founder of Visishtadwaita, and others also founded Mutts with similar objects and for similar purposes. Nannuneri in the Tinnevelly District also known as Vanamamalai mutt and the Ahobila Mutt were founded, so goes the tradition, by the disciples of Sri Ramanujacharya. As adverted to already, the dwaita mutts at Udipi were founded by Sri Madvacharya. Ahobila Mutt was established for the spiritual instruction and benefit of the Vaishnava Brahmins of the Vadagalai sect. '*Rangachariar* v. *Yegna Dikshitur*', 13 Mad 524, relates to this Mutt. Besides these, there are Saiva mutts of the Sudras and the Vira Saiva Mutts of the Lingayats. Of the Sudra mutts perhaps the Dharmapuram mutt is the largest.

21. "The origin of these associations", to quote Muttusami Ayyar, J. in '*Giyana Sammandha Pandara* v. *Kandasami*', 10 Mad 375 at p. 386,

> "their constitution and development form part of the history of the establishment and spread of the Brahminical systems of religious doctrine among the Sudra communities in Southern India (referring to the Sudra Mutts). Originally the ascetic who renounced the world and devoted himself to religion, confined his attention to the study of theology, to imparting religious instruction to his disciples, and to complying with-the ordinances prescribed for the guidance of his order."

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22. In the well known case of '*Vidyapurna Thirthaswami* v. *Vidhyanidhi Tirtha Swami*', 27 Mad 435, Subramania Ayyar O.C.J. referring to these mutts described the object with which they were established as follows:

> "Now there can be no doubt that institutions of the class under consideration were established as centres of theological learning and in order to provide a line of competent teachers with reference to the established Hindu creeds of the country. If any proof of this statement were necessary, that is furnished by the unquestionable connection which exists between sum of the more important of this class of institutions and the leading exponents of the tenets of those creeds. As pointed out in Mr. Ghose's Hindu Law, page 680, no less than seven mutts, being among the most celebrated, owe their origin to the great Adwaita Philosopher Sankaracharya. Other mutts not less numerous or important following the tenets of the Visishtawaita system of Ramanujacharya are traceable to that teacher. The well-known eight muttts at Udipi, the centre of the Dwaita system of thought, are on all hands admitted to have been founded by Madhwacharya, the chief expounder of that system. The Sudra mutts of this Presidency, of which those at Dharmapuram and Tiruvaduthorai are the chief, represent what is known as the Saiva Sidhantam." (The reference to Seven mutts of Sankaracharya seems to be a mistake for five).

23. The learned Judge refers to the influence exercised by mutts as centres of learning in the next paragraph in the same page thus:

> "The influence exercised by mutts as centres of learning on the religious and other literature of the country cannot be denied. The varied and well-known contributions made thereto by the famous Vidyaranya Swami of the Sringeri or Sarada Mutt, or under his auspices, are among the most conspicuous examples of this kind. There is scarcely a branch of learning considered by Hindus as important, to which Vidyaranya or the scholars whom he gathered round him, did not make valuable contributions, and it is to his

commentaries that the modern world owes its knowledge of the traditional meaning of the oldest of sacred books—the Rig Veda. Nor has the influence of the Mutts at Dharmapu-ram, Tiruvaduthurai, etc. on the Dravidian literature been inconsiderable."

24. To similar effect are the observations of Bashyam Ayyangar, J. in his judgment in the same case. Referring to the mutts of Southern India, Ameer Ali, J. says in '*Vidya Varuthi Thirtha* v. *Baluswami Ayyar*', 44 Mad 831 at p. 840:

> "In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian people under the religious rule of the Hindu system, colleges and monasteries under the names of mutt were founded under spiritual teachers of recognised sanctity."

25. It is thus evident that the mutts are centres of theological learning especially for the study, practice and propagation of the cult of each system of philosophy and to train and equip a line of competent teachers whose duty is to go forth into the land bearing the torch of learning and spreading its light. They must have functioned & indeed in future must continue to function to fulfil the objects with which they were founded with foresight by the great teachers of the religion. If they had survived the onslaughts of other religions through centuries, it can only be due to their intrinsic merits and not to adventitious circumstances. It is the learning and piety of the head of the Mutt, the superior, which attracted disciples and induced even laymen to make

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munificent gifts of land and other properties placing them at the disposal of the Swami for the time being.

26. It is common knowledge that gifts are offered as padakanikas at the feet of the Swami. There are also permanent endowments of lands and villages made in ancient days by kings and Rajas without indicating the particular object for which such properties were endowed. It would perhaps be considered impudence on the part of the donor to impose any conditions or restrictions regarding the use of the income from the properties gifted to a personage whom he held in high religious esteem. The piety of the head to whom the gifts were made was a sufficient guarantee that the corpus and the income would not be frittered away for mundane purposes. These mutts, in short, are something like colleges established and founded for the study and teaching and for propagating the cult of the religion peculiar to the mutt.

27. So much about the functions of these mutts in Hindu religion. The more difficult question for solution is the juristic relationship of the superior or the head of the Mutt to the property. The difficulty is enhanced when attempt is made to fit facts to notions borrowed from the English jurisprudence. Viewed from the juristic conception of a trust, it is difficult to infer that the Matathipahi is invariably a trustee of the properties. The properties might have been acquired under different circumstances for various purposes and unless the deed of endowment is forthcoming, it may not be possible to easily infer a trust. The succession, according to the invariable usage of these mutts, always devolves upon the disciple selected and nominated by the outgoing head or Matathipathi. It is not governed by the ordinary Hindu law relating to the properties belonging to a sanyasi as laid down by Mitakshara. The question was considered in a number of decisions of this Court and also by the Judicial Committee. These decisions may be examined to arrive at a conclusion on the question, as to the jural relationship of the Matathipathi to the properties and whether he is a trustee in the sense in which that term is understood in the Trust Act.

28. As Salmond points out in his book on Jurisprudence, 9th Edn., at p. 349:

> "A trust is a very important and curious instance of duplicate ownership. Trust property is that which is owned by two persons at the same time, the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee, and his ownership is trust ownership; the latter is called the beneficiary, and his is beneficial ownership.....The trustee is destitute of any right of beneficial enjoyment of the trust property. His ownership, therefore, is a matter of form rather than of substance, and nominal rather than real. If we have regard to the essence of the matter rather than to the form of it, a trustee is not an owner at all, but a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person. In legal theory, however, he is not a mere agent but an owner. He is a person to whom the property of some one else is fictitiously attributed by the law, to the extent that the rights and powers thus vested in a nominal owner shall be used by him on behalf of the real owner. As between trustee and beneficiary, the law recognizes the truth of the matter; as between these two, the property belongs to the latter and not to the former. But as between the trustee and third persons, the fiction prevails. The trustee is clothed with the rights of his beneficiary, and is so enabled to personate or represent him in dealings with the world at large."

29. Though it is elementary knowledge, it is always ireful to bear in mind the elements that go to constitute a trust. In '*Sammantha Pandara* v. *Sellappa Chetti*', 2 Mad 175, Muthusami Ayyar, J. considered that

> "The property of the mattam does not descend to the disciples or elders in common; the preceptor the head of the institution, selects among the affiliated

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disciples him whom he deems the most competent, and in his own lifetime installs the disciple so selected as his successor, not uncommonly with some ceremonies. After the death of the preceptor the disciple so chosen is installed in the gaddi, and takes by succession the property which has been held by his predecessor. The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. 'It is in a certain sense trust property; it is devoted to the maintenance of the establishment but the supefior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not 'apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution'." (The underlining (here in single quotation) is mine).

30. In the next case '*Giyana Sammandha Pandara* v. *Kandasami*', 10 Mad 375, the learned Judge observed:

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"Thus, the ascetic who originally owned little or no property, came to own the Matam under his charge & its endowment, in trust for the maintenance of the Mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connection with it, according to usage."

31. According to his view therefore the property is held in trust the objects of the trust being the maintenance of the mutt, the support of the Head and his disciples and the performance of religious and other charities in connection with the Mutt. The learned Judge, however, added that the Matathipathi had a larger dominion over the property and was not even accountable for its management nor for the expenditure of the income, the only limitation being that he should not apply the income or the property for any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. It will be seen from this conception of the ownership that it is not strictly permissible to apply the motion of a trust to the fullest extent.

32. In '*Vidyapurna Tirtha Swami* v. *VI-Dyanidhi Tirtha Swami*', 27 Mad 435, the question received a critical examination by the two learned Judges, Subramania Ayyar and Bashyam Ayyangar JJ. According to their view the inalienability of the properties belonging to the Mutt flows from the fact that the property was given for the maintenance of charities, religious or otherwise, connected with the Mutt. The Swamiji of the Mutts were not mere employees or subordinates in the institution but heads thereof. Their duty was to promote learning and further the interests of the religion and they being ascetics are not prone to be affected by motives incidental to worldly life, requiring less restraint in dealing with property than ordinary men. On this reasoning the learned Judge concludes:

"It followed therefore that the law gave them over what remained of the income after defraying the established charges of the institutions, a full power of disposition, while in respect of the corpus it treated the individuals composing the line of succession as in the position of tenants for life."

33. He differs from some of the observations made by Muthuswami Ayyar, J. in '*Sammandha Pandara* v. *Sellappa Chettf*, 2 Mad 175. The precise dual character of the heads of the institutions like the Mutts was compared to that of the temples by the learned Judge. In the case of temples undoubtedly the idol is the ideal person and juristic entity in whom the property is vested and the dharma-kartha or the manager for the time being had no sort of beneficial interest in the property which is entrusted

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to his care and management but he being undoubtedly in a fiduciary position his liability is strictly that of a trustee though he is not a trustee himself and he is not a trustee because the property does not vest in him. How does the position stand regarding the Mutts? The learned Judge deals with this question at page 442 and adverts to the fact that invariably in the Mutts there are idols connected with the worship, which is a secondary matter "the principal purpose" to quote the learned Judge,

> "of such an institution being the maintenance in circumstances likely to command due respect and estimation of a line of competent religious teachers, who, as already shown, are given for the welfare of the foundation itself, a real and so to speak, beneficial interest in the usufruct, the restrictions governing the disposition whereof by them being of the nature of a mere moral obligation."

34. The learned Judge goes on to observe:

> "Having regard to these facts it is obvious that the correct view to be taken is that in the case of mutts the ideal person is the office of the spiritual teacher Acharya which, as it were, is incarnate in the person of each successive Swami who, for the time, is a real owner and not a mere trustee."

35. In the same case, Bashyam Ayyangar, J. expressed the definite opinion that the head of a Mutt as such is not a trustee in the sense in which that term is generally understood in the law of Trusts and that the principles regulating the appointment of new trustees are by analogy derived therefrom should not be invoked in determining the legal position of a Matathipathi with reference to his properties. He contrasts the position of a dharmakartha of a temple and the position of the head of a Mutt. At page 451 he pointed out that in the case of debutter property such as property belonging to devasthanams or temples which have been established for the spiritual benefit of the Hindu community in general or for that of particular sects or sections thereof, the management of such institutions is usually vested in one or more persons variously described as dharmakarthas, panchayats, uralans etc. but referred to in the Acts as trustees, managers or superintendents. He says:

> "Their office is either hereditary or for life and, as a general rule, they have beneficial interest in the endowments or their income. As already stated, the worshippers are beneficiaries only in a spiritual sense, and the endowments themselves are primarily intended for spiritual purposes, though indirectly and incidentally a good number of people derive material or pecuniary benefit therefrom as office holders, servants or objects of charity. In the decisions above referred to at length, the presiding idol is treated as a juristic person in whom the properties constituting the endowments are vested. The question has not been suggested or considered, whether the community itself for whose spiritual benefit the institution was founded and endowed may not more appropriately be regarded as a corporate body forming the juristic person in whom the properties of the institution are vested and who act through one or more of the natural persons forming the corporate body, —these latter being the dharmakarthas or panchayats etc. charged with the execution of the trusts of the institution and possessing strictly limited powers of alienation of the endowments, as defined in the cases cited above. Though a fluctuating and uncertain body of men cannot claim a profit 'a prendre in alieno solo', nor be the grantee of any kind of real property (see '*Goodman* v. *Mayor of Saltash*', (1882) 7 AC 633, yet there is high authority for treating such a community as a corporation of juristic person in relation to religious foundations and endowments."

36. With reference to the heads of the Mutts he observes at p. 454:

> "The position of the head of the mutt is thus not the same as or analogous to that of managers or dharmakarthas of devasthanams &

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temples, but resembles more that of Bishops and Archbishops in the Christian system of Europe. In the case of temples, the endowments, whether in the shape of landed property or tasdik allowances, have to be devoted to the carrying out of the specific purposes connected with the temple, i.e., the daily worship and the periodical ceremonies and festival — purposes defined and settled by usage, and custom and generally recorded in what is known as the dittam — and the dhar-makarthas are mere trustees for the carrying out, or executing of such trusts. In the case of mutts, however, such defined and specific purposes immediately connected with the maintenance of the mutt as an institution, are, in the nature of things, very limited and a large part of the income derived from the endowments of the mutt as well as from the money offerings of its disciples and followers — which offerings as a rule are very considerable —is at the disposal of the head of the mutt for the time being, which he is expected to spend, at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such religious and charitable objects is one in the nature only of an imperfect or moral obligation resting in his conscience and regulated only by the force of public opinion and he is in no way, whether as a trustee or otherwise, accountable for it in law.....

> In legal contemplation, therefore, the head of a mutt as such, has an estate for life in its permanent endowments and an absolute property in the income derived from the offerings of his followers, subject only to the burden of maintaining the institution. Over the corpus of the endowment, however, his power of disposition is very limited, as in the case of managers of temples and devasthanams. He cannot alienate or charge the corpus or the income beyond his own lifetime, so as to bind the mutt and his successors except for the purposes plainly necessary for the maintenance of the mutt."

37. The conclusion of both the learned Judges therefore was that as regards mutt properties, i.e., the corpus the matathipathi has a life estate but over the income derived from various sources he has full power of disposition limited only to the objects of the institution. The corpus can be alienated only for purposes binding on the institution i.e., for necessity or benefit as in the case of dharmakarthas, managers of temples etc.

38. There are three decisions which arose out of the same litigation & relate to the Tiruvannamalai Mutt. Two suits O.S. Nos. 1 and 2 of 1905 were instituted in the District Court, Madura with the consent of the Advocate General under Section 539 of the CPC corresponding to the present S. 92. The object of the suits was to have it declared that there was no lawful trustee for the Mutt. The object of filing the two suits was some doubt was felt, whether the head of the Mutt was a trustee within the meaning of Section 92 of the CPC. Therefore in one of the suit a mere declaration was sought. In both the suits there was a common issue whether the first defendant, the de facto holder of the office was a mere trustee of the mutt or had a life estate in the Adhinam properties. Both the suits were dismissed by the District Judge on the authority of '*Vidyapurna Tirthaswami* v. *Vidyanidhi Tirtha Swami*'. 27 Mad 435, holding that the Pandarasannadhi i.e., the head of the mutt was not a mere trustee and that therefore no suit lay under S. 539 of the Code.

39. There were appeals to the High Court which came up in the first instance before Munro and Abdur Rahim JJ. who referred the Question:

> "Does the head of a mutt hold the properties constituting its endowment as a life

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tenant or as a trustee?" to a Full Bench as the learned Judges doubted the correctness of the decision in '*Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*', 27 Mad 435, in view of the earlier decisions in '*Samantha Pandara* v. *Sellappa Chetti*', 2 Mad 175 and *Giyana Samanda Pandara* v. *Kandasami*', 10 Mad 375. The matter came up in '*Kailasam Pillai* v. *Nataraja Thambiran*', 33 Mad 265, before a Full Bench consisting of Sir Ralph Sillery Benson O.C.J. Wallis & Sankaran Nair JJ. The question was fully examined by the learned Judges & the answer given by them was that it could not be predicated of the head of a mutt, as such, that he holds the mutt properties constituting its endowments either as a life tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long continued and well established usage and custom of the institution in respect thereto. The right of the head over the surplus income and his power to utilise it for the spiritual advancement of himself and his disciples or for the public was recognised.

Sankaran Nair, J. observed at page 286:

"His discretion in this matter is unfettered. He is not accountable to any one and he is not bound to utilize the surplus. He may leave it to accumulate. From the nature of the case he cannot be controlled by the Courts. In such cases there is no trust. Where the trust is clear the Courts will of course enforce it. But the embarrassment and difficulty that would be caused may be taken into consideration in deciding where there is a trust. Though the other members may not be entitled to demand that the surplus funds should be applied to any particular purpose, it may be that they have the power to check any expenditure for purposes entirely repugnant to the character of the institution, if it would diminish the fund out of which they have to be maintained and educated and the necessary expenses, payment of Government revenue etc., have to be incurred."

40. Of course, the learned Judges also recognised that lands held by the mutt could not be alienated except for necessary & binding purposes & that is for the reason not that it is trust property but that the mutt is a permanent institution the head of which for the time being is bound to pass it on to his successor without burdening it except for necessaries. The matathipathi undoubtedly is under a legal obligation to maintain the mutt, to support the disciples and to perform the indispensable services from and out of the income in his hands. In view of the answer given by the Full Bench, when the case went back to the Division Bench, the decision of the learned District Judge was reversed & the suits were remanded for ascertaining whether there was any specific evidence to establish that with reference to any particular property,

there was a trust created in the manner recognised by law. After remand, the matter was considered by the subordinate Judge to whom it was transferred and he recorded a finding that there was no evidence to show that the Pandarasannadhi was a trustee and he again dismissed the suits.

41. The matter came up again to the High Court and the decision is reported as '*Kailasam Pillai* v. *Nataraja Tambiran*' 32 Mad L.J. 271. By this time, the Privy Council judgment in '*Ram Prakash Das* v. *Anand Das*', 43 Cal 707 (P.C.), was pronounced in which there were observations to the effect that the position of a mahant was that of a trustee. Attempt was made therefore to re-open the decision of the Full Bench and to canvass its correctness. But this attempt failed as the Division Bench refused to re-open the question rightly pointing out that the remedy of the aggrieved parties was by way of an appeal against the previous judgment to the Judicial Committee. The

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correctness of the finding of fact that there was no evidence of a trust, however, was not canvassed before the Division Bench. The Division Bench considered the other questions arising in the appeal regarding the validity of the appointment of the person in possession which is not material for this discussion. This decision was taken in appeal to the Judicial Committee in '*Nataraja Tambiran* v. *Kailsam Pillai*', 44 Mad 283 (P.C). Before the Judicial Committee no attempt seems to have been made to challenge the correctness of the decision in '*Kailasam Pillai* v. *Nataraja Tambiran*', 33 Mad 265, and the finding that there was no evidence to show that the head of a Mutt was a trustee of the Mutt or its properties was accepted as correct and on that basis the case proceeded, and the only questions which their Lordships of the Privy Council were called upon to consider as necessary for the decision of the case was the question relating to the validity of the appointment of the Pandarasannadhi.

42. In the same volume in '*Vidya Varuthi Thirtha* v. *Balusami Ayyar*', 44 Mad 831 (PC), there is another decision of the Privy Council relating to a Mutt situate in the Mysore State but which owned property in this presidency. The point that arose for decision no doubt was one of limitation in a suit to recover properties alienated by the previous head of a Mutt and the question debated was whether or not the head of the Mutt was a trustee within the meaning of Article 134, Sch. I of the Limitation Act. In considering this point Mr. Ameer Ali reviewed the whole question in the light of the law applicable to Hindu and Muhammadan endowments and also considered the effect of the earlier decision of the Board in '*Ram Parkash Das* v. *Anand Das*', 43 Cal 707 (PC).

43. This decision is important as a considered pronouncement of the Privy Council on the question now under consideration. The observations of the Judicial Committee in '*Greedharee Doss* v. *Nundokishore Doss*', 11 Moo Ind App 405 (PC), that the

> "only law as to these Mahants and their functions and duties is to be found in custom and practice, which is to be proved by testimony."

44. Has again been reiterated at page 838. The word 'trustee' in the decision in '*Ram Parkash Das* v. *Anand Dass*', 43 Cal 707 (PC), it was explained, was intended to be used only in a general sense as a convenient and compendious expression to convey the general obligations. It was not intended by that expression to define the term or to hold that the word in its specific sense is applicable to the laws and usages in India. The decisions of this Court in '*Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*', 27 Mad 435, and of the Full Bench in '*Kailasam Pillai* v. *Nataraja Tambiran*', 33 Mad 265, were referred to in the course of the judgment without any disapproval, of the view taken by the Full Bench. In the case of temples, "the image or the deity of the Hindu pantheon", observed Mr. Ameer Ali

> "is, as has been aptly called, a 'juristic entity', vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same 'juristic' capacity and gifts are made to them 'eonomine.....When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the-institution. In almost every case he is given the right to a part of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a 'trustee' in the English sense of the term, although in view of the obligation and duties resting on him, he is answerable as a trustee, in the general sense for maladministration."

45. After a review of the decisions including '*Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*', 27 Mad 435 and '*Kailasam Pillai* v. *Nataraja Tambibiran*', 35 Mad 265, the conclusion is stated at page 847 as follows:

> "From the above review of the general law relating to Hindu and Muhammadan pious institutions it would prima facie follow that an alienation by a manager or

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superior by whatever name called, cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English law. Of course, a Hindu or a Muhammadan may "convey in trust" a specific property to a particular individual for a specific and definite purpose and place-himself expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term."

46. Later on it was added that the expression

"'Conveyed in trust' is hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution."

47. It was therefore held that the head of a mutt was not a trustee within the meaning of Article 134. '*Srinivas Chariar T.P.* v. *C.N. Evalappa Mudaliar*', 45 Mad 565 (PC), drew a distinction between the position of a dharmakartha and that of a shebait of a religious institution. At p. 581 it is stated:

"The position of a dharmakartha is not that of a shebait of a religious institution, or of the head of a mutt. These functionaries have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character."

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48. In the very learned judgments delivered in '*Vidyapurna Tirthaswami* v. *Vtdyanidhi Thirthaswami*', 27 Mad 435, the distinction between those functionaries is explained. But a dharmakartha is literally and no more than the manager of a charity, and his rights, apart it may be in certain circumstances from the question of personal support, are never in a higher legal category than that of a mere trustee.

49. To these weighty pronouncements may be added the latest decision of the Supreme Court in '*Angurbala* v. *Debabrate*', (1951) SCJ 394, where it had to consider the question whether the Hindu Women's Rights to Property Act XVIII of 1937 as amended by Act XI of 1938, was applicable to the devolution of shebaitship. The Act would apply if the shebaitship is property. The answer given was that it was property within the meaning of that Act. Mukerjea, J. at page 398 summarised the position of a shebait as follows:

"The exact legal position of a shebait may not be capable of precise definition but its implications are fairly well established. It is settled by the pronouncement of the Judicial Committee in '*Vidya Varuthi* v. *Baluswami*', 44 Mad 831, that the relation of a shebait in regard to debutter property is not that of a trustee to trust property under the English law. In English law the legal estate in the trust property vests in the trustee who holds it for the benefit of cestui que trust. In a Hindu religious endowment on the other hand the entire ownership of the dedicated property is transferred to the deity or the institution itself as a juristic person and the Shebait or Mahant is a mere manager. But though a Shebait is a manager and not a trustee in the technical sense, it would not be correct to describe the shebaitship as mere office. The shebait has not only dutiss to discharge in connection with the endowment, but he has a beneficial interest in the debutter property. As the Judicial Committee observed in the above case, in almost all such endowments the Shebait has a share in the usufruct of the debutter property which depends upon the terms of the grant or upon custom or usage. Even where no emoluments are attached to the office of the Shebait, he enjoys some sort of right or interest in the

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endowed property which partially at least has the character of shebaiti both the elements of office and property, of duties and personal interest are mixed up and blended together; and one of the elements cannot be detached from the other. It is the presence of this personal or beneficial interest in the endowed property which invests shebaitship with the character of proprietary rights and attaches to it the legal incidents of property. This was elaborately discussed by a Full Bench of the Calcutta High Court in '*Monohar Mukerjea* v. *Bhupendra Nath*', 60 Cal 452, and this decision of the Full Bench was approved of by the Judicial Committee in '*Ganesh Chunder* v. *Lal Behary*', 71 Mad LJ 740 : 63 Ind App 448 (PC), and again in '*Bhabatarini* v. *Ashalata*', (1943) 2 Mad LJ 70 : (70 Ind App 57 P.C.) The effect of the first two decisions, as the Privy Council pointed out in the last case, was to emphasize the proprietary element in the shebaiti right and to show that though in some respects anomalous, it was an anomaly to be accepted as having been admitted into Hindu law from an early date."

50. The view taken in '*Baluswami Iyer* v. *Venkitaswami Naicken*', 32 Mad LJ 24, following the decision of the Privy Council in '*Ram Parkash Das* v. *Anand Das*', 43 Cal 707, does not seem to be correct. It is this decision which went on appeal to the Privy Council in '*Vidya Varuthi* v. *Baluswami Ayyar*', 44 Mad 831, and was reversed by the Privy Council. It is therefore too late in the day to contend, as was done on behalf of the respondent, that this decision is still good law and it is unnecessary to refer to the other decisions in view of the weighty pronouncements of the Judicial Committee and of the Supreme Court.

51. From this review of the authorities, it may be taken as established that the head of the mutt is not a trustee in the sense in which that word is used in the law of Trusts and his position cannot be brought under any legal label known to English jurisprudence. He is not even a life tenant in respect of the properties permanently vested in the mutt or the religious institution. He has a right to the income but he has no power of disposition over the corpus unless necessity or benefit is established. He has large powers over the surplus of the income after meeting the demands of the institution such as its maintenance, the maintenance of the disciples and the performance of the daily worship etc. He has the discretion to use the surplus for spiritual objects and that discretion is unfettered so long as the surplus is not diverted to any immoral or wicked purposes. He has the liberty to accumulate the income. The padakanikas are at his absolute disposal. If, however, it is established that any specific property has been vested as a trustee in the head of the mutt, to that extent and in respect of that property, he becomes a trustee. In other respects he is not liable to account for the income much less to the padakanikas.

52. He is a person with manifold rights and duties. He is the spiritual head; he is the teacher and the guru. He has to carry on the worship of the deity installed in the mutt, maintain the disciples and propagate the views of the religion of the institution. His life is one of discipline and non-attachment to worldly things and he is expected to meditate and study and further the creed of the mutt. Such institutions are autonomous bodies governed and controlled by the directions and orders of the head of the Mutt. He is treated almost as a representative of the Godhead by his disciples and the followers. He is held in high esteem and the disciples consider any extraneous control over the head as lowering the dignity and the prestige he enjoys as such head. These are some of the salient rights and duties of a Mathadhipathi. It follows that to some extent he has the beneficial ownership of the properties while in respect of some of the properties he may be a manager. No doubt, the management of the properties may bear a secular aspect but the secular and the religious aspects cannot be dissociated as they are inextricably mixed up when it is once established that the property and the income are at the disposal of the Swami for the sole and exclusive purpose of the spiritual welfare of himself and his disciples and followers.

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53. Before dealing with the various grounds on which the legislation is challenged, it may

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be useful to briefly review the legislation by which the Government exercised control over Hindu religious and charitable endowments, & to refer to the relevant provisions of the earlier and the new Acts which have been attacked. In England, from earliest times, the King claimed the prerogative right of exclusive jurisdiction over all charities which was exercised through various channels. It is now being exercised through visitors and by the Charity Commissioners under statutory authority. Before Madras Regulation VII of 1817 was enacted, there is evidence that the British Government claimed the power of superintendence & management of the property and affairs of the temples which was exercised through the agency of the Collectors.

54. In 1810 in the Bengal Presidency and in 1817 in the Madras Presidency, the Government enacted regulations by which they assumed control of all public endowments, Hindu and Muhammadan, which were placed under the superintendence of the Board of Revenue. Madras Regulation VII of 1817 related to endowments of land and money granted in respect of mosques, Hindu temples or colleges or other pious and beneficial purposes. Secular charities and nonreligious charities such as choultries and cha-trams were also included in it. By S. 2 of that Regulation, the superintendence over the endowments was vested in the Board of Revenue. Mutts were not specifically included in it the Board of Revenue was authorised to appoint local agents, the Collector of the District being ex officio one of such agents. The main object of the Regulation was to see that the income from the endowments was properly applied to the purposes for which they were established. The local agents had to keep watch over the endowments in their charge and to report to the Board. This system of management continued till about 1842 when owing to the agitation set on foot by Christian missionaries that a Christian Government should not administer Hindu and Muhammadan endowments, the supervision and control were given up by the Board of Revenue and the endowments were handed over to the respective trustees. As a result of the relinquishment of control it was experienced by the Government that there was mismanagement of the trusts which resulted in embezzlement and misappropriation of funds belonging to the various institutions.

55. The India Government took up the matter as result of which Act XX of 1863, known as the Religious Endowments Act of 1863, was enacted. It applied to Hindu as well as Muhammadan endowments and authorised the constitution of committees in every division or District which has to take the place of the local agents provided under Regulation VII of 1817 and the Committee was authorised to exercise the powers of the Board of Revenue under that Regulation. Provision was made to appoint a successor to the office of trustee, manager or superintendent whenever there was a vacancy & also to get a manager appointed by application to the Civil Court in cases where succession to the trusteeship was in dispute until such succession was established in a Court of law. Under S. 14 a right of suit was given to persons interested in any mosque, temple or religious establishment to sue the trustee, manager or superintendent for any misfeasance, breach of trust or neglect of duty. Even after a few years after this Act came into force, it was felt in Madras that the control exercised by the Committees was not adequate.

56. In 1877 when the Code of Civil Procedure was enacted in respect of trusts created for public charitable purposes, a right of suit analogous to the right of suit

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under Section 92 was conferred under Section 539 which was later enlarged to suits in respect of trusts for public charitable and religious purposes by the Code of Civil Procedure, 1882. In 1920 the Central Government enacted the Charitable and Religious Trusts Act of 1920, Act XIV of 1920, with a view to provide more effectual control over the administration of charitable and religious trusts. The provisions of this Act are undoubtedly wider in scope as under the Act power was conferred in the case of trusts for charitable or religious purposes to apply to the District Court to furnish information and to get the accounts of the trusts audited. The trustee was empowered by Section 7 of the Act to apply for directions to the Court whenever necessary.

57. The Code of Civil Procedure of 1908 enacted S. 92 which replaced the earlier section 539. It enlarged the scope of the suit in respect of trusts created for public purposes of a charitable or religious nature. Under this section in case of breach of trust two or more persons having interest in the trust with the previous sanction of the Advocate-General or Collector of the District were empowered to institute a suit in a Court having jurisdiction for removal of a trustee and for appointment of a new trustee and also for directions regarding accounts and enquiries. The Court is also empowered in such a suit to settle a scheme for the administration of the trusts. This section was taken advantage of by many of the worshippers of temples, and representative suits under O. 1, R. 8 of the CPC were also instituted. The administration of a large number of temples and the conduct of the trustees was made the subject-matter of judicial enquiry in suits instituted in various Courts.

58. The British Government throughout followed a policy of neutrality in matters of religion ever since the date of the Proclamation of 1858 by Queen Victoria. When Diarchy came in, the question of undertaking legislation for the administration of religious endowments received serious attention at the hands of the Madras Government Earlier no doubt several attempts were made to introduce bills for the better administration of the endowments drafted by very eminent people such as Muthusami Ayyar, Chenchal Rao, Anandacharlu, and others. In 1925 the Madras Hindu Religious Endowments Act, 1923, (Act I of 1925) was passed by the local Legislature with the object of providing for the better governance and administration of certain religious endowments. The Act divided temples into what are known as Excepted and Non-excepted temples. It defined "mutt" as meaning

> "an institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples & succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage; and includes places of religious worship other than a temple or places of religious instruction which are appurtenant to such institution."

59. A Board of Commissioners was constituted under the Act vested with powers enumerated

therein. Temple Committees for local areas were constituted. Section 34 made it obligatory on the part of every mutt and temple to maintain a register showing particulars regarding the past and present trustees, the usages of the institution, the particulars of the endowments, the scheme of administration and the dittam or scale of expenditure and so on. With regard to non-excepted temples under Chapter V, provision was made for fixing the dittam or the scale of expenditure for the submission of the budget and for settling schemes which could be modified later on sufficient cause shown or even cancelled by the Court on the application of the Board. Mutts and

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excepted temples, however, received a different treatment. The Act required trustees of mutts and excepted temples to submit a budget and an annual statement of actual receipts and disbursements and there was also a power to settle a scheme for their administration. The only power conferred upon the Board in settling scheme under the Act was to associate if necessary, any person or constitute any separate body for participating or assisting in the administration of such endowments along with the trustee or trustees. There were other provisions relating to finance including a power to levy contributions from mutts and temples not exceeding 11 per cent, of its income as may be determined by the Board. The operation of Ss. 92 and 93 and Order I, Rule 8 of the CPC was excluded in respect of suits claiming any of the reliefs under Section 69(1) of the Act i.e., for appointing or removing a trustee of a mutt or excepted temple, vesting any property in a trustee and so on. The suit under S. 69 could be instituted by the Board or Committee having jurisdiction over the Mutt or temple or any person having interest with the consent of the Board. Power was also conferred by S. 74 to get possession of the property of the trust through Court.

60. Immediately after the Act came into force, its validity was challenged in suits instituted for the purpose on the ground that the Act was not validly passed. For this reason, the legislature enacted the Madras Hindu Religious Endowments Act, 1926, Act II of 1927, repealing Act I of 1925. Some alterations were also made in the provisions of the Act which was repealed and the same were re-enacted. In the case of Mutts and excepted temples, there was no provision for fixing the dittam and the trustee of a Mutt or excepted temple was required only to submit a budget and also a statement of the actual receipts and disbursements of the previous year. The provisions relating to the framing of a scheme were retained. There was no provision to remove a hereditary trustee of a Math or excepted temple except by a suit under Section 73 of the Act. The other provisions of the Act were continued though the numbering of the sections was altered.

61. This Act was amended from time to time. It is unnecessary to refer to the changes introduced later. Suffice it to say that the Act was amended by 1946 by as many as ten Acts I of 1928, V of 1929. IV of 1930. XI of 1931. XI of 1934. XII of 1935, XX of 1938. XXII of 1939, V of 1944 and X of 1946. A radical change was introduced, however, by Act XII of 1935. The Government was not satisfied with the powers of the Board then existing and they clothed the Board with an important and drastic power by introducing a new Chapter, Ch. VI-A. by which jurisdiction was given to the Board to notify a temple for reasons to be given by it. The trustee was to be given an opportunity to show cause against the application of the notification procedure and if the objection was overruled after enquiry, the Board was to issue a notification in the Fort St. George Gazette to the effect that it had decided to apply the provisions of the new Chapter. A novel feature of this chapter is that an appeal against the decision of the Board is provided to the Board itself consisting of the President and all the other Commissioners of the Board sitting together. If no appeal is prefererd or if it was preferred and was dismissed, then the local Government would issue a notification in the Fort St. George Gazette declaring the temple or endowment to be subject to the provisions of this Act whereupon the Board would be authorised to appoint a salaried executive officer professing the Hindu religion to take over the administration of the temple or the endowments. There is no right of suit and the order of the Government is final. This procedure, it must be noticed, did not apply to mutts under Act XH of 1935.

62. Act X of 1946 introduced several changes. This Act abolished the distinction between excepted and non-excepted temples and extended the provisions of the Act to religious endowments in the Presidency Town also. The definition of "religious endowments" has been amplified so as to give power to the Board over the property or

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endowments of a defunct temple. The powers of the Board have also been enlarged to a large extent. The provisions of Sections 38 and 39 of the Act regarding the preparation of registers of endowments and the annual verification of the register have been made applicable to Mutts also. In settling a scheme for temples under Section 57 of the Act the Board was empowered to remove an existing trustee or trustees whether hereditary or non-hereditary and the notification procedure was made applicable to temples governed by a scheme previously framed by the Board or settled by Court. So far as Mutts are concerned, the power of the Board was enlarged in various respects, the most important of which is the power to appoint a paid executive officer to take charge of the administration of a Mutt and its endowments. The surplus funds could also be diverted by direction of the Board in the scheme in accordance with the provisions of S. 67. The power of removal of an executive officer appointed under the scheme is vested exclusively in the Board.

63. Under new Section 61 substituted by Act X of 1946, in the case of Mutts it was required that the budget of every mutt should make adequate provision for the dittam or scale of expenditure for the time being in force and the other customary expenses of the mutt and for the due discharge of all liabilities in respect of the debts binding on the math. The budget may also provide for the application of the surplus for such religious or charitable purposes not inconsistent with the objects of the mutt.

64. Under Section 61-A it was open to the Board to require the trustee of a mutt to appoint a competent person as manager for the management of the secular affairs of the math. The contribution payable by a mutt was 3 per cent, of the income which was fixed by the earlier Act of 1944. The power to decide the amount of the income was vested solely in the Board. There were also provisions for the audit of accounts and for levying an audit fee. Section

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64-A made the provisions of Ss. 59 and 60 of the Act applicable also to mutts. Section 59 requires that the trustee should furnish accounts to the Board and Section 60 provides for the inspection by the President of the Board or any commissioner or Assistant Commissioner of the movable & immovable properties belonging to the institution & all records, correspondence etc. S. 79-A provides that the Board should decide any matters mentioned in S. 79 and such power shall be exercised by a Committee of not less than two Commissioners including the President and finality is given to the decision of the Board. The matters referred to in S. 79 relate to the established usage of a mutt or temple or the rights, honours, emoluments and perquisites to which any person may by custom or otherwise be entitled in such mutt or temple. The jurisdiction to decide whether an institution is a mutt or temple and whether the trustee is a hereditary trustee as defined in the Act or not was exclusively vested in the Board and the jurisdiction of the Court to take cognizance of any such dispute in the exercise of its original jurisdiction is taken away. Appeal however is provided against the decision of the Board by way of application to the Court to modify or set aside such decision and the decision of the Court is made appealable.

65. Drastic changes of a fundamental character in the law were introduced by Act XIX of 1951 which, as its preamble shows, is intended to amend and consolidate the law relating to the administration and governance of Hindu Religious and Charitable Institutions & Endowments in the State of Madras. The ambit and scope of the Act are extended by making it applicable to charitable institutions as well and the endowments attached to them. Power is conferred by Section 2 of the Act to extend the provisions of the Act to religious institutions and endowments of Jains and the Act

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is to apply to charitable endowments only if a notification extending the provisions is issued by the Government.

66. The system of controlling and supervising the endowments through a statutory body hitherto known as the Madras Hindu Religious Endowments Board has been completely abolished & the administration of the religious and charitable institutions and endowments has been vested in a department of the Government, the Commissioner being the head thereof. Under him there are Deputy Commissioners and Assistant Commissioners and Area Committees. The State is divided into areas, at present three areas, and each area is in charge of a Deputy Commissioner to whom the powers of the Commissioner, which are permissible under the Act, may be delegated. The State is also divided into divisions and each division will be in charge of an Assistant Commissioner. Below the Assistant Commissioners are the Area Committees for all temples situate in an Assistant Commissioner's division or a part thereof; but in the case of temples falling within S. 38, the Area Committees have no jurisdiction i.e., religious institutions whose annual income as calculated for the purposes of the levy of contribution under S. 76 is not less than Rs. 20,000.

67. Power is given to the Commissioner under Section 18 to call for and examine the records of Commissioner, Assistant Commissioner, and Area Committee or any trustee not being the trustee of a mutt or of a specific endowment attached to a mutt, in respect of any proceeding under the Act not being a proceeding in respect of which a suit or an appeal to a Court is provided by this Act to satisfy himself as to the regularity, correctness or propriety of any decision or order. Some of the powers of the Commissioner, Deputy Commissioner and Assistant Commissioner are enumerated in Chapter XIX. Section 6 contains the definitions and a mutt is defined as a

> "Hindu religious institution with properties attached thereto and presided over by a person whose duty it is to engage himself in imparting religious instruction or rendering spiritual service to a body of disciples or who exercises or claims to exercise spiritual headship over such a body and includes places of religious worship or instruction which are appurtenant to the institution."

68. There is an explanation which is not relevant. A religious institution is defined as meaning a mutt, temple or specific endowment and a "religious endowment" means all property belonging to or given or endowed for the support of mutts or temples, or given or endowed for the performance of any charity or service of a public nature connected therewith or of any other religious charity; and includes the institution concerned and also the premises thereof, but does not include gifts of property made as personal gifts to the archaka, service-holder or other employee of a religious institution.

69. A "trustee" is defined as any person or body by whatever designation known in whom or in which the administration of a religious institution is vested, and includes any person or body who or which is liable as if such person or body were a trustee. A perusal of the definition would disclose that the word 'trustee' is used in the Act in a sense totally different from the narrower meaning attached to it in the law of Trusts. It is intended to bring within its purview the 'Dharmakartha' or the manager of a temple and even 'Matathipathis' in whom the administration of religious institutions is vested. Even if a person is liable to answer in the same manner and to the same extent as if he were a trustee, such a person also would be a trustee within the meaning of the Act.

70. Chapter III contains general provisions applicable to all religious institutions. Section 20 vests the administration of all religious endowments and the general superintendence & control in the Commissioner. The power of superintendence includes within its ambit the power to pass any orders which may be deemed necessary to ensure that such endowments are properly administered and that their

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income is duly appropriated for the purposes for which they were founded or exist. Section 21 gives the right & authority to a Commissioner, Deputy Commissioner and Assistant Commissioner and such other officers as may be authorized by the Commissioner or the Area Committee in that behalf, the power to enter the premises of any religious institution or anyplace of worship for the purpose of exercising any power conferred or discharging any duty imposed by or under this Act. If resistance to the exercise of such power is offered in discharge of such duty, police help can be obtained by an application to a Magistrate having jurisdiction. The only restriction on this power is a person who is not a Hindu & is not entitled even if he be an officer authorized under the Act, to exercise this power. As would be seen, the power is very wide in its scope and does

not take into account the religious sentiments and sanctity attached by a religious denomination to a particular institution and irrespective of the fact whether the person exercising the power, though a Hindu, belongs to the particular sect or caste, he is authorized to enter the institution including the sanctum sanctorum.

71. Section 23 makes it obligatory on the trustee of a religious institution to obey all lawful orders issued under the provisions of this Act by the Govt., the Commr., the Dy. Commr., the Area Committee or the Assistant Commissioner. Section 24 lays down the standard of care required by the trustee in exercising his powers. Section 25 deals with the preparation of register for all institutions and the particulars which they should contain. The Commissioner is authorised to direct the trustee to make such alterations and omissions or additions in the register as he may think fit. Section 26 deals with the annual verification of the register. Section 27 lays a duty on the trustee to furnish accounts, returns, reports or other information relating to the administration of the institution and its funds etc. Section 28 authorises the Commissioner or any Officer or other person deputed by the Commissioner in this behalf to inspect all movable and immovable property belonging to the institution and all records, correspondence etc. Section 31 deals with the surplus funds and empowers the trustee with the previous sanction in writing of the Deputy Commissioner to appropriate such surplus or any portion thereof for all or any of the purposes specified in S. 59(1) of the Act. Sections 32 to 51 do not apply to Mutts or specific endowments attached to Mutts.

72. Chapter IV which begins with S. 52 deals with Mutts. Section 52 provides for the removal of a trustee of a Mutt on the grounds specified therein by a suit instituted by the Commissioner or any two or more persons having interest in the Mutt and having obtained in writing the consent of the Commissioner. If succession to the headship is in dispute or when there is a vacancy which cannot be filled up immediately or when the trustee is a minor, the Board has to make interim arrangements for the administration after taking into consideration the claims of the disciples of the Mutt if any. S. 54 relates to dittams. The trustee is required to submit to the Commissioner proposals for fixing the dittam and the amounts to be allotted to the various objects connected with the institution. The proposals have to be published and after receiving suggestions, if any, the proposals will be scrutinised by the Commissioner and after necessary enquiry from the trustee, it would be open to the Commissioner if he thinks that a modification is required, to submit the case to the Government who shall pass orders thereon and the orders of the Government are final. Section 55 recognises the right of the trustee to spend at his discretion for purposes connected with the Mutt, padakanikas; but he is required to keep regular accounts of

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all receipts and disbursements regarding such pathakanikas.

73. Under S. 56 the Commissioner is empowered to call upon the trustee of a Mutt to appoint a manager for the administration of its secular affairs and to report the name of the Commissioner. In default of such appointment it is open to the Commissioner to appoint a person himself. The manager so appointed is of course a subordinate to the trustee of the Mutt and shall be responsible along with the trustee for the due submission to the Commissioner of the registers, accounts and budget of the Mutt and also for the performance of the statutory duties imposed upon the trustee by this Act.

74. Chapter V deals with inquiries into various questions connected with the institutions. Section 58 empowers the Deputy Commissioner to frame schemes for temples and Mutts as well. In the case of mutts, sub-s. (3) to S. 58 empowers the Deputy Commissioner, while framing a scheme, to appoint a paid executive officer who shall of course be a person professing the Hindu religion but need not necessarily belong to the same denomination. He is also authorised to determine what the properties of the religious institution are. The order of the Deputy Commissioner framing a scheme is appealable under S. 61 to the Commissioner. The Commissioner's order in appeal may be questioned in a suit instituted under S. 62. Section 59 provides for the division of the trust funds or funds of the religious institutions under the cypres doctrine. Section 62 provides for suits enabling a party aggrieved by orders passed by the Commissioner under S. 61(1) and (2), 57, 58, 60 or under S. 57, S. 58 or S. 60 read with sub-s. (1)(a), (2) or (4)(a) of S. 19 or with sub-s. (3) or (4) of S. 80, within 90 days of the receipt of such order. A further appeal lay to the High Court.

75. Chapter VI deals with notified religious institutions and the Act, for the first time, includes within the ambit of that procedure, Mutts also. The power can be exercised notwithstanding the fact that the religious institution is governed by a scheme settled under the Act and the power is exercisable by the Commissioner. If the Commissioner decides after hearing objections following the procedure laid down in S. 63 that the institution should be notified, the matter is reported to the Government and it publishes a notification in the Fort St. George Gazette declaring the religious institution to be subject to the provisions of this chapter. Such notification remains in force for a period of five years. The effect of notifying a religious institution is to take over the administration and vest it in an executive officer appointed by the Commissioner. The Commissioner is to decide the power and the duties which the executive officer should exercise but subject to the proviso that only such power and duties as appertain to the administration of the endowments of the religious institution shall be assigned to the executive officer.

76. Chapter VII deals with budgets, accounts and audit. Budget is compulsory in the case of religious institutions and the trustee is enjoined to keep regular accounts which should be got audited by an auditor, the details of which need not be referred.

77. Chapter VIII deals with finance. Section 76 vests in the Government the power to levy an annual contribution not exceeding 5 per cent, of its income. It is stated that this is levied for services rendered by the Government and their officers to religious institutions and in the case of certain institutions getting a particular income there is also a further charge of 1£ per cent, for audit the contribution being 5 per cent. What was originally 3 per cent, has now been increased to 5 per cent.

78. Chapter IX deals with Tirumalai Tirupathi Devasthanams and Chapter X contains miscellaneous

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provisions. Section 92 states that nothing contained in this Act shall be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination or any section thereof by cls. (a), (b) and (c) of Article 26 of the Constitution and suits are barred except to the extent allowed by the Act intended to question the administration of a religious institution. Section 99 vests revisional jurisdiction in the Government to call for records and examine them to satisfy themselves as to the correctness, legality or propriety of any decision or order passed by any of the authorities. Section 100 contains the rule making power. Chapter XI deals with transitional provisions. Any reference to the Board or its President should be read as referring to the corresponding authority under the Act and the Hindu Religious Endowments Act of 1926 was repealed. Certain rules made under that Act are validated and continued in force. These are, in short, the provisions having particular reference to mutts.

79. It is convenient at this stage to deal with two preliminary questions that have been raised in the arguments. Mr. K. Bhashyam, learned advocate for the petitioner, argued that the mutt in question is not really a public religious institution within the meaning of S. 1(2) of the Act, and that therefore the Act cannot be applied. He emphasized the fact that Shirur mutt exists exclusively for the benefit of Shivalli Brahmins and every member of the public is not entitled as of right to enter into the mutt or to partake either in the religious instruction or in the worship ??? on by the head of the mutt. Even among the members of the Shivalli Brahmin community, it is not all persons that are entitled to be taken into the inner fold of disciples. The choice of a person to be initiated to be made a disciple rests entirely in the discretion of the head, the Swami and no person has a right to insist that he is entitled to get his initiation from the Swami. It is an autonomous body existing for the spiritual benefit of the followers of the mutt. It is therefore claimed that it is solely and exclusively a private institution, something analogous to a college run under private management and therefore cannot be treated as a public religious institution. There is no doubt considerable force in this argument; but we are unable to entertain that objection at this stage as it was not raised before the Board and not even in the pleadings in this petition. The question whether an institution is a public institution or a private one has necessarily to be decided on evidence applying the tests recognised and established by decisions to distinguish a public institution from a private one. It is a well-known fact that the extent and nature of the rights fend duties and every matter relating to a mutt is dependent exclusively upon established usage. If such usage had been established by evidence that the public or a section thereof have no right to enter into the mutt and to claim its benefits, it would have been a different matter. The objection, therefore, taken only in the course of the arguments cannot now be entertained.

80. Mr. Seshachalapathi, learned counsel for the Endowments Board, raised the preliminary objection that we should not issue a writ of prohibition as the petitioner has his ultimate remedy by way of suit if a scheme were to be framed by the proper authorities under the new Act and that the application is therefore premature. It must be remembered that we are dealing with a writ of prohibition and not certiorari. A writ of prohibition lies to prevent an inferior tribunal from exceeding its jurisdiction or even from assuming a jurisdiction which does not vest in it under law. It also lies if a provision of a statute is contravened by the tribunal or even if any principles of law are contravened. In deciding the question whether a writ of prohibition should issue or not, the existence of an alternative remedy is, in our opinion, an irrelevant consideration when the complaint is that an inferior tribunal is exceeding its jurisdiction or is assuming a jurisdiction not vested in it by law. If the tribunal is permitted to exercise that jurisdiction which is objected to, if it exercises it wrongly,

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the mischief would be done before the alternative remedy is availed of. It is unnecessary to insist upon a party complaining that he should first suffer and submit himself to the jurisdiction which is being wrongly exercised or is wrongly exceeded and then take advantage of the alternative remedy. In Hals-bury, Vol. IX, page 822 (Hailsham edition), the position is thus stated:

> "The Court, in deciding, whether or not to grant a writ of prohibition, will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction, or an appeal lies against such absence or excess. Similarly the fact that an appeal on the merits of the case has already failed, or that the party applying for prohibition has himself initiated the proceedings in the inferior Court, is not material to the decision of the Court to grant or to refuse the writ."

81. Decisions in England, as is evident from this passage, have gone even to the length of helping a person aggrieved notwithstanding the fact that he was the very person who first initiated the proceedings and invoked the jurisdiction of the inferior Court. The objection raised by Mr. Seshachalapathi, in our opinion, has no force and must be rejected as it is not supported by any authority. The analogy of the position in the case of a writ of certiorari does not apply here.

82. We may now examine the Articles of the Constitution which have been relied on as having been contravened by the impugned legislation. The power of the legislature of the State of Madras to enact the law now challenged is conferred by the Constitution by Articles 245 and 246 and item 28 of the concurrent list, List III of the seventh schedule. Article 245 is made expressly subject to the provisions of the Constitution and Article 246(2) enables a State Legislature specified in Part A to enact laws with respect to any matters enumerated in List III of the Seventh Schedule. Item 28 of that list is

> "Charities and charitable institutions, charitable and religious endowments and religious institutions."

83. In the Government of India Act, 1935, Item 34 of List II was "charities and charitable institutions, charitable and religious endowments". As religious institutions were not specifically mentioned in that item, a question was raised in '*Manikkasundara Bhattar* v. *R.S. Nayudu*', (1946) FCR 67, that the Madras Temple Entry (Authorisation and Indemnity)

Act XXII (22) of 1939 was ultra vires. The contention, however, was overruled by the Federal Court. In order to obviate such difficulties in future, in the present Constitution, Item 28 expressly includes religious institutions. Power therefore under the present Constitution to enact laws with respect to matters enumerated in Item 28 of List III is conferred upon the State legislature but subject however to the provisions of the Constitution. The power of the State Legislature, it cannot be now contended, is part of any prerogative power or inherent right of the State to control and superintend religious institutions. It is an express power conferred by the Constitution upon the State legislature. What the limits to that power are is a matter to be determined by reference to the other Articles of the Constitution.

84. We are adverting to this aspect for the reason, that one of the counsel who appeared for the Commissioner, attempted to rest the power also on the prerogative right exercised by the British Government before India became independent and claimed to have been inherited by the State i.e., the power to legislate for the better administration and superintendence of religious and charitable endowments and

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institutions. The Constitution proceeds on the assumption that sovereignty vested in the people of India and they, through their accredited representatives in the Constituent Assembly, gave themselves the Constitution. The State legislature, therefore, has no other independent sovereign right to legislate apart from what is contained within the four corners of the Constitution. Therefore, what the British Government did earlier may not be very relevant except to consider the extent to which the temples and mutts allowed themselves to be subjected to extraneous control and supervision when religious liberty was not guaranteed by any written constitution.

85. The power of the State Legislature to enact a law in respect of religious and charitable endowments and institutions being undoubted, it remains to consider whether that power had been exercised within the limits laid down by the Constitution, and whether the fundamental rights claimed on behalf of the petitioner have been infringed so as to take away or abridge all or any of them. It is claimed on behalf of the petitioner that the right to equality before the law and the equal protection of laws guaranteed under Article 14 have been denied to him, that there was unreasonable discrimination based solely on religion which offends Article 15, that the right to acquire and hold and dispose of property under Article 19(1)(f) has been unreasonably restricted and that the right to freedom of religion conferred under Articles 25 and 26 has been unduly restricted and circumscribed practically denying the liberty granted by the Constitution. The levy of contribution under S. 76 of the new Act is, it was contended, in the nature of a "tax" within the meaning of Article 27 which is unconstitutional.

86. The conditions, the violation of which would bring a given legislation within the mischief of Article 14, have now been authoritatively settled by two decisions of the Supreme Court by which we are bound viz., '*Charanjit Lal* v. *The Union of India*', 1951 SCJ 29 and '*The State of Bombay* v. *Balsara*', 1951 SCJ 478. In the second of these cases, the principles to be borne in mind when applying Article 14 have been analysed and stated in the form of propositions by Fazl Ali, J. at page 491 as follows:

"(1) The presumption is always in favour of the Constitutionality of an enactment, since it must be assumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

(2) The presumption may be rebutted in certain cases by showing that on the face of the statute there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.

(3) The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.

(4) The principle does not take away from the State the power of classifying persons for legitimate purposes.

(5) Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

(6) If a law deals equally with members of a well defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

(7) While reasonable classification is permissible such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained and the classification cannot be made

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arbitrarily and without any substantial basis."

87. In view of this clear pronouncement of the highest authority, it is needless to refer to the authorities so copiously cited at the bar to illustrate one or the other of the principles enunciated above. The gravamen of the charge is that while the Christian and Muhammadan religious and charitable institutions and endowments were excluded, Hindu religious and charitable endowments and institutions alone were selected for special treatment and that such a discrimination is unwarranted, unreasonable and unjust. The classification of institutions and endowments based on religion, Hindu, Muhammadan or Christian, cannot be said to be either arbitrary or unreasonable having regard to the object sought to be attained viz., the better administration and management of such institutions. It is not a classification or division made for the first time by the State Legislature. The distinction existed for nearly a century. As the incidents and the nature of the institutions and endowments of different religions differ in several respects, it cannot be said that the classification is based solely on religion as the institutions included in the classification are religious as well as secular and having regard to the object in view, the institutions having several common features are rightly classified under one group. Article 14 does not prevent the legislature from taking up one set of institutions for legislative consideration at one time and enacting laws in respect of them,

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??? the other types of institutions for ??? to a future date.

88. It is impossible to accept the contention that the ??? Act violates either Article 14 or Article 15

89. The right to acquire, hold and dispose of property is conferred on the citizen by Article 19(1)(f). This right, however, as many of the fundamental rights enumerated in the Constitution, can only be exercised subject to reasonable social control in the larger interests of the State and for its welfare. This principle is recognised by Cl. (5) of Article 19 which states that the recognition of the right does not prevent the State from making any law imposing reasonable restrictions on the exercise of the right in the interests of the general public or for the protection of the interests of any Scheduled tribe. The Constitution embodies the corporate will of the people and they have expressly elected through their representatives to surrender and forego in the larger interests of the State and for the welfare of the people, part of their rights to the State. The fundamental rights recognised in the Constitution no doubt to some extent constitute limitations on the powers of the Parliament and the State Legislature enact laws and these were intended in the interests & for the benefit of the minorities. To what extent the control should be permitted and whether the legislature in enacting a particular law transgressed its limits without any justification and whether such transgression is within reasonable bounds are matters left open for Courts to decide. Unlike the American Constitution where under the power known as "due process of law" the Courts have exercised and have been exercising a greater degree of freedom in declaring a law unconstitutional on the ground of its unreasonableness for deciding which no particular standard had been laid down by the legislature, under the Indian Constitution the Courts' function is circumscribed and limited to the extent of considering whether the restrictions are reasonable or not.

90. At the outset in considering Article 19(1)(f) the Court has to be satisfied that the right claimed by the petitioner is "property" within the meaning of that sub-clause. Property is nowhere defined in the Constitution. It has now been clear by the decision of the Supreme Court in '*Cwaraniit Lal Chowdhurv* v. *The Union of India*', 1951 SCJ 29,

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that the relief by way of a writ could be granted only in favour of a person whose right has been infringed. A person who is not aggrieved and who is not personally affected cannot set the law in motion. In view of the decision in '*A.K. Gopalan* v. *The State of Madras*', 1950 SCR 88 and applying the reasoning in that case, if a person is deprived of his rights to property under Article 19(1)(f), the proper article to be considered is Article 31. Article 19(1)(f) applies only so long as a person is not deprived of his property by a law enacted by a competent legislature. It was contended on behalf of the respondent that trusteeship as understood in the law of trusts is not property contemplated by the Article. Willis in his book on *Constitutional Law* at page 815, in dealing with property that may be taken under the power of eminent domain, says:

> "In general it may be said that any and all property may be taken. Land, buildings, water, an easement as distinguished from general property, a contract, and a franchise may be taken."

91. Weaver in his book on *Constitutional Law* at page 374 says:

> "Property is ownership. It consists of the free enjoyment of one's acquisitions without control or diminution save by the law of the land. It consists not merely of ownership and possession but in the unrestricted right of use and disposal. Anything which destroys any of these elements to that extent destroys the property itself. The right of property is a natural right and neither the Federal Government, nor the State Government can deprive its owner of it or its possession except by the due process of law.
>
> "Property includes not only real estate and personal property, but also incorporeal rights such as patents, copyrights, leases, accounts and choses in action, and every other thing of an exchangeable value which one may have."

92. It is not disputed on behalf of the respondent that property includes even incorporeal rights. In '*Dwarkadas* v. *Sholapur S. & W. Co. Ltd.*', AIR 1951 Bom 86, the question was considered by Chagla C.J. at page 90, where he expressed the opinion that property used in Articles 19 and 31 need not necessarily be tangible property but may be even intangible property and might include incorporeal rights. The word 'property' occurs in Placitum 31 of the Australian Constitution and Nicholas in his Book on the Australian Constitution at page 201 states that:

> "the word 'property' in placitum (XXXI) is of the widest connotation: it is 'nomen gene-ralissimum'. It covered the acquisition for an indefiinte period of the exclusive right to use certain vacant land on which the claimant had erected a car park station with the permission of the owner; '*Minister of State for the Army* v. *Dalziel*', 68 CLR 261."

93. In the case referred to in the above quotation Rich, J. stated at page 285:

> "The meaning of property in such a connection (i.e. S. 51 p. xxxi) must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system or by reference to Sheppard's Touchstone. The language used is perfectly general. It says the acquisition of property is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property. It extends to any acquisition of any interest in any property."

94. A trustee in the legal sense is the owner of the property, but has no beneficial interest. The argument is that property is used in Articles 19(1)(f) and 31 in the sense of property which can be beneficially enjoyed and which can be validly disposed of as in Cl. (f) not only the right to acquire, but also to hold and dispose of property is enumerated. As trusteeship even of a hereditary kind could not be alienated under law, it is not property. This was the argument on behalf of the respondent.

95. The manager of a temple who is commonly called 'Dharmakartha' or some other equivalent name is not a trustee in the sense in which it is understood in the law of

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trusts nor is the head of a mutt such a trustee. The decisions in support of this have already been noticed. A 'Dharmakartha' very often has no beneficial interest in the property in his possession but his office is hereditary (we are of course not

referring here to non-hereditary trustees). We have considered the decisions in extenso on the jural relationship of the mathadhipathi to the mutt and its properties. He is not a bare trustee, but he occupies a peculiar position and has beneficial ownership to some extent in the property and the income. The mathadhipathi therefore cannot be correctly described as a "trustee" owning no beneficial interest in the property under his management. Even if the argument, therefore, of the respondent were accepted, the mathadhipathi satisfies that test and has beneficial interest in the property. Even in the case of a dharmakartha or the manager of a temple, there may be instances where such a dharmakartha is not merely a manager but also has beneficial interest in the property. In such a case also, the test laid down on behalf of the respondent would be satisfied. If there be however an instance where the dharmakartha has no beneficial interest of any sort but is a mere manager with hereditary rights, there is no reason to exclude such a hereditary right of management even from the scope of property; but however it is not necessary to express a final opinion on this.

96. In the judgment of Mukherjea, J. in '*Angurbala* v. *Debabrata*', 1951 SCJ 394, already referred to, dealing with the word "property" in the Hindu Women's Rights to Property Act, reference was made to the decision of Varadachariar, J. in '*Umayal Achi* v. *Lakshmi Achi*', (1945) 8 FLJ 8, where the learned Judge took the view that a bare trusteeship with no beneficial or personal interest in the trust properties is not property though for certain purposes as conceded even by the learned Judge, trusteeship may be property. Mukherjea, J. distinguishes shebaitship from trusteeship as shebaitship always carried with it an element of beneficial or personal interest in the properties in his charge. The learned Judge therefore distinguished the case in '*Umayal Achi* v. *Lakshmi Achi*', (1945) 8 FLJ 8, from the case before him on this ground. The learned Judge also approved of the decision of this Court in '*Suryanarayanacharyulu* v. *Seshamma*', ILR (1950) Mad 451, where it was held that the office of archaka which is a hereditary religious office in which the holder for the time being is beneficially interested to enjoy the income of the endowed property is "property" and that therefore the decision of the Federal Court was inapplicable. On this, reasoning, a Mathadhi-pathi's position cannot be worse than that of either a shebait or an archaka of a temple.

97. The view taken by Mukherjea, J. is based upon a Full Bench decision of the Calcutta High Court in '*Monohar Mukerji* v. *Bhupen-Dranath Mukerji*', 60 Cal 452, which was approved by the Judicial Committee in '*Ganesh Chunder* v. *Lal Behary Dhur*', 71 Mad LJ 740 : 63 Ind App 448 and '*Bhabatarini* v. *Ashalata*', 1943-2 Mad LJ 70 : 70 Ind App 57. It may be an anomalous position, but as observed by Mukherjea, J. it is an anomaly which has been admitted into Hindu Law for a long time from which there is no escape. The addition of the right to dispose of property in Article 19(1)(f) along with the right to acquire and hold is not intended to give a definition of property so as to limit it to disposable property. Property may be inalienable but yet a person may be entitled to hold it as in the case of inalienable service inams. The person holding such an inam is entitled to enjoy its income so long as he holds it, though he will not be entitled to dispose it of either by will or by gift 'inter vivos'; but must allow the property to pass on to the next office holder according to the law of succession

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governing such property. The argument that if the headship of a mutt is considered to be property, in no case can the mathadhipathi be removed even if it is established that he is disqualified from holding the position or proved that he is unworthy to hold it, overlooks the fact that in such an event, Article 31(1) clothes the legislature with power to enact a law depriving a person of the property. Of course such a legislation should not contravene or infringe any of the other liberties or fundamental rights recognised by the Constitution. The distinction between Articles 19(1)(f) and 31(1) is the difference between plucking the feathers of a bird one by one and killing it. In such a case Article 31(2) does not come into play as it would not be "acquisition" meaning transfer of property from the owner to the State but deprivation of property within the meaning of Article 31(1). For a further discussion of the meaning of the word 'acquire' reference may be made to the decision of the learned Chief Justice and Venkatarama Iyer, J. in the judgment relating to Rent Reduction Act in '*Ramakrishna Ranga Rao* v. *State of Madras*', C.M.P. Nos. 894 and 895 of 1951.

98. If Article 19(1)(f) applies, as we hold it does, the next question for consideration is whether the restrictions on the rights to property imposed by the impugned legislation are reasonable, and the interests of the general public demand them, there being no question of the protection of any Scheduled Tribes here.

99. The effect of the legislation is practically to reduce the Mathadhipathi to the position of a servant, subordinate to the Government even in respect of rights relating to property. The executive administration replaces the statutory control by the Board. The Mathadhipathi is bound to obey all lawful orders emanating from the Government down to the Asst. Commissioner. The premises of the Mutt and the places of worship and meditation are not immune from interference by the Government. All officers of Government have a right to enter any part of the religious institution and place of worship in the discharge of their duties and for the purposes of the Act and any resistance in the exercise on such power entails penal consequences. The only safeguard is the person so entering must be a Hindu but it is very often ineffective and useless. It is a well known fact that there are mutts belonging to different sects and creeds, the adwaita mutts, the Visishtadwaita, dwaita and saiva mutts and smartha-mutts and Zangam or Veerasaiva mutts. A Vaishnavite will not be permitted to enter the premises or at any rate to enter the place of worship, in a Veerasaiva mutt. There are differences even among Vaishnava sects between Vadagalais and Thengalais, and the customs and usages in the mutts vary. The place where the deity is installed is not allowed to be entered even by the ordinary worshippers. The officer even if he is a Hindu, may not be a believer in the faith of that particular Mutt and may have no respect for it and may even enter the premises in the western style with his shoes on. All these are matters of detail which can be better imagined than described.

100. In the utilisation of the surplus funds, the discretion of the head or the mathadhipathi is seriously interfered with by the provisions of the Act. In incurring expenditure under S. 30 of the new Act for the health, safety or convenience of the disciples, pilgrims or worshippers the voice of the Mathadhipathi is not final. Surplus funds may be diverted for other purposes alien to the objects of the institution. While under law lie is entitled to use it at his discretion for any purposes which cannot be described as wicked or immoral, his discretion is now taken away. In the application of the funds for the daily expenditure, he has to conform to the dittam and the opinion of the Commissioner regarding the fixation of the scales of expenditure which has to be

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submitted to Government who has to pass orders, is final. The routine expenditure in the institution consists usually in the feeding of the disciples and the head, the cost of carrying on of the worship of the deity and the feeding of the visitors and others according to the usage of the Mutt. There may be periodical special services or worship and the scale at which the amount has to be spent is usually at the discretion of the head of the Mutt.

101. In this institution it has been the usage to perform the 'paryayam' for example on a large scale as the feeding of the Brahmins on that occasion cannot be avoided and the Judicial Committee in the case of this very Mutt in '*Vibhudapriya* v. *Lakshmindra*', 50 Mad 497, decided that the 'Mathadhipathi' was justified in incurring debts for the performance of the paryayam.' In this view they differed from the narrow view taken by this Court based on economy and upheld the binding nature of the debt. It was observed by two learned Judges of this Court that the expenditure on such a large scale was not justified and one of the learned Judge stated that

> "It is idle to pretend that the feeding could have gone on anything like this scale in all the six centuries during which these maths existed or even in the earlier years of the last century."

102. And in support of that view a passage in '*Palaniappa Chetty, K.P.L.S.* v. *Sreemath Devasikamony Pandara Sannadhi*', 40 Mad 709, was relied on. In considering these observations, Mr. Ameer Ali observed at page 506:

> "The learned Judge seems to have misapprehended the effect of their Lordships' judgment in *Palaniappa Chetty's case*."

103. It was further observed that the High Court overlooked the observations of the Privy Council in '*Vidya Varuthi* v. *Baluswami Iyer*', 44 Mad 831 PC, to the effect that the superiors

> "have ample discretion in the application of the funds of the maths but always subject to certain obligations and duties equally governed by custom or usage."

104. The learned Judge proceeds to observe in the same page:

> "These Mathadhipathis have a difficult task to perform; unaided by any established rule they are expected to exercise control over the numbers of pilgrims, who come to the temple in order to participate in the festivals and share in the food offerings. Even if it were permissible for the superior to exclude a certain number from being fed, their Lordships doubt whether popular sentiment would sanction his so doing. The obligations under which they labour are regulated by custom, which are of longstanding and have been observed for centuries."
>
> "What their Lordships have to see in this case is, firstly, whether the debts were contracted by the deceased Swami for his own purposes or for the purposes of the temple and in discharge of the duties under which he lay in the performance of the worship and the feeding of pilgrims; and secondly, whether the moneys so borrowed were legitimately applied for those purposes."

105. It follows therefore that if there is a customary obligation like the feeding of the Brahmins who visit the mutt at the time of the paryayam, that obligation cannot be got rid of by the Mathadhipathi and even if he incurs debts for discharging such an obligation, the debts will bind the math and so long as those moneys are not applied for the personal use of the Swami nobody can question the extent or the necessity for the large scale of expenditure incurred by the Mathadhipathi. Customs and usages vary from mutt to mutt and an attempt to apply the are and cut down the expenditure purely from a secular angle of vision is not to view the matter in the proper perspective. It is this vision, as pointed by the Judicial Committee in the above case, that this Court did not have and the necessity for setting matters right arose before the Judicial Committee. The same mistake and the same error might be repeated by the Government and the Commissioner under, the Act as the decision of the Govt. in

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settling the dittam is stated to be final. The power to hold property carries with it the power to enjoy and utilise the income in a manner in which the person holding the property is entitled to spend it under law. This power is unduly and unreasonably restricted by. S. 54 of the new Act.

106. Again, take the pathakanikas under S. 55. It is common knowledge that they are the property of the Matathipathi. While the Act recognises the Matathipathi's right and discretion to spend it for purposes connected with the mutt, he is kept under an obligation to keep regular accounts of the receipts and disbursements. Regarding the management of the properties, it is open under the Act to the Commissioner to require and insist that the Swamiji should appoint a manager and in default, power is given to the Commissioner himself to appoint one. A person is entitled to manage his own property as its incident. There are two other modes by which this right of the matathipathi to manage his properties can be taken away under the Act. One is by an attempt to frame a scheme as in the present case which enables the Commissioner to appoint a paid executive officer to take over the management and there is the second and more dangerous weapon, viz., the power of notification by which without any remedy by way of judicial review, the executive is empowered to take the drastic step of depriving a Matathipathi of his right to manage his own affairs. The decision of the Government is final and the notification continues in force for a period of five years. These modes practically leave nothing in the Matathipathi except a vestige of a right to call himself a Matathipathi with no power to manage the property, to deal with its income, to apply its surplus for the objects of the institution at his discretion and choice which is a right recognised and established by the decisions

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of the highest tribunal which we have already adverted to. It cannot be seriously contended and indeed, no decision in support of such a serious invasion has been placed before us. It may be suggested that the appointment of the manager or the executive officer paid or otherwise, and the notification procedure relate only to secular affairs of the mutt and do not trench upon the religious affairs. This argument has been repeatedly urged before us in justification of the drastic provisions of the Act.

107. In our opinion, a separation of religious affairs from secular affairs of a Mutt in such watertight compartments is not possible. The property of the mutt and its income exist for one purpose and only one purpose and that is the religious purpose. It has to be applied and utilised for the maintenance of the mutt, for carrying on the worship and for the propagation of the religion. It is not merely a question of leasing the lands and realising and paying the income into the hands of the head, but extends to the receipt of the income and the disbursements thereof over which practically the Matathipathi has no control. He has no deciding voice in the matter of the selection of the various items of expenditure for the purposes of the mutt and cannot give priority to one over the other. His hands with reference to the property, are tied completely. It does not stop at merely requiring him to prepare the budget and submit it and the accounts; but goes further and takes over the management itself into the hands of the Government through their appointed agents. It cannot therefore be seriously contended that the restrictions so imposed are reasonable and that they are required in the interests of the general public.

108. In construing the expression 'reasonable restriction' it has been pointed out by the Supreme Court in '*Dr. N.B. Khare* v. *State of Delhi*', 1950 SCJ 328, that the word reasonable in clause (5) of Article 19 goes with 'restrictions' and not with 'law' and that in deciding the reasonableness or otherwise of the restrictions. the Court

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need not be confined to an examination of the restrictions in the abstract with reference merely to their duration or territorial extent, but it is open to look into the circumstances under which or the manner in which the restrictions have been imposed. Reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive as well as procedural provisions. The possibility of the favour being abused in the hands of the executive may not be altogether irrelevant. In '*Chintaman Rao* v. *State of Madhya Pradesh*', 1950 SCJ 571, it was observed at p. 573:

> "The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

109. The same reasoning would apply equally to Article 19(1)(f) and 19(v). The restrictions imposed are so drastic in scope that they go beyond the object sought to be achieved.

110. Now we come to religious freedom. It is often said that the conception underlying our Constitution is a secular State and that the goal is a welfare State. But it is argued further, as it is a secular State, it should not possess legislative power to control and supervise religious institutions and religious freedom. This argument proceeds on a misconception. America, Australia and the Irish Free State are all secular States and they all guarantee religious freedom subject to limitations and subject to the power, to control, such liberty for the welfare of the State. Secular State implies that the bond of union is not based on religion but on citizenship as distinguished from a theocratic State. In England there is an established Church and the King is considered as the supreme head on Earth. He is the Head of the Church of England and also the patron of all Archbishops and Bishops within the United Kingdom. The Crown, therefore, enjoys the right of patronage in resepct of several churches in the Kingdom. In America and other countries such as Australia and the Irish Free State, the position is different. Under the American Constitution, "a wall of separation between the Church and the State" is recognised and this was due to the fact that the American people, before the framing of the Constitution, suffered centuries of religious oppression and persecution and as the bitterness of that sufferings was still fresh in their memory, the wall of separation was erected. The First Amendment enacted:

> "The Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof."

111. Unlike Articles 25 and 26 of the Indian Constitution, this Amendment is framed more as a restriction on the legislative power of the Congress rather than from the point of view of the individual. Under the Constitution of the Irish Free State, Article 8 on which Article 26 of our Constitution was modelled; is:

> "Freedom of conscience and the free profession and practice of religion are subject to public order and morality guaranteed to every citizen." (the rest of the article is omitted).

112. Article 116 of the Australian Constitution is:

> "The Commonwealth shall not make any laws for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

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113. The right to freedom of religion under Article 25 of the Indian Constitution is conferred upon all persons and is not confined to citizens. Article 26 relates to the freedom of a religious denomination to manage its own religious affairs. Under Article 25 the guarantee is freedom of conscience and the right freely to profess, practice and propagate religion. It is subject to public order and morality and health and Article 26 also is subject to a similar limitation. In Article 25 power is conferred on the State to make any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice and sub-clause (2)(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Freedom of conscience is the minimum of religious

liberty. It is intangible as it is subjective and is not capable of legal protection except that a person may not be compelled by law to abandon his belief, creed or opinion. A man may not only hold his religious opinions but may put them to practice and translate them into articulate force by profession, practice and propagation. Unless these are also protected there is no meaning in protecting freedom of conscience. Religion has been defined by Field, J. in '*Davis* v. *Beason*', (1890) 133 US 333 : (33 Law Ed 637), as meaning a man's

> "views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the 'Cultus' or form of worship of a particular sect, but is distinguishable from the latter."

114. Profession of religion implies, in our opinion, the right of the person who believes in a religion to state his creed and also to propagate it either by speech or by writing or by any other visible means. The practice of religion is the practical expression of his belief in the particular form of private or public worship. He may himself carry on worship or partake in a worship carried on by others. The exercise of these rights, however, is not altogether free from restrictions. It cannot be doubted that in the public interests and in the interests of and for the welfare of the State, the expression of one's religion should not be allowed to degrade into licentiousness or to perpetrate a crime or endanger public order, morality or health. In other words, to use an expression familiar to American law, it is subject to the police power of the State. Clauses (a) and (b) of sub-cl. (2) of Article 25 reserve also a power to regulate or restrict any economic, financial, political or other secular activity associated with religious practice and also in the interests of social welfare and reform and for throwing open religious institutions to the Harijans. That these restrictions are imperative and are justified is established by a number of decisions of American Courts which illustrate the manner in which and the extent to which social control has been exercised in America, restricting the religious liberty of the citizen.

115. In '*Reynolds* v. *United States*', (1879) 98 US 145 : (25 Law Ed 244), polygamy though justified by the tenets of a religious sect, was allowed to be restricted by legislation in the interests of society. Polygamy was considered meritorious by the Mormon religion. '*Davis* v. *Beason*', (1890) 133 US 333 : (33 Law Ed 637), is another instance where a similar law was upheld. In '*Cantwell* v. *State of Connecticut*', (1940) 310 US 296 : (84 Law Ed 1213), the question was whether a statute prohibiting solicitation of contributions to any philanthropic, religious or charitable cause without the approval of the Secretary of the Public Welfare council offended against religious liberty. This is one of the cases relating to the Jachova's

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witnesses. At page 1218 it is stated:

> "The Constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forstalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts. Freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end unduly to infringe the protected freedom. No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such previous and absolute restraint would violate the terms of the guaranty. It is equally clear that a statute may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment."

116. The statute was held unconstitutional. It may be mentioned that so far as the states are concerned, though there is no express provision as the First Amendment is applicable only to Congress it has been held that the same liberty is attracted by Amendment 14 of the Constitution which applies to States. This was decided in '*Everson* v. *Board of Education*', (1947) 330 US 1 : 91 Law Ed 711 and '*Illinois* v. *Board of Education*', (1948) 333 US 203 : 92 Law Ed 649. The wall of separation between Church and State is attributed to Jefferson as is stated in '*Everson* v. *Board of Education Euring*', (1947) 330 US 1 : 91 Law Ed 711. In '*Murdock* v. *Pennsylvania*', (1943) 319 U.S. 105 : 87 Law Ed 1292, it was stated that the power to tax the exercise of a privilege is the power to control or suppress its enjoyment. A fee imposed for the privilege of canvassing or soliciting within a municipality was held to be an unconstitutional invasion of the right of freedom of religion. These are merely illustrations of the kind of control that is permissible.

117. In the Australian Constitution it has been held that notwithstanding the absolute nature of the prohibition in S. 116 preventing the Commonwealth from making any law for establishing any religion etc., it is open to the Court to consider and determine whether the freedom of religion has been unduly infringed by a particular legislative provision. In justification of this view, the decisions of the American Courts already referred to were relied on. Without such restrictions it might lead to anarchy and make it difficult, if not impossible, to maintain the rule of law. On this principle it was held that, the provisions of the National Security (Subversive Associations) Regulations were not invalid notwithstanding that such regulations prohibited the advocacy of doctrines or principles in pursuance of religious convictions which are however prejudicial to the prosecution of the war in which the Commonwealth was engaged. The judgment of Latham C.J. in '*Adelaide Company of Jehovah's Witnesses* v. *The Commonwealth*', 67 CLR 116, contains a useful and illuminating discussion of the ambit of religious liberty. At page 123 speaking about religion he says:

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"It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed in the world. There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined" to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious obervance. Many religious conflicts have been concerned with matters of ritual and observance. Section 116 must be regarded as operating in relation to all these aspects of religion, irrespective of varying opinions in the community as to the truth of particular religious doctrines, as to the goodness of conduct prescribed by a particular religion, or as to the propriety of any particular religious observance. What is religion to one is superstition to another. Some religions are regarded as morally evil by adherents of other creeds. At all times there are many who agree with the reflective comment of the Roman Poet — "Tantum religio potuit suadere malerum" .....

"Almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of that or other foods, the observance of ceremonies, not only in religious worship, but in the every day life of the individual — all these may become part of religion. Once upon a time all the operations of agriculture were controlled by religious precepts. Indeed, it is not an exaggeration to say that each person chooses the content of his own religion. It is not for a Court, upon some a priori basis, to disqualify certain beliefs as incapable of being religious in character."

118. The picture of religion so aptly drawn applies to the religious beliefs in this country as well. Later on at page 125 the learned Judge catalogues instances of religious practices which are considered by a majority of people as wicked. He says:

"At all periods of human history there have been religions which have involved practices which have been regarded by large number of people as essentially evil and wicked. Many religions involve the idea of sacrifice and the practice of sacrifice has assumed the form of human sacrifice or animal sacrifice as appears in the Old Testament, and in many other sacred writings and traditions. So also religions have differed in their treatment of polygamy. Polygamy was not reproved in the Old Testament; it has been part of the Mormon religion; it is still an element in the religion of millions of Mohammedans, Hindus, and other races in Asia. The criminal religions in India are well-known. The thugs of India regarded it as a religious duty to rob and kill. The practice of Suttee, involving the immolation of the widow upon the funeral pyre of her husband, was for centuries a part of the Hindu religion."

119. These illustrations show that it is very difficult to separate religious belief and practice from politics or ethics. But in the interests of the State it cannot be contended, at any rate at the present day that such practices cannot legitimately be prohibited by legislation though such legislation might infringe religious liberty. Article 25 uses the word "freely" while Article 116 of the Australian Constitution used the word "free". The Illustrations given by Latham C.J. at page 127, establish that the meaning of the word which is vague and indeterminate takes its colour from the context. To quote his words:

"Compare for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law, as was pointed in '*Mc. Arthur'S Case*', (1920) 28 CLR 530. Free love on the contrary means licence or libertinage, though, even so, there are

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limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to any one who comes, subject, however to his condition or behavior not being objectionable. Free trade means, in ordinary parlance, freedom from tariffs. Thus there is no dictionary meaning of the word 'free' which can be applied in all cases."

120. It must always be treated as subject to the law for there could be no freedom except freedom in accordance with law as otherwise, there will be no ordered society and it would be impossible for society to function. It was pointed out by John Stuart Mill in his Essay on Liberty which is quoted at page 131 of the same report:

"The sole end of which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. It may be going too far to say that self-protection is "the sole end" which justifies any governmental action. But I think it must be conceded that the protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective. It is consistent with the maintenance of religious liberty for the State to restrain, actions and courses of conduct which are inconsistent with the maintenance of civil Government or prejudicial to the continued existence of the community. The constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organized. This view makes it possible to reconcile religious freedom with ordered Government."

121. The ultimate decision whether a given law infringes religious freedom or not must rest with the Court.

122. The Mathadhipathi's right freely to practise and propagate religion, it is contended, has been interfered with by some of the provisions of the new Act. The power to enter the religious institutions under S. 21 and the very wide power conferred under Ss. 23 and 24 of the Act to issue lawful directions to be obeyed, the right to interfere with the dittam or scale of expenditure under S. 54 are stated as instances of such infringement. These provisions undoubtedly vest very large powers in the Commissioner and are certainly calculated to interfere with the practice of religion i.e. the carrying on of the worship and the propagation of religion by instructing the disciples and initiating them into the fold of religion. The Swamiji's

tranquillity and peace of mind which are so essential for deep contemplation may also be disturbed. The holiness and the sanctity of the institutions are destroyed. That the provisions may be abused is not based, merely on speculation and imagination but on facts is made clear by the instructions issued by the Board under the earlier Act.

123. In memorandum dated the 1st October, 1945, the Mathadhipathi of Kaniyoor Mutt was asked to state whether the Board's sanction was obtained to present a Japamala to a devotee and a silver kalasa to a Swamiar. It turned out ultimately that the japamala was actually given to a doctor for having treated the Swamiji for asthma during the course of a whole year without fees and the silver kalasa was actually purchased by the Mutt and not presented to anybody. The Swamiji, it will be seen, is not only accountable and answerable to the properties and the income of the mutt under the provisions of the earlier Act and the new Act but he is also answerable to things he wears on his body such as japamala. Another instance is by an order of 17th

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October, 1949 the Mathadhipathis were presented from presenting clothes and paying bonus to temple servants from out of the funds of the religious institutions for deepavali. In another order of 7th May, 1947 the Board directed that as the wages of labour have increased instead of using human agency for carrying the deity in procession, the authorities of religious institutions should construct 'sagadams' and use them by engaging a very few persons or a pair of bulls to drag them.

124. On 13-3-1946 instructions were given that in view of the acute food situation expenditure on food grains should be cut down and the rituals and festivals should be reduced to their barest minimum. On 22-9-1950 the Board requested executive authorities in charge of Hindu religious institutions to use all available tanks for pisciculture unless there is a usage or custom in any particular locality against the utilisation of the tanks for such purpose. Then the order was later on modified by restricting it only to tanks which have hitherto been ordinarily used or leased out for fishing. This modification was on 3rd July 1951. Regarding the application of the surplus funds, the Board gave directions or issued orders to utilise them for various purposes wholly foreign to the objects for which the religious institutions were established e.g. for the Balamandir. On 28th October, 1950 an order was issued that surplus funds within the meaning of S. 67 of the earlier Act may be contributed to, the support of the Balamandir and if there is no provision in the budget application may be made to the Board and they were directed to send the contributions to the Hony. Secretary. Rupees 10/- was directed to be sent to Sarada Vidyalaya, T. Nagar and also for the Provincial Welfare fund for Guild of Service and so on. These are instances of the possible "lawful" orders that may be issued by the Commissioner and which the trustees in whatever form the orders may be clothed are bound to treat as obligatory in order to avoid the displeasure of the Commissioner. The contention that the sections of the Act above referred to constitute an infringement of the right under Article 25 seems to be well-founded.

125. Article 26 which relates to religious denominations is also relied on. It runs as follows:

> "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—
>
> (a) to establish and maintain institutions for religious and charitable purposes;
>
> (b) to manage its own affairs in matters of religion;
>
> (c) to own and acquire movable and immovable property; and
>
> (d) to administer such property in accordance with law."

126. The dictionary meaning of the word 'denomination' as given by Webster is

> "of action of naming from or after something; giving a name to, calling by a name; a characteristic or qualifying name given to a thing or class of things; that which anything is called; an appellation, designation or title; a collection of individuals classed together under the same name; now almost always specially a religious sect or body having a common faith and organization and designated by a distinctive name."

127. There being several religions in India such as Islam, Christianity, Zoroastrianism and Hinduism, it may not be wrong to take Hinduism and the members of that religion as constituting a religious denomination in a larger sense or if it should be taken in a limited sense Advaita, Dwaita; Visishtadwaita, Saivitea may be another classification and the members of each faith may be treated as members of one denomination. In an Irish case *'Mac Laughlin* v. *Campbell'*, (1906) 1 Ir R 588, the meaning of "denomination" was-given by Fitz Gibbon L.J. as only a 'Sect Writ Large'. Even taking it in that sense, the division of the members of the Hindu religion based upon a system of philosophy which is adopted by a group of members may be treated as a denomination or sect and any section of that denomination, and a division made

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either on territorial or sectional basis, may be treated as a section thereof.

128. Every religious sect therefore under the Article has the right to establish and to maintain institutions for religious and charitable purposes and to manage its affairs in the matter of religion. It is also permissible for such a sect to own and acquire movable and immovable property and to administer such property in accordance with law. The right to maintain implies the right to continue the institution according to the established usage, to carry on the worship and to make it function in the manner in which it has been functioning according to long established usage. Except on the ground of public order and morality and health, this right cannot be in any manner affected by legislation. The religious sect or denomination considered as an autonomous body has got an unquestioned right to manage its own affairs in matters of religion. Whether an uncertain and fluctuating body could own and acquire property or not, a religious denomination being a definite body is permitted by the Constitution to own and acquire movable and immovable property also and to administer such property but in accordance with law.

129. It is contended that the denomination contemplated is not identical with a religious sect or members of a religious persuasion but it must be a closed body like a Corporation. This argument however was not supported by any authority, and in view of the clear language of the Article, it is difficult to accept it. If is rather difficult to dissociate the religious

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affairs of an institution from the property or its secular affairs. The secular affairs are only directed for the purpose of better management of the religious affairs for which alone the institution exists. They are inextricably mixed up. It was however argued that under clause (d) of the Article the legislature has undoubted power to enact a law regulating the administration of the property. The expression 'in accordance with law' must now be understood in the light of the decision in '*A.K. Gopalan* v. *The State of Madras*', (1950) SCR 88, as meaning statute law or law enacted by a competent legislature.

130. The argument, however, did not go to the length of maintaining that this clause would enable a legislature not only to regulate the administration of the property but even to deprive or to destroy the right. It may well be conceded that the law need not necessarily be the established law such as the law relating to trusts or property as was contended on behalf of the petitioner but may even extend to any statute law that may be enacted by a competent legislature providing for the regulation or the administration of the properties. But regulation does not mean destruction or annihilation of the right. It is a question of degree whether in a given case the enacted law merely regulates or substantially takes away the right leaving to the denomination a mere vestige of the right. It need not be a total deprivation of the right. It would be enough if there was a substantial deprivation of the right to administer the property. In such a case the law, it must be admitted, cannot be upheld.

131. The difficulty however is whether the mutt in question can be held to be a mutt belonging to a religious denomination. The petitioner contends that the mutt belongs to Shivalli Brahmins as it is for their benefit and for their spiritual enlightenment that the institution exists and that it should be treated as a religious institution established & maintained for the religious benefit of this community. The community has the right to the continued existence of the mutt for serving the spiritual needs of its members and the head of the mutt is the person in whom the

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power to administer the religious affairs and the administration of the property are vested. The superior is also a member of the community. The Article is concerned with religious institutions and the consideration of the question whether there is any beneficial ownership in the properties of the institution by the members of the denomination is irrelevant as it is solely concerned with the institution which exists for spiritual and not for material benefit. There is no difficulty therefore in treating the Shivalli Brahmin community as a denomination entitled to protection of the right guaranteed under the Article. The right to administer religious and secular affairs has been unduly interfered with as the head may not have even an effective voice in the appointment of persons to carry on the administration under him. The appointment of an agent or manager requires the approval of the Commissioner and if it was decided to frame a scheme or notify a temple, the Commissioner or the Government as the case may be, has the sole and exclusive right to appoint a paid executive officer. It is a substantial deprivation of the right to administer the property in accordance with law and the impugned Act in so far as it takes away the rights to administer the religious and secular affairs of the mutt must be held to be invalid as infringing Article 26, Secs. 18(2) and (3), 25(4), 28, 29, 58(4), 59 and 76. The Sections of the impugned new Act which are ultra vires will be specified at the end of the judgment.

132. It is also urged on behalf of the respondent that all the four clauses must be satisfied by a religious denomination which claims a right under Article 26 & as the fluctuating body like the religious denomination cannot hold property under law, it must be inferred that religious denomination means only a closed body like a Corporation. In the first place the rights of a religious denomination are not like fishery rights. A claim based on lost grant in favour of a fluctuating body was not upheld as in the case of '*Braja Sundar Deb* v. *Moni Behara*', (1951) SCJ 363. In '*Simmonds* v. *Elliott*' (1917) 2 K.B. 894, it was assumed that the church of England was a religious denomination. The very article of the Constitution empowers the denomination to own and acquire property. The objection, therefore, has no basis in view of the clear language of the Article. It is unnecessary, in our opinion, that in order, to claim the benefit of Article 26 a religious denomination should be capable of holding all the four rights in the four sub-clauses off that Article. Each clause recognises a distinct and separate right. The denomination may exercise all or any of those rights and it is unnecessary that it should own all the rights before it can claim recognition as a religious denomination.

133. The next point for consideration is, whether Section 76 of the new Act (Act XIX of 1951) is 'intra vires' the State legislature or whether it offends Article 27 of the Constitution, and is therefore, unconstitutional. S. 76 runs thus:

"1. In respect of services rendered by the Government and their officers, every religious institution shall from the income derived by it pay to the Government annually such contribution not exceeding five per centum of its income as may be prescribed.

2. Every religious institution the annual income of which in the fasli year immediately preceding as calculated for the purposes of levy of contribution under sub-section (1) is not less than Rs. 1000/- shall pay to the Government annually for meeting the costs of auditing its accounts such further sum not exceeding 1£ per centum of its income as the Commissioner may determine."

134. Sub-clauses 3 and 4 of S. 76 need not be referred to for the present.

135. Article 27 of the Constitution of India runs:

"No person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

136. The first question is, whether the levy of five per centum of the income of a

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religious institution provided for in Section 76(1) of the new Act is a "tax" within the meaning of Article 27.

137. After analysing the concept of a tax in Chapter VI Vol. III of his Principles of Political Economy, Professor Nicholson said at p. 264:

> "Professor Bastable's definition of taxation sums up in a convenient form the principal

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results of the foregoing analysis. 'A tax is a compulsory contribution of the wealth of a person or body of persons for the services of the public powers'."

138. It was the same idea cast in different words that found favour with Cooley in his book on Constitutional Limitations. In a foot note at page 986, the learned author observed:

> "A tax is a contribution imposed by the Government on individuals for the services of the State. It is distinct from a subsidy certain and orderly which is shown in its derivation from Greek, order or arrangement. Jacob, *Law Dictionary*; Bouvier, *Law Dictionary*. "The revenues of a State are a portion that each subject gives of his property in order to secure, or to have, the agreeable enjoyment of the remainder." Montesquieu, Spirit of the Laws b. 12, c-30. In its most enlarged sense the word 'taxes' embraces all the regular impositions made by Government upon the person, property, privileges, occupations and enjoyments of the people for the purpose of raising public revenue."

139. Willoughby on the Constitution of the United States, Vol. II at p. 666 adopts Cooley's definition when he says:

> "Taxes have been defined by an eminent authority to be 'burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes.' The same author in another work observes that they 'differ from forced contributions, loans and benevolences of arbitrary and tyrannical periods in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution and a just apportionment of the burdens of Government."

140. No doubt, what S. 76(1) authorised was a levy of contribution, the maximum of which was prescribed at 5 per centum of the income of a religious institution. The section itself left it to the Government to prescribe rules for the levy of this contribution from time to time within the permissible maximum of five per centum. It is also true that the section itself specifically stated that this levy was in respect of the services rendered by the Government and its officers.

141. If this levy is tested by the definition given by Professor Bastable, it would appear to satisfy all the known tests of a tax. It is a compulsory contribution. It is a uniform contribution. Section 76(1) itself directs that every religious institution shall pay the contribution. If any doubt could arise as to the uniformity of the levy, to which every religious institution was made subject by Section 76(1), sub-cl. 3 of Section 76 should remove it. It says:

> "The annual payments referred to in sub-sections (1) and (2) shall be made notwithstanding anything to the contrary contained in any scheme settled or deemed to be settled under this Act for the religious institution concerned."

142. That this levy of contribution, as it is called by Section 76(1), is "for the services of the public powers" should also be clear. No doubt every religious institution is entitlted to the services of the Government and their officers in accordance with the

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several sections of the new Act. But the liability of any given religious institution to pay the contribution authorised by Section 76(1) is not fixed with specific reference to the services enjoyed by that institution. As we have pointed out, it is a uniform levy that is contemplated and authorised, a liability imposed alike on every religious institution subject to the provisions of the new Act. Therefore, the expression "in respect of the services rendered by the Government and their officers" as used in Section 76(1) of the Act would really be the same as a "compulsory contribution for the services of the public powers" within the scope of Professor Bastable's definition of tax.

143. We have already pointed out that item 28 of the Concurrent List, List III of the Seventh Schedule to the Constitution, has given the State Legislature legislative competence to enact laws in respect of religious institutions. Item 47 of the same list gives legislative competence to the State Legislature to enact laws in respect of "fees in respect of any matters in this list, but not including fees taken in any Court." One of the contentions put forward was that the contribution referred to in S. 76(1) was a fee within the meaning of item 47 of List III of the Seventh Schedule of the Constitution. Whether it is such a fee or a tax within the meaning of Article 27 is the question for determination.

144. Neither the compulsory nature of the levy nor the uniformity of the levy may each by itself or even cumulatively help in deciding the question, whether the contribution up to a maximum of 5 per centum is a tax or is only a fee. The quantum of the levy however is a relevant factor in deciding whether the contribution is a tax or a fee. The old Act, it should be remembered, fixed the maximum of the contribution at 3 per centum of the annual income of the religious institution. The new Act fixed the maximum at 5 per cent. We have already pointed out that the levy of contribution is not in direct proportion to the benefit any given religious institution may derive from the services rendered by the Government and their officers within the meaning of S. 76(1). The services of the Government and their officers may not be in direct relation to the income either of any given religious institution. But the contribution bears a fixed proportion to the income of the religious institution. It is the capacity to pay and not the benefit conferred that seems to be the guiding principle of fixing the quantum of contribution a religious institution can be called upon to pay under Section 76(1) of the new Act. That is more in accord with the "contribution" being viewed as a tax rather than as a fee. No real attempt was made by any of the learned counsel for the respondents — the Government, Board and the Commissioner, to establish that the contribution of five per cent, bore any just relation to the expenses to be incurred by the Government and its officers in exercising the powers conferred on them by the Act. The fee contemplated by item 47 of List III of the Seventh Schedule to the Constitution need not necessarily be nominal. But the element of compulsion which is an integral part of a tax need not always be present in the fee.

145. Another contention puf forward by the respondents was that it is not every fax that is prohibited by Article 27 of the Constitution, but only the taxes

> "the proceeds of which are specifically appropriated in payment of expenses for the promotion of maintenance of any particular religion or religious denomination."

146. And the learned counsel pointed out that there

was no proof of any such appropriation with reference to the contribution authorised by Section 76(1) of the new Act. This argument appears to overlook the provisions of the Constitution regulating the method by which the revenues of the State are merged

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in a Consolidated Fund, and thereafter appropriated by Appropriation Acts. Article 266 of the Constitution requires that all the revenues received by the State including the loans raised should form into a Consolidated Fund to be entitled the Consolidated Fund of the State and that no moneys out of the Consolidated Fund so constituted should be appropriated except in accordance with law and for the purpose and in the manner provided in the Constitution. Under Article 204, after the grants under Article 203 have been made, a bill has to be introduced to provide for an appropriation out of the Consolidated Fund of the State of all moneys required to meet the grants so made by the Assembly and the expenditure charged on the Consolidated Fund of the State, but not exceeding in any case the amounts shown in the statement previously laid before the House or Houses. Without a specific provision in the Appropriation Act, no amount can be spent out of the Consolidated Fund of the State, unless it be under Article 205 of the Constitution. Section 76(1) of the new Act imposes the liability to pay the contribution on every religious institution. Sub-clause (4) of Section 76 provides for the expenditure to be incurred by the Government to pay the salaries, allowances etc. of the officers and the establishment the Government has to maintain to give effect to the provisions of the new Act. Section 76(4) obviously cannot be the appropriation contemplated by Article 204. The payment of salaries etc. directed by Section 76(4) will have to be met from out of the Consolidated Fund of the State but only under a specific Appropriation Act.

147. We have already held that though the levy is called the contribution for services rendered in S. 76(1) of the new Act, it is really a tax. It is not really necessary that the Act imposing the tax should also provide for the appropriation of the proceeds of the tax, before it can be brought within the mischief of Article 27. In fact, such an appropriation is impossible within the scheme of the Constitution. When the constitution therefore speaks in Article 27 of specific appropriation, it can only refer to the appropriation contemplated by the Constitution and not any other independent or specific appropriation, not permitted or warranted by the Constitution. Sub-clause (1) and, sub-clause (4) of Section 76 between them, in our opinion, bring the tax within the mischief of Article 27. Sub-Clause (4) of S. 76 imposes the liability on the Government to meet the expenditure of the Services of the Government and its officers referred to in sub-clause (1) of Section 76. Section 76(4) lays therefore a statutory obligation on the Government to provide for the necessary appropriation in the Appropriation Acts to be passed by the Legislature. What Section 76(1) provides for is a tax the proceeds of which are "specifically appropriated"—the appropriation is not the one contemplated by Article 204 of the Constitution— for payment of expenses for the maintenance of Hindu religious institutions. That supervision of the Hindu Religious institutions is part of the maintenance within the meaning of Article 27 can admit of no doubt. It is not every item of the expenditure included in the maintenance of religious institutions that need come out of the tax, before a tax can be declared as offending the provisions of Article 27 of the Constitution. That the tax was utilised specifically for meeting a portion of the expenditure of the maintenance of its affairs, is enough to bring it within the mischief of Article 27.

148. Section 76(1) no doubt imposes the liability to pay the tax on the religious institution. What Article 27 guarantees is the freedom of a person against compulsion to pay a tax prohibited by that Article. It is not necessary at present to go into the question whether a religious institution in S. 76(1) of the new Act is a person within the meaning of Article 27, Section 76(1), as we said, subjects the religious: institution to the liability to pay the tax. Section 78 of the new Act provides for the discharge of that liability by the trustee of the religious institution. The petitioner, the matathipathi of the Shrirur mutt, is certainly a trustee as that expression Has been defined in the new Act. The liability to pay the tax imposed by Section 76(1) on the institution thus)

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falls on the trustee under S. 78 of the new, Act, and he is certainly a person within the; meaning of Article 27.

149. What we have said above refers only to the tax imposed Joy S. 76(1) of the new Act., The audit fees prescribed by S. 76(2) stand on a different footing and they cannot be treated as taxes.

150. In our opinion, the requirements of Article 27 of the Constitution are fully satisfied in the case of the tax imposed by S. 76(1) of the new: Act. It offends Article 27. The levy is unconstitutional and ultra vires the State Legislature.

151. Only one other question has to be disposed of under this head. The learned counsel for the respondents urged that the question whether Section 76(1) of the new Act is infra vires, or ultra vires the State Legislature does not arise in this petition because there has been no levy so far. The writ asked for in this petition by the Matathipathi of the Shirur Mutt is, as already pointed out, one to prohibit the Govt., and its officers from exercising any of the-powers vested in them by the new Act. The liability of the mutt, of which the petitioner is the Matathipathi, to pay the tax which Section 76(1) imposed arose on the very day the Act came into force. Section 76(1) leaves no discretion to the Government to impose or refrain from imposing the tax on the mutt. Section 4 of the new Act does not apply. Once that liability arose, the petitioner as the Matathipathi of the mutt, whose will eventually be the-liability to pay the tax under the provisions of Section 78, is entitled to invoke the powers vested in this Court to declare that the liability under S. 76(1) imposed on the religious institution is unconstitutional and could not be enforced even under S. 78 of the new Act Besides, this petition was heard along with other petitions and it was the entire scheme of the new Act as also the specific sections thereof that came up for discussion; and we cannot, therefore, refuse to deal with the contention that Section 76(1) is ultra vires the State Legislature.

152. There is very little substance in the-argument that Article 30 comes in and of the petitioner as the right under that Article is in noway infringed.

153. Now coming to the merits of the decision of the Board to frame a scheme, it is rather difficult to accept the petitioner's contention, that the board acted with bias when it decided to initiate proceedings to frame a scheme and ultimately decided to frame one. The petitioner filed, in support of the allegations in his affidavit, the affidavits of others suggesting that the President of the Board and one of the Commissioners were hand in glove with Mr. A. Lakshminarayana Rao and Sripadhachar when they visited Udipi. It is no doubt true that officers having control and supervision over such institutions should not give room to any reasonable apprehension in the minds of a litigant by moving closely with the persons of the rival party. The allegations made, even if true, would not justify an inference of bias on the part of the Board.

154. In arriving at a decision that a scheme was necessary the Board failed to take into consideration the objections sent by the Swami by post on the 13th before the Board made up its mind even though it cannot be said, having regard to the dates on which adjournments had been granted from time to time on behalf of the Swami that the Board failed to give a reasonable opportunity to hear the petitioner. When the objections were in fact filed, there was nothing preventing the Board from taking into consideration the statement filed on behalf of the Swami. It must be remembered that

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Sripadhachar was in management as agent of the Swami for a period of two years and the Swamiji removed him and instituted a suit for recovery of the documents and accounts. The mismanagement on which the decision to frame a scheme was founded must have been partly due to Sripadhachar and he cannot altogether be absolved from responsibility. When the complaint of the Swami that Sripadhachar acted in defiance of his authority was the subject-matter of a suit, it would have been most appropriate for the Board to have stayed its hands until the result of the suit was known, and until it was established whether the termination of the power of attorney by the Swamiji was or was not justified in the circumstances.

155. The Board, it must be remembered, in the first instance initiated proceedings under Section 18 to enquire into the matter, but for reasons best known to themselves dropped them perhaps when it became known that a suit was filed for it was in evidence that the Swamiji sent during the proceedings under S. 18 a copy of the plaint to the Board. It was open to the Board to have enquired into the matter first before rushing through the proceedings to frame a scheme initiated after the filing of the suit by the Swamiji. It suggests that it was intended more to stifle the suit than to adjudicate upon the dispute raised by the Swamiji. That has given rise to the contention that the order of the Board was perverse as it was based mostly, if not solely, on the fact that the services of Sripadhachar were terminated and also the further fact that the statement actually filed by the Swamiji before the order was made deciding to frame a scheme was in the hands of the Board and the Board did not consider it. It seems to us that in the circumstances the power exercised by the Board is an abuse of its powers and the decisfon of the Board is undoubtedly a perverse one.

156. It had been held by this Court in *Devasikamani Fonnambala Desikar* v. *Commissioner for H.R.E. Endowments, Madras*', ILR (1941) Mad 807, that a decision which is perverse really amounts to a nonexercise of the jurisdiction entrusted to the authority concerned. For this position, reliance was placed upon the decision in the '*Board of Education* v. *Rice*', (1911) AC 179. What happened in the first case was while a scheme for the administration of a temple was in force, the Board initiated proceedings under Chapter VI-A, the notification proceedings under the earlier Act with the object of taking over the management from the hands of the trustee. The reasons given by the Board in support of the procedure adopted were examined by this Court and it was found that there were no valid reasons to justify the action of the Board in taking the drastic step of applying the notification proceedings in Chapter VI-A. The power of notification, it was pointed out, should not be exercised without a grave reason, as it was a drastic step calculated to deprive the trustee or the head of the Mutt of his right to management of the office. It seems to us that the hasty action taken by the Board in disregard of the complaint of the Swamiji and without considering his objections, & even without waiting for a final adjudication by the Court in which proceedings were pending on the matters in controversy between the Swamiji and Sripadhachar is a perverse exercise of the jurisdiction of the Board; and the decision to frame a scheme cannot be supported even on the merits. The order of the Board is without jurisdiction both on the merits and also on the constitutional objections which we have upheld in the course of this judgment.

157. To sum up, we hold that the following sections are ultra vires the State Legislature in so far as they relate to this mutt; and what we say will also equally apply to other Mutts of a similar nature. The sections of the new Act are: Sections 20, 21, 25(4), S. 26 (to the extent S. 25(4) is made applicable), S. 28 (though it sounds innocuous, it is liable to abuse as we have already pointed out earlier in the judgment), S. 29, Cl. (2) of S. 30, S. 31, S. 53 (because Courts have ample powers to meet these contingencies), S. 54, Cl. (2) of S. 55, S. 56, Cl. (3) of S. 58, S. 59, Ss. 63 to 69 in Chapter VI, Cls. (2), (3) and (4) of S. 70, S. 76, S. 89 and S. 99 (to the extent it gives the Government virtually complete control over the Mathadhipathis and

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Mutts). Since S. 5 of the new Act has repealed the earlier Act, the Madras Hindu Religious Endowments Act, Act II (2) of 1927, and since we are not holding the whole new Act ultra vires, it is unnecessary to go into detail in examining which of the provisions of the earlier Act were ultra vires the State Legislature tested by the fundamental rights guaranteed by the Constitution. If a decision were necessary, we should say that the sections in the earlier Act which correspond to the sections of the new Act enumerated above as being ultra vires will also be ultra vires.

158. The rule nisi must be made absolute.

159. The petitioner is entitled to his costs. Advocate's fee Rs. 250.

160. This is a fit case for appeal to the Supreme Court as it involves important questions regarding the interpretation of the Constitution. A certificate will issue under Article 132 of the Constitution.

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161. Writ Petitions Nos. 379 and 380 of 1951: These two petitions relate to the temple at Chidambaram in South Arcot District and were filed for the issue of a Writ of Certiorari or direction or order in the nature of such a writ of certiorari against the first respondent, the State of Madras, calling for the records relating to the notification No. G.O.Ms. 894, Rural Welfare dated 28-8-1951 published in the Fort St. George Gazette on 4-9-1951 in the matter of Sri Sabhanayakar Temple, Chidambaram and quashing the said proceeding or in the alternative to issue a writ of mandamus, or direction or order in the nature of such a writ of mandamus directing them to rescind the said notification. The second respondent in the petitions as originally filed was the Hindu Religious Endowments Board, Madras. When the Madras Hindu Religious and Charitable Endowments Act (Act XIX (19) of 1951), came into force on 30-9-51, the petitioners obtained leave to amend the petitions by substituting the Commissioner, Hindu Religious and Charitable Endowments in place of the Board and also included a prayer for the issue of a writ of mandamus or an order in the nature of such a writ directing the respondents to forbear from taking further proceedings under Act XIX (19) of 1951 and from giving effect to the order of the 2nd respondent dated 31-8-1951. Leave was granted for the amendment as there was no objection.

162. The temple at Chidambaram, Chit and Ambalam (the atmosphere of wisdom), is a public temple of great antiquity sacred to Saivites all over India. According to the South Arcot Manual of the year 1878, the area occupied by the temple is about 39 acres in the centre of the town. Of the five Lingams of Siva, corresponding to the panchabhuthas, earth, water, light, air, and akasa (ether), the Lingam in this temple is Akasa Lingam. In fact, no Lingam exists but a curtain is hung before a wall on which some Bhijaksharas were written and when people go to worship, the curtain is withdrawn to see the "Lingam". Offerings are made before the curtain. This is generally known as 'Chidambara Rahasyam' the secret of Chidambaram. The Manual at page 401 refers to a legend going back to the fifth Manu, one of whose sons Shwetha Varma, who was a leper and refused to rule over the country, the Kingdom of Gouda allotted to him by his father. Leaving his kingdom, he set on foot on a pilgrimage and came to Conjeevaram where he met a hunter who informed him that there was a famous rishi nearby with tiger's paws who lived in a jungle near a 'Kovil where an invisible deity dwelt. Near the kovil there was also a pool. Shwetha Varma out of inquisitiveness met the rishi who was called Vyagrapada. With his divine foresight the Rishi came to know of the arrival of Shwetha Varma and asked him to bathe in the

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pool. Thereupon, the dreadful disease vanished and his skin obtained a golden hue. In consequence he was known thereafter as Hiranya Varma.

163. The Dikshitars who live nearby are Brahmins having some peculiar customs of their own and the pagoda is practically treated as their property. They claim a divine origin for themselves and the story is that Brahma took them from Tillai (Chidambaram) to perform 'Yagnam' near Benares where they stayed till these were invited by Hiranya Varma to Chidambaram at the suggestion of the deity at Chidambaram. Tillai Muvayirattar or the three thousand men of Tillai, known as the Dikshitars arrived at Chidambaram and to their amazement and distress, it was discovered that their number was less by one. Thereafter, the Akhasa Vani or the voice of the sky announced that he was the God himself that was missing i.e., Sabha Nayakar which is the present name of the presiding deity in the temple. Professor Wilson in his glossary says that the Dikshitars are really a branch of the Kanouj Brahmins whose abode is the modern Allahabad.

164. This temple has many peculiar features which are not common to the other temples in India. The management of the temple all along vested in the Dikshitars of whom there were 253 families at the time of the Manual now reduced to 250. Every married male member of the sect has an equal voice and control in the management of the temple. The right of management does not go by succession but is acquired by birth and marriage so much so every born and married becomes entitled to share the privilege and perquisites incidental to the management which is terminable only at his death. This is an inducement to early marriage of boys even at the age of 5. It is a close community as they do not marry from any outside families but only from among themselves. Hence the proverb noticed By Thurston Vol. I Castes and Tribes page 338, that a "Tillai girl never crosses the boundary line".

165. The management is by turns. They are the dharmakarthas as well as the Archakas of the temple. They framed rules for the management of the temple, for the custody of the properties particularly the jewels even as early as 1849 and a printed copy of that has been filed as an exhibit in these proceedings. They are generally on duty in the pagoda 20 at a time, and each batch of 20 stays on duty for 20 days. Though every married male is entitled to take part in the management, till he attains 25 he is not considered to be qualified for performing the principal rituals in the shrine when he is initiated in a ceremony called 'Diksha'. The Temple has five Sabhas or halls called the Chitt Sabha the Kanaka Sabha, the Deva Sabha, the Nirutta Sabha and the Raja Sabha. There are also the Amman Koil and the Moolasthanam besides a Vishnu Koil and a Pillayar Koil. The Chitt Sabha is the seat of the presiding deity, Sabhanayaka or Nataraja and unless service is first held in it, according to usage, it cannot be held in any other shrine.

166. The temple has very little property of its own and the system of providing the necessary material for the various abhishekams, archanas and naivedyams during the seven kalams and for the Brahmotsavam and other utsavams is somewhat peculiar. The worship in the temple is according to vedic rights and not in accordance with agamasastras as in other temples. The expense of conducting the seven kalotsavams is provided by podu Kattalaidars or common kattalaidars who instead of money, supply the articles necessary for the abhishekam, archana and naivedyam etc. The seven kalams are: milk naivedya between 6 and 7 a.m. at the principal shrine; 'Kalasandhi' between 8 and 9 a.m.; 'Irandam Kalam' between' 10 and 11 a.m.; 'Uchi Kalam' 12 noon; 'Saya-raksha' 6 p.m.: night 'Irandam Kalam' 8 p.m. and 'Ardha jamam' 10 p.m. At all the six kalams except the first, abhishekam is done to the Spatika Lingam called Chandramouliswara. Abhishekam to the 'Marakatha' murthy otherwise known as Rathnasabhapathy

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is done only at Irandam kalam between 10 and 11 a.m. No abhishekams are done to the principal deity Nataraja Murthi and Sivakamiamman except on special occasions. For all these the Podu Kattalaidars provide the materials.

167. There are also the Utsava Kattalaidars whose duty it is to meet the cost of the utsavams. Besides these the Dikshitars undertake, on behalf of religious minded people, to perform an archana or abhishekam on stated days when cooked food is offered in the name of the devotee. The Dikshitar receives for this purpose a sum of money annually. He sends Vibhudi prasadam to the devotees, the food offering being taken by him. The Podu Dikshitars have nothing to do with this. It is the individual right of the Dikshitar who carries on the worship on behalf of the devotee. These are individual kattalais.

168. There is yet another kind of kattalai for performing an archana, mainly on janma naksha-tram days or any special days according to the choice of the devotee. Every Dikshitar has got his own clients for this purpose and he carries out the duties in return for which he obtains periodical payments from his clients, with this also the Podu Dikshitars have nothing to do. The only property owned by the temple besides the premises of the temple is '*Tiruvitakku Manyam*'. These manyams were originally of the extent of about 200 acres distributed in various villages and consisted of wet and dry lands and also topes. Of these, lands to the extent of 100 acres have been resumed by the Govexnment and a beriz deduction of Rs. 330-10-4 is given out of which the Podu Dikshitars receive only Rs. 94-14-0 on behalf of the Devasthanam and the balance is paid to other persons. For over a period of 75 years these lands, it is common ground, have been in the possession of tenants from whom collection of melwaram is made on behalf of the temple by the Podu Dikshitars either directly or by leasing the right to collect among themselves to the highest bidder.

169. The Dikshitars have no other emoluments and they combine in themselves the functions of a trustee as well as an archaka. They have no inams and they have to devote their time exclusively to look after the affairs of the temple and carry on the worship in it by an internal arrangement made by them over a century ago as evidenced by the rules which have been framed by them and which are in vogue even at the present day. They are prohibited from taking up any other avocation and therefore they must necessarily depend for their livelihood consisting of as many as 250 families of 1500 members on what they receive at the temple either as dakshina or as offerings of food known as pavadai and other offerings made to the deity. They are bound up with the temple and service to God is the only source of their lievlihood. These in brief are the usages of the temple obtaining for several centuries. These materials can be gathered from the District Manual at page 400, the decision of this Court in '*Natesa* v. *Ganapathi*', 14 Mad 103 and Thurston's Castes and Tribes, Vol. I. page 238 and from the affidavits filed in the case.

170. When the Hindu Religious Endowments Act of 1923 (Act I of 1925) came into force, on behalf of the Dikshitars a memorial was submitted to his Excellency the Governor in Council, Fort St. George, in which they referred to the history of the temple and its endowments and the usages obtaining in it. They requested the Government to grant exemption to the temple from the operation of the Act by virtue of the power conferred on the Local Government under Section 2 of the said Act. This request of the petitioners was granted by the Government in G.O. 3750 L. and M. dated 28th August 1926 which states that the Government are pleased to exempt the Sri Sabha Nayakar temple at Chidambaram from the operation of all the provisions of the Madras Hindu Religious Endowments Act (Act I of 1925) except Sections 38, 57,

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58, 59, 64, 65, 66, 69 and 70. Section 38 dealt with hereditary trustees, 57 with submission of budgets and annual accounts, 58 and 59 related to schemes, 64 and 65 and 66 to finance and contribution and 69 and 70 to the removal of a trustee and costs.

171. In 1931 some of the worshippers moved the Board to frame a scheme and the Board started proceedings to frame a scheme in O.A. 644 of 1931, but owing to some technical defects the proceedings were dropped. On 2nd February 1932 the Board took up the matter 'suo motu' in O.A. No. 73 of 1932 and settled a scheme on 8th May 1933. The Dikshitars instituted O.S. 16 of 1923 in the District Court South Arcot questioning the scheme. The District Judge confirmed the scheme with certain modifications by the decree dated 9th September 1936. There was an appeal to this Court in A.S. 306 of 1936 and this Court agreed with the District Judge and confirmed the scheme with a slight modification. The judgment of this Court is dated 3rd April 1939 and is reported as '*Ponnuman Dikshitar* v. *H.R.E. Board, Madras*', (1939) 2 Mad L.J. 11. The scheme was directed to be enforced from 1st June 1939.

172. The main features of the scheme as modified by the District Court are the trusteeship is vested in the Podu Dikshitars, the active management being vested in a committee of whom six were to be elected by the Podu Dikshitars from among themselves and three to be chosen from among the Podu Dikshitars by turn or murai. The six trustees elected should not stand for re-election for a period of five years from the termination of their office. The Managing Committee was enjoined to appoint a manager subject to the approval of the Board on a salary basis. The Managing committee was enjoined to establish 'hundials' for the deposit of voluntary and compulsory offerings & also to fix the rates for the performance of archana and special worship. Their duties are defined under the scheme. They were required to lease out temple property invariably by public auction. They are bound to maintain accounts and the Board was authorised to appoint one or more of the worshippers as honorary trustees who shall attend to the inspection of the accounts, ascertain whether the kattalais are being performed regularly and bring to the notice of the Managing Committee any irregularities in such matters. The Committee was required to prepare a list of jewels and submit a copy of the same to the Board. The vacant sites belonging to the temple, it was directed, should be utilised for putting up temporary sheds during the time of the festival.

173. During the pendency of the suit and before the judgment of the District Court was pronounced on 28th August 1936, the exemption granted in 1926 was annulled. The Board

attempted to notify the temple by proceedings initiated under Chapter VI-A of the earlier Act on 1st May 1936. As a result of the observations in the judgment of the High Court, these proceedings were however dropped on the 20th March 1940. The High Court then observed:

> "It seems to us very undesirable that the Board should have taken any steps in regard to the notification of this temple. The procedure in regard to notification ought not to be lightly resorted to, unless and until there is such serious mismanagement of a temple as would justify an ouster of the trustees in charge of a temple from their office. The scheme was framed in 1933 and proceedings relating to its notification were pending in the District Court and the scheme had not been given any fair trial. It would not possibly be said that the scheme was not worked satisfactorily by the trustees and that therefore in the interests of proper

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administration of the temple it was necessary for the Board to take the drastic step of having the temple notified. We trust and hope that the Board would drop all proceedings in the matter and allow the scheme as modified by the District Court and as modified by us to be given a fair trial and would give the trustees a fair opportunity to carry on the administration in accordance with the scheme."

174. Again in 1946 the Board seems to have revived the idea of starting proceedings under Chapter VI-A but they were again dropped on 11th August 1947. In 1950 proceedings under Chapter VI-A which terminated in the notifications now challenged were initiated by the Board and the Board after hearing the objections of the petitioners decided on 21st March 1951 to notify the temple as they were satisfied that a case for such a step was made out. There was an appeal as provided under the Act to the full Board and it was disposed of by order of the Board dated 11th July 1951. This was immediately followed by the notification by a further order of the Board dated 31st August 1951 appointing an executive officer. The Government approved the proposed action of the Board and issued a notification in the Fort St. George Gazette on 28th August 1951.

175. The notification is attacked both on constitutional grounds and also on the merits. The same articles as were relied on in C.M.P. No. 2591 of 1951 (Sirur mutt case) were also relied on in this case.

176. As we have considered the Article of the Constitution elaborately in C.M.P. No. 2591 of 1951, it is needless to repeat the reasoning and the conclusions reached by us in that case. They are equally applicable to this case. The idol, it is now well established, is a juristic person capable of taking and holding property. The right to possession and management, however, of the property endowed to the idol is in a manager or 'Dharmakartha' or shebait and the manager represents the idol in all transactions and suits. Usually, the dharmakartha has no beneficial interest and the property is not vested in him. The authority of the manager is analogous to that of a guardian of an infant heir and his liability in respect of his management is analogous to that of a trustee. We have held in C.M.P. No. 2591 of 1951 that if the dharmakartha or the head of a Mutt has a beneficial interest in the property and its income, such rights are "property" within the meaning of Article 19(1)(f) of the Constitution. It is not disputed that the Podu Dikshitars in whom the management' of the temple is vested are both the managers and the archakas and they have a substantial beneficial interest in the income.

177. It was observed in '*Natesa* v. *Ganapathi*', 14 Mad 103, that the Dikshitars hold both the offices in the institution and the net income of the temple which is derived from general offerings is their recognised means of livelihood—see at page 104. The only remuneration for the services rendered by the archakas is the right to share in the joint income and to enjoy the proceeds of the income from individual kattalais which each Dikshitar derives. The income of Rs. 800/- from the Tiruvilakku manyam is utilised for the lighting in the temple and if there is any surplus, it is distributed among the Dikshitars. Except the Tiruvilakku manyam the temple does not own any other properties from which it derives income and which is received by the Dikshitars. 250 families of about 1500 members have to be fed and maintained from out of the earnings made by the Dikshitars from the temple. The Dikshitars, therefore, are collectively and individually entitled to the beneficial interests in the offerings made to the God & in the collections made for the archanas and the other aradhanas. Some of the collections are the joint property of the community of Podu Dikshitars while the others are their individual income. In the light of what has been said in C.M.P. No. 2591 of 1951 and in view of the authorities examined therein, it follows that the Dikshitars who are the citizens of India have individual proprietary rights and the question is whether the notification takes away or abridges any of their proprietary

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rights and whether such notification is an unreasonable restriction on their right to acquire, hold and dispose of property.

178. Looking at it from the point of view, whether the Podu Dikshitars are a denomination, and whether their right as a denomination is to any extent infringed within the meaning of Article 26, it seems to us that it is a clear case, in which it can safely be said that the Podu Dikshitars who are Smartha Brahmins, form and constitute a religious denomination or in any event, a section thereof. They are even a closed body, because no other Smartha Brahmin who is not a Dikshitar is entitled to participate in the administration or in the worship or in the services to God. It is their exclusive and sole privilege which has been recognised and established for over several centuries. The notification seriously interferes with their right to manage the affairs in matters of religion to own and acquire movable and immoveable property, and even to administer such property in accordance with law. A law which substantially deprives the religious denomination of its right to administer the property of the denomination leaving only a scintilla of the right in the denomination cannot be justified and upheld as an exercise of the power to regulate the administration of the institution. Nor is it reasonable restriction within the meaning of the Article 19(5) of the Constitution.

179. The procedure to notify a temple under the earlier and the new Acts is undoubtedly a drastic innovation, which encroaches upon the rights of the Dikshitars to manage the property belonging to the denomination. It completely supersedes the machinery of management by the Dikshitars established and regulated from time to time by rules framed by the denomination

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in 1849 and reprinted in 1900 which have been filed and exhibited in the litigation in which the scheme was questioned. They are also filed as exhibits in this case. The rules cover every detail of the administration of the temple by the Podu Dikshitars and it is really surprising how more than a century ago they could have thought of framing detailed rules regarding the administration by them with a view to make it more effective. The notification procedure, as has been pointed out by this Court often, should be resorted to only when there has been gross mismanagement in the administration and the machinery provided for its management has broken down. This was the situation before the Constitution came into force.

180. A deprivation of the right to manage by the Dikshitars and vesting it in an executive officer appointed by the Government and the new Act making the administration a Governmental department is a serious inroad upon the rights of the Dikshitars. The Board under the earlier Act when satisfied by its own enquiry that there was mismanagement could exercise the power notwithstanding that the religious institution was governed by a scheme settled by Court or by the Board even. The power to finally decide the advisability of notifying an institution is vested exclusively in the Board. No doubt, there is a right of appeal to the full Board provided under the earlier Act and under the new Act even that illusory right of appeal has been abolished. There is no right of suit permitted to question the action of the Board either under the earlier Act or under the provisions of the new Act. The Commissioner's decision is communicated to the Government under the new Act and the Government publishes the notification declaring the institution to be subject to the provisions of Chapter VI. The right of appeal to the Board under the earlier Act and the vesting of the exclusive jurisdiction without any remedy in the Commissioner and the Government to take the serious step of replacing the administration by the Dikshitars

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by an executive officer without a power of judicial review of any sort, is to say the least, unreasonable and unjust. It is a well established principle that a person cannot be a Judge in his own cause. This is a principle recognized by the jurisprudence of all civilized nations. Even in England where the substitution of administrative justice has now become a common feature, this principle has been adopted and applied. Robson in his book on *Justice and Administrative Law summarises the position* at p. 56 as follows:

> "Underlying this condition that the Judge must be free from certain obvious and crude forms of interest in the case which he is called upon to decide, is the fundamental principle that a man cannot be judge in his own cause. Nor can he be both accuser and judge. 'If there is on a tribunal anyone who is an accuser, and who, although he is accuser, acts also as judge', said Charles, J. 'his presence on that tribunal is fatal to its jurisdiction.' It is of no importance that had he been absent the decision would have been the same. His mere presence vitiates the decision. 'The object of the rule', the late Lord Atkin more recently remarked, 'is not merely that the scales be held even; it is also that they may not appear to be inclined'. This is one of the most deeply rooted ideas in all systems of justice. So essential is it to English legal notions that it has been suggested that not even an Act of Parliament could make a man judge in his own causa and that a Statute would be void if it attempted to do so. Whether that is or is not sound constitutional law is not likely to be put to the test. In modern times the tendency has been rather in the other direction; and there are several recent measures on the statute book in which Parliament has applied the common law rule to whole departments of State. For example, where a local authority proposed to acquire land compulsorily for housing purposes, and the taking of it was resisted by the owner, the Minister of Health was required by statute to appoint 'an impartial person, not in the employment of any Government department' to inquire whether the land was suitable and whether it could be acquired without undue detriment to the owners and adjoining landowners."

181. The learned author also gives other examples where this principle has been applied. If that is the position in England where there is no written Constitution recognising fundamental rights and the power of Parliament to enact a law is supreme & is subject to no limitations, it cannot be said that where legislative power should be exercised subject to limitations recognised and embodied in the Constitution, the limitations of the nature contained in Chapter VI of the new Act and Chapter VI-A of the earlier Act, cannot but be held to infringe the very fundamental principle of jurisprudence that no man should be a judge in his own cause and is therefore unreasonable and unjust. One has to only peruse the provisions of the notification dated 31st August 1951 to convince himself that the Podu Dikshitars rights have been unjustly abridged and unreasonably restricted. The executive officer appointed under the notification is given the power and control over the properties and the servants of the temple and is vested with the right to conduct the festivals and other religious rites and rituals, of course, according to custom and usage. He is authorised to establish hundials for the collection of the voluntary and other offerings in the temple. He is given the right of suspending, removing or dismissing the servants of the temple and is empowered to receive all the incomes of the devasthanam and make all disbursements on its behalf, which must be brought into account. This provision shuts out to the Dikshitars the only source of their livelihood. No remuneration is provided even for the services which they render in the temple, the only saving clause being that the trustee shall be entitled to receive the customary personal honours which they have been receiving till now from the Devasthanam. The clause is vague and does not in any manner and to any extent clearly and definitely state or save the surplus income and the other individual income which they have been and ought to have been

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receiving as the only remuneration for the services rendered by them. It will reduce them, if the income is taken away by the executive officer, to starvation and the 250 families consisting of 1500 members whom their religious usage renders unfit to pursue any other profession or avocation are doomed to starvation and eternal perdition. Under the guise of the power vested in the legislature, a law which permits such deprivation cannot indeed be said to be either reasonable restriction on the power to acquire, hold and dispose of property under

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Article 19(1)(f) or a valid exercise of a power intended solely for the regulation of the administration of the properties of the temple. An abrogation of a right by a law is not a regulation by it. It is annihilation and not regulation. The provision therefore, relating to the notification and the notification actually issued are opposed to the fundamental rights granted to the individual and guaranteed by the Constitution under Article 19(1)(f) and to the denomination under Article 26 and therefore cannot be upheld.

182. The right to contribution under S. 76 of the new Act has been held by us in C.M.P. No. 2591 of 1951, as unconstitutional as it is opposed to Article 27.

183. The notification, in our opinion, is also bad on the merits. The order of the Board in the first instance deciding to notify the temple and the order of the full Board on appeal proceeded on grounds which cannot be justified. There is already a scheme framed by the Board and finalised by the Court. It came into force on 1st June 1939. The scheme, it is said, did not help in putting an end to the mismanagement by the Dikshitars and certain provisions of the scheme have not been given effect to, notwithstanding the directions of the Board. It is also stated among the reasons that a register of jewels was not maintained & was not made available for the inspection of the officers of the Board. That the temple was in bad state of repair; that the Dikshitars did not take steps to enforce the Podu Kattalais; that no steps were taken to recover possession of the Tirvilakku manyam lands, that chit system for archanas was not introduced; that the vacant sites of the temple were not leased out for the sheds; that the electrical lighting arrangements in the temple were insufficient and of a temporary nature; that the drains around the temple and inside the shrine were not kept in a sanitary condition; that the D.C.B. was not maintained and so on, which are enumerated seriatim in the annexure to the Board's order dated 21-3-1951.

184. These objections were answered by the Dikshitars. The full Board and the Board which considered the matter in the first instance agreed in concluding that there were acts of mismanagement established which necessitated a notification of the temple. The appellate order concedes that except the Tiruvilakku manyam lands, there was no other property which was endowed for the performance of kattalai or services in the temple and the kattalaidars, meaning the Podu kattalaidars, were not shown to have created any endowments and that therefore they do not come under the definition of specific endowments. At the very early stage of the enquiry, the Dikshitars requested the Board to issue notice to the kattalaidars as they were necessary parties to the enquiry as the question relating to kattalaidars was also raised. This request was not granted for the reason that the kattalaidars have not created any endowments and that there are therefore no specific endowments. There is no complaint at any stage that the kattalaidars defaulted in providing the materials for the carrying on of the worship at the seven kalams and the utsavams of the temple. The temple not having owned any lands except the Tiruvilakku manyam, there is no income received by the Podu Dikshitars from any property. In view of the finding

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of the full Board, the entire reasoning of the first order of the Board regarding kattalais, seems to us was not justified.

185. Nor is there necessity to keep elaborate accounts of the income as the kattalaidars do not pay any amount into the hands of the Dikshitars but they themselves provide the necessary material at the time of each worship or aradhana. This is a fundamental fact peculiar to this temple and if this is borne in mind, the foundation for most of the charges falls to the ground e.g. how are the Dikshitars to gel large amounts required for the repairs to the temples. They cannot be expected to starve themselves and carry out the repairs which require a large outlay. It is not as if the Dikshitars were not alive to the necessity of putting the temple in proper repair. The income from the Tiruvilakku manyam was only Rs. 800/- and on this basis, it was that the Board was levying contribution and therefore that may be taken as the correct income. That would be wholly insufficient to contribute anything for the repairs of the temple.

186. By the efforts of the Dikshitars a Sabha known as Tirumathil Tiruppani Sabha was constituted for the collection of subscriptions and donations for the repairs of the temple. If is through their efforts that they were able to find a benefactor to renovate the Pandya Naicken temple in 1948. The first and second prakarams of the temple were renovated by the benefactions of Nattukottai Chettiars. It is to such benefactors that the Dikshitars and the temple must look for the major repairs and for renovation wherever necessary. There are no other means of getting large income to the temple and to encroach upon what the Dikshitars receive for the archanas and worship and which is utilised by them for their sustenance and to require them to contribute from out of it large sums for the repairs and renovation of the temple seems to us wholly unjust.

187. The introduction of the system of archana chits and the hundials for collections has been, a source of trouble between the Dikshitar? and the Board ever since the scheme was framed. No doubt the scheme directed the establishment of the hundials and the introduction of the chit system. But the scheme was not clear is to between whom and in what proportion should these collections be divided. Time and again the Dikshitars pointed out this difficulty whenever the Board insisted upon the introduction of the hundials and the chit system. It must be remembered that this is not a temple like the Tirupathi or Palani temple where in fulfilment of vows taken by the worshippers, money or other offerings are made in the hundials. The scheme referred to voluntary and compulsory offerings for the hundials. If however any amount is paid into the hands of the Podu Dikshitars alone, it was brought into account in cases where it is earmarked as a gift to the God. But where the payment is only for the services rendered by the Dikshitars either for the archana or aradhana, they themselves were appropriating it as that was the only emolument which they are entitled to for the services.

188. On 28th March 1940 and again in 1946, the Dikshitars sent up memorials to the Board regarding the hundials and the introduction of the chit system; but the Board did not then and even up to this date decide to whom the collections should go. The apprehension of the-Dikshitars that they will be deprived of their

source of living was not unreasonable and unjust. The Board's orders themselves disclose that the income received by them in the temples is the sole source of their livelihood. In 1947 when an attempt was made to initiate notification proceedings on these very grounds, they were immediately dropped when representations were made,

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as stated by the Dikshitars in the affidavit, to the then Chief Minister Sri O.P. Ramaswami Reddiar. Between 1940 and 1948 no directions were given by the Board in this behalf. They left this question in a nebulous state without deciding one way or the other and this is now made the chief ground for the issue of a notification. It was open to the Board to have moved the Court for a modification of the scheme or for themselves to have decided on the complaint made by the Dikshitars from time to time.

189. Another ground which was strongly relied upon relates to the Tiruvilakku manyam. It was originally 200 acres of which 100 acres were resumed by the Government and a beriz deduction was given out of which a portion was being paid to the temple. The remaining extent is only 100 acres. This is borne out by the orders of the Board itself. The lands were in the possession of tenants from whom collections were being made by the Dikshitars. Though the title deeds to these lands which are distributed in several villages stand in the name of the deity, it is not known whether the grant consists of melwaram and kudiwaram or melwaram alone. For over 75 years the tenants have been in undisturbed possession of the lands. They have been paying melwaram on the land to the temple. It is therefore not an unreasonable inference to draw that the grant consisted only of melwaram and that the tenants had the kudiwaram interest in the lands and the right to recover possession might have been barred. It has been represented to us in the course of the arguments that in fact the Podu Dikshitars consulted a lawyer who gave the opinion that it would be a sheer waste of money to institute suits for the recovery of possession of lands. This fact, it was stated was represented to the Board and it is alleged in the affidavit filed before us and was not seriously denied. The criticism therefore by the full Board in their order on appeal that the Podu Dikshitars persisted in refusing to take action for recovery of possession and they did not even obtain legal opinion on the advisability of recovering possession of the property and the lands seems to us to be unwarranted, it is needless to state that in those circumstances, it would have been wholly inadvisable to have launched the temple in an unnecessary and costly litigation when there is very little chance of success.

190. Regarding the jewels, there seems to be a misconception on the part of the Board when they state in the appellate order:

> "Admittedly no jewel register is maintained and facilities were not given to the officers of the Board to verify and check the jewels with the list given in the Section 38 register."

191. This charge, in our opinion, is not well founded. A jewel register in triplicate was submitted to the Board by the Dikshitars in 1949. The jewels were got weighed and checked under the personal supervision of the biggest bullion merchants in Chidambaram. Jewels were in fact inspected by the Officers of the Board. The Dikshitars in their affidavit stated that they gave full lists in 1940 soon after the scheme came into force and in 1946 a list of all the additional jewels received was also given together with, a box. The jewels were again weighed and valued and a fuller list was prepared and given to the Board on 30th July 1949. The lists are in books which have been produced before us from the custody of the Board. We have personally inspected the book which has been produced before us by the Board and we are fully satisfied that not only the lists were complete and exhaustive but that they were also checked by the Assistant Commissioner on 21-10-1950. We are unable to notice any discrepancies.

192. The selvanam box contains unusable and broken articles such as gold pieces, gems etc. It is not usually opened but about 35 or 40 years ago out of the materials in the box a makara kandikai valued at Rs. 75,000 was got made. A list was made of the other broken and unusable jewels and it was given to the Board on 26-9-1946. This is

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all borne out by the register which has been produced before us. The charge therefore seems to us to proceed without an appreciation of the true facts. The rules book maintained by the Dikshitars regulates the management of the temple affairs, secular and spiritual and contains specific rules framed as early as 1849 regarding the jewels. Of these-rule 12 says:

> "Two complete lists should be prepared of all the jewels, vessels, clothes and other movable-property in the temple, one of which should be kept in the safe room called Asthanthiram of the temple and the other should be in the custody of the turnholders who do pooja."

193. This rule has got several sub-rules providing for the safe handling of these articles & for their safe custody; they also lay down varying grades of punishment for loss of jewels by theft or negligence. The 10th rule in 1849 book is to-the following effect:

> "Special jewels worn by the deity on occasions of Brahmotsavams i.e., in June and December of each year are provided for in this rule. A meeting of all the Dikshitars is to-be convened and the keys have to be produced by key holders and in the presence of the entire Podu Dikshitars two lists are to be-prepared, one signed by the Utsava Moraikar should be kept in the safe room and the other should be kept by the Karyakar."

194. This rule also has got several clauses providing for safe custody and also how loss owing to theft or negligence is to be punished. When the temple was renovated between 1885 and 1892, the safe room was considerably altered and strengthened and the 1900 rules make provision for safe custody of the jewels. Groups of ten Dikshitars have to be in charge of these special jewels for six months ending with the Tamil months of Ani and Margazhi (now, the-number is twenty). They get their right by rotation according to the morai list; each is provided with a different lock and key and the Asthana room is locked with all the locks. Whenever occasion arises for taking out the jewels such as Brahmotsavam or to enable a distinguished visitor to see them, a special meeting of all the Poduvars is convened and the-Asthana Moraikars are directed to assemble at a particular hour with their keys to open the safe room, take out the jewels and after the purpose is over, put them back again. All this has to be done in the presence of the Poduvars. There were also elaborate rules for handing

over and taking over charge from one set of turnholders to the other after the months of Ani and Margazhi. The system devised by the Dikshitars is undoubtedly a very safe system making it almost impossible for the jewels to be lost and no one could have devised a better system than that. The elaborate discussion therefore by the Board in the first order and the conclusion of the appellate Board regarding the jewels seems to us unwarranted. There is therefore very little justification for the charge which has been taken as a serious ground for the issue of the notification.

195. The appellate order refers that indiscriminate payments were exacted from worshippers by the Dikshitars as remuneration for ar-chanas. The only evidence is that Rs. 1-4-0 a month is charged for archana and this cannot be said to be indiscriminate or exorbitant. By introducing the chit system and hundi collections under the guise of regulating the worship it really commercialises worship in the temple. It is common knowledge that in most of the temples, it is almost impossible for poor men to get darsan if he is not able to pay the required amount. The value of the worship and the spiritual significance are lost when it is treated as a saleable commodity which should

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be controlled and exploited for the purpose of earning income for a temple.

196. These are the reasons on which the appellate order was based. It is unnecessary to deal with the grounds elaborately as we are satisfied that the order on which the notification was issued is without any foundation and proceeded on a total misconception of the facts.

197. These are the facts appearing on the record and it is somewhat surprising that the Board should have taken the serious step, as has been held by this Court, of nptifying this temple which procedure ought not to be lightly resorted to unless and until there is such serious mismanagement of a temple as would justify an ouster of the trustee in charge of a temple from his office. In suck circumstances it is open to us to issue a writ to quash an order which proceeds on grounds which are so perverse as to amount to a non-exercise of the jurisdiction entrusted to it. The notification therefore must be quashed even on the merits.

198. In C.M.P. No. 2591 of 1951 we have enumerated the sections of the impugned new Act which are ultra vires the State Legislature in so far as they are made applicable to Mutts and Matathipathis and to the religious denominations for which those Mutts exist. In the case of *Sri Sabhanayakar Temple at Chidambaram*, with which we are concerned in this petition, it should be clear from what we have stated earlier in this judgment, that the position of the Dikshitars, labelled trustees of this temple, is virtually analogous to that of a Matathipathi of a Mutt, except that the Podu Dikshitars of this temple, functioning as trustees, will not have the same dominion over the income of the properties of the temple which the Matathipathi enjoys in relation to the income from the Mutt and its properties. Therefore, the sections which we held ultra vires in relation to Mutts and Matathipathis will also be ultra vires the State Legislature in relation to Sri Sabhanayakar Temple, Chidambaram and the Podu Dikshitars who have the right to administer the affairs and the properties of the temple. As we have already pointed out even more than the case of the Shivalli Brahmins, it can be asserted that the Dikshitars of Chidambaram form a religious denomination within the meaning of Article 26 of the Constitution.

199. The rule nisi must be made absolute. The petitioner is entitled to his costs is the petition. Advocate's fee Rs. 250. We certify under Article 132 of the Constitution that it is a fit case for appeal to the Supreme Court.

C.R.K./K.S.

200. *Rules made absolute.*

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AIR 1971 MADRAS 405 (V 58 C 83)

VENKATARAMAN AND KRISHNASWAMY REDDY, JJ.

Pichai, Appellant v. The Commissioner for Hindu Religious and Charitable Endowments (Administration Dept.) Madras and others, Respondents.

Appeal No. 769 of 1963, D/- 29-7-1970 against decree of sub-J., Madurai in O. S. No. 31 of 1961.

(A) Madras Hindu Religious Endowments Act (22 of 1959), Section 6 (20) — The definition of temple is wide enough to include any place of public religious worship irrespective of installation of idols or a building or a tower or stupi. Presence of idols is not an essential requisite of temple. The only conditions are that it must be dedicated to, or for the benefit of, Hindu community or a section thereof or used by it as of right. (Paras 12, 13)

(B) Madras Hindu Religious Endowments Act (22 of 1959), Section 6 (20) — The installation and consecration of idols with ceremonies like pran-pratishta etc. prescribed by Hindu shastras in case of idols of God is not a sine qua non for public religious worship — Nor is it a legal requisite of a temple within Section 6 (20) — (X-Ref.:— S. 6 (17) (18)) — (X-Ref.: — Section 64) — (X-Ref.: Hindu Law — Religious endowment). (Case law discussed). (Para 14)

The performance of ceremonies such as prana-pratishta, Kumbabhishekam etc., are not essential for the installation of the images of saints or nalvar idols and if such idols had been worshipped by the public as of right without let or hindrance, that would be sufficient to bring the place where the idols are kept, within the meaning of temple under the Act. An endowment can be created by making dedication pure and simple without any provision for performance of ceremonies. (Paras 18, 19)

On the facts of the case it was held that the dedication of properties by the founder in favour of four nelvar idols installed in the mandapam of the temple was for the benefit of the Hindu community and for the religious worship and that the Hindu community used the said place as of right. The settlement deed created a religious endowment or institution for which a scheme could be framed under Section 64 of the Act. (Paras 23, 25, 27, 33)

Cases Referred: **Chronological** **Paras**

(1966) AIR 1966 Andh Pra 197 (V 53) = 1964-2 Andh WR 457, Venkataramana Murthi v. Sri Rama Mandiram 17, 28

(1963) AIR 1963 SC 510 (V 50) = 1962 Supp (2) SCR 276, Poohari Fakir Sadavarthy of Bondilipuram v. Commr. H. R. and C. E. 28

(1957) AIR 1957 SC 133 (V 44) = 1956 SCR 756, Deoki Nandan v. Murlidhar 20

(1953) AIR 1953 SC 491 (V 40) = 1954 SCR 277, Saraswathi Ammal v. Rajagopala Iyer 24

(1951) AIR 1951 Mad 473 (V 38) = 1950-2 Mad LJ 511, Ramaswami Servai v. Board of Commrs. H. R. E. Madras 16

(1939) AIR 1939 Mad 134 (V 26) = 1939-1 Mad LJ 134, Commrs. H. R. E. Board v. Narasimham 15

G. S. Venkatarama Iyer, for Appellant; Addl. Govt. Pleader and Gopalaswami, for Respondents.

KRISHNASWAMY REDDY, J.:— This appeal is by the plaintiff against the judgment and decree of the First Additional Subordinate Judge, Madurai dismissing the suit filed by him to set aside the order of the Deputy Commissioner for Religious Endowments Board in framing a scheme in respect of a religious trust created by one Chockalingam Pillai by a settlement deed dated 24-10-1924.

2. The brief facts which culminated in the filing of the suit by the appellant are these: There is a temple called Kalyanasundareswarar temple in Avaniyapuram village. One Chockalingam Pillai, a native of the said village who was a pious and religious man desired to make four idols of Sri Appar, Sundarar, Manickavasagar and Sambandamurthi and instal them in the said temple of Sri Kalyanasundareswarar. He requested his friend and relative, one Muthukaruppa Pillai of the same village who had taken interest in thiruppani work of the said temple, to make the aforesaid four idols and construct temples for them. The said Muthukaruppa Pillai made the four idols and completed the work as desired by Chockalinga Pillai. Thereafter, Chockalingam Pillai, in pursuance of the promise made by him to Muthukaruppa Pillai that he would make arrangements for the performance of daily pooja, neivedhyam, Shodasa upacharams etc, endowed and dedicated certain properties in favour of the said four idols by a deed of settlement dated 24-10-1924 (Ex. A. 1.) for the purpose of doing daily pooja and also Gurupooja every year in respect of the said idols and for similar purposes mentioned in the said deed. By the said deed, he appointed the aforesaid (1) Muthukaruppa Pillai, (2) Pichai alias Chockalingam Pillai (appellant) who is the grandson of his elder brother and (3) one Gopala Iyer, the son of the Manager of Kalyanasundareswarar devastanam as trustees for the management of the properties

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and administration of due performances of the various items of pooja and other things mentioned in the said deed.

3. Chockalingam Pillai died in 1926. Muthukaruppa Pillai who took over the management of the properties died in 1934. Gopala Iyer, another trustee appointed under the settlement deed died in 1937. His son, Sesha Iyer filed a suit, O. S. No. 19 of 1944 on the file of the District Munsif, Madurai taluk, against the appellant and third respondent, Natesa Pillai, son of Muthukaruppa Pillai, claiming to be the managing trustees, for recovery of possession of the trust properties from the appellant and for rendition of accounts. His claims as managing trustee as well as recovery of possession from the appellant were negatived in the suit and the decree was confirmed in appeal No. 3 of 1945 on the file of the District Court, Madurai. However, the appellant was directed to deposit a sum of Rs. 2064 as the amount due by him in respect of the income from the trust properties. The said Sesha Iyer again filed a suit, O. S. No. 84 of 1951 on the file of the Sub Court, Madurai, against the appellant and the third respondent for their removal from the trusteeship and for recovery of the trust properties on the ground of mismanagement. During the pendency of the suit, Sesha Iyer died. His adopted son Seshayya who was a minor at that time was brought on record as his legal representative. The suit was ultimately compromised and a decree was passed in pursuance of the said compromise by the Sub Court, Madurai on 8-7-1954. Under the terms of the compromise decree, the properties endowed and dedicated to the four idols shall belong to the Chockalingam Pillai Trust, that the appellant shall be the managing trustee of the said Trust and that he should purchase nanja lands from out of the sum of Rs. 2,222 and odd available with him (appellant) belonging to the said Trust and if such lands could not be purchased, he should deposit the said sum in a bank in the name of Chockalingam Pillai Trust. The appellant did not purchase the properties as provided in the decree, but, however, deposited the money in the bank in his own name.

4. As the appellant was not performing the charities according to the wishes of the founder and as per the provisions of the decree of compromise, the Executive Officer of Sri Kalyanasundareswarar temple (second respondent) by a notice dated 1-6-1956 called upon him to perform the pooja for the nalvar idols and to render accounts in respect of the trust properties. The appellant by his reply notice dated 12-6-1956 informed the Executive Officer that Muthukaruppa Pillai had not performed the duties undertaken by him regarding the building of the temple, installation of the images and performance of the consecration ceremonies and as such the Executive Officer of the temple was incompetent to call for accounts or demand performance of pooja for images which were not installed and deified.

5. The Deputy Commissioner for Religious Endowments of Tanjore, issued a notice to the appellant under date 4-9-1958 informing him that the trust had not been carried out properly, that he had not accounted for the income from the properties and that, therefore, he proposed to frame a scheme. The appellant by his reply dated 29-10-1958 inter alia represented that no temple had been built for the images and the images had not been installed therein, that he was prepared to perform Kumbabhishekam if the images were installed in the temples to be erected and that he was having the amounts of the trust with him and had invested the same in fixed and current accounts with banks.

6. The Deputy Commissioner after due enquiry found that the trust was an endowment connected with the temple of Sri Kalyanasundareswarar and framed a scheme by order dated 20-2-1960 in O. P. No. 57 of 1959. Under the Scheme, the Deputy Commissioner directed the appointment of two new trustees besides the three hereditary trustees and also directed the Executive Officer of the said temple to take charge of the properties of the trust. On appeal by the appellant, the Commissioner for Religious Endowments confirmed the scheme framed by the Deputy Commissioner with a modification that the appointment of two other trustees was unnecessary, by his order dated 30-11-1960 in A. P. 51 of 1960.

7. The only point urged before us by Sri M. S. Venkatarama Iyer, the learned counsel for the appellant, is that the Deputy Commissioner, Religious Endowments Board, had no power to frame a scheme under Section 64 of the Madras Act XXII of 1959 as the settlement deed by Chockalingam Pillai did not create an endowment in favour of an institution or temple and as such, the scheme framed by him should be set aside as ultra vires. This contention is mainly based on the ground that the nalvar idols (Sri Appar, Sundarar, Manickavachagar and Sambandamurthi) mentioned in the settlement deed were not installed and consecrated with due performance of ceremonies such as prana pratishta, Kumbhabhisheka etc. and that, therefore, the idols have not become the objects of public religious worship. It, therefore, becomes necessary to consider whether

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prana prathistha or Kumbhabhishekam ceremonies of nalvar idols are essential requisites to bring it within the definition of 'temple' under Section 6, Clause (20) of the Hindu Religious Endowments Act, 1959.

8. According to Hindu authorities and Agama Sastras, elaborate rites and ceremonies were introduced in regard to the building of temples and consecration and purification of idols. Man-made images in contrast to Swayambu images or self-revealed ones are installed and consecrated in a temple after due performance of long and elaborate ceremonies, of which prana pratishta or vivification ceremony is an essential one by which the eternal spirit is supposed to be infused into the idol. Kumbhabhishekam is performed by bathing and washing the image with sacred water purified by ceremonies including homa, offering of oblation to the sacred fire and prana pratishta. Then the deity begins to reside in the idol and becomes the object of religious worship. Thus, the performance of the ceremonies enjoined by Agama Sastras in respect of installation and consecration of idols would substantially indicate that they become objects of public religious worship, to which the properties can be endowed.

9. But we have to consider whether the ceremonies to be performed according to Hindu Sastras in installation and consecration of idols are essential requisites for a "temple" as defined under Clause (20) of Section 6 of the Madras Hindu Religious and Charitable Endowments Act 1959 (hereinafter called the "Act").

10-11. The following are the relevant provisions to be considered: Under Section 6 Clause (18) "religious institution" means a math, temple or specific endowment.

"Religious endowment" or "endowment" is defined in Section 6 clause (17) as follows:—

"'Religious endowment' or 'endowment' means all property belonging to or given or endowed for the purpose of maths or temples, or given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity; and includes the institution concerned and also the premises thereof; but does not include gifts of property made as personal gifts to the archaka, service-holder or other employee of a religious institution;.....

Explanation 2: All property which belonged to, or was given or endowed for the support of a religious institution, or which was given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity be deemed to be a 'religious endowr or 'endowment' within the meanin this definition, notwithstanding that fore or after the date of the comme ment of this Act, the religious institu has ceased to exist or ceased to be as a place of religious worship or struction or the service or charity ceased to be performed;

Provided that this Explanation shall be deemed to apply in respect of any perty which vested in any person be the 30th September 1951, by operation of the law of limitation."

12. Under Section 6, clause 'temple' means a place by whatever signation known used as a place of pu religious worship, and dedicated to, for the benefit of, or used as of ri by the Hindu community or any sec thereof, as a place of public religi worship. The definition of 'temple' c templates following conditions, nam "temple" means a place by whate designation known used as a place public religious worship (1) and de cated to the Hindu community or a section thereof as a place of public r gious worship; or (2) and dedicated the benefit of the Hindu community any section thereof as a place of pub religious worship; or (3) and used as right by the Hindu community or a section thereof as a place of public re gious worship.

13. The definition of "temple" so comprehensive as to include any pla irrespective of installation of idols or building or a tower, dwajasthambha or a stupi. For instance, there are ins tutions like Bhajana Madams where pi tures of Gods of Hindu pantheon lil Sri Rama and Sri Krishna are kept ar where the public congregate daily f worship, sing bhajans in praise of Gc and receive prasadams. Though the are no idols in such Bhajana madam yet as they are places of public rel gious worship by Hindu community, the will come within the meaning of Sec tion 6 clause (20) of the Act. It is well known fact that in South India, i a place called Vadalur, Sri Ramalinga swamigal otherwise called Vallalar ha founded an institution called Gnan Sabhai where no idol or no picture o any deity is kept. But a light is kept burn ing perpetually, indicating God as "Jyothi" or "light". Daily pooja is performed and the Hindu community congregate ir large numbers and offer their prayers and worship in the said Sabhai. Thus, it has become a place of public religious worship. Pictures and paintings of Gods in some famous public temples are worshipped by the devotees who go to such temples for the worship of the presiding deity. We mention these things

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to show that it is not necessary in all cases that the presence of idols is an essential requisite to bring the place within the definition of 'temple' under the Act.

14. We have already observed that when idols of Hindu Gods are installed according to Hindu Sastras, prana pratishta is an essential ceremony. The question is, if the idols are installed in a place without due ceremonies being performed, will that cease to be a place of public religious worship within the meaning of "temple" under the Act? It is clear from the definition of 'temple' that if a place is used as place of public religious worship by the Hindu community or any section thereof, and dedicated as such, it becomes a temple and a religious institution. If the Hindu or a section of Hindus believe that there is divine presence in an idol, irrespective of the fact that such idol had been installed or consecrated according to Hindu rituals and ceremonies enjoined by Agama Sastras and also believe that by worship of such idols they acquire material and spiritual benefits and with that object worship such idols, they become objects of public religious worship. There are several places in South India where idols of little Gods like Madan, Muthuveeran, Kathayee, Mariyayee, Ellamman etc., are installed and a particular section of the Hindu community congregate and worship with the belief that they get material benefits from such Gods. Some of these idols are installed even in open places. Rituals such as prana pratishta and kumbhabhishekam are not performed to such idols and yet, they would come within the definition of 'temple' under the Act. We see in the City of Madras a particular section of the Hindu community placing some idols and images in some public places and worshipping them. The Samayapuram temple in Tiruchirapalli District and the Mariamman temple in Tanjavur District where the idols of non-Aryan Goddesses are kept, are worshipped by a large section of the Hindu community with the belief that their prayers are granted, and several valuable offerings are made by the devotees to those Goddesses. Many of those temples dedicated to non-Aryan Gods are of Dravidian origin based on the Aryan belief of image worship. Non-aryan priests, namely, Poojaries perform poojas to such Gods and Goddesses. It does not appear that the aforesaid idols in the said temples have been installed and consecrated according to the rituals and ceremonies enjoined by Agama Sastras. They have become places of public religious worship by long user of the places as such by the Hindu community. We are, therefore, of the view that the installation and consecration of idols with ceremonies like Prana pratishta etc. prescribed by Hindu Sastras is not the sine qua non for public religious worship. In any event, it is not a legal requisite under the definition of 'temple' in the Act. However, we shall not be understood to be doubting the religious efficacy of the deity taking its abode in the idol by prana pratishta and other rituals as enjoined by Agama Sastras.

15. In Commrs. H. R. E. Board v. Narasimham, AIR 1939 Mad 134, Varadachariar, J. on behalf of the Division Bench constituting himself and Pandrang Row, J., in considering the definition of 'temple' as a place of public religious worship under the Madras Hindu Religious Endowments Act, 1927, the present definition being substantially the same, made the following observation, with which we respectfully agree:—

"The Hindu Religious Endowments Act, no doubt speaks of a temple as a place of 'public religious worship'..... The test is not whether it conforms to any particular school of Agama Sastras; we think that the question must be decided with reference to the view of the class of people who take part in the worship. If they believe in its religious efficacy, in the sense that by such worship they are making themselves the object of the bounty of some superhuman power, it must be regarded as 'religious worship'."

In that case, the facts disclosed that 66 stones representing the images of heroes who gave their lives as martyrs were placed and worshipped by the Hindu community and the institution came to be known as 'Sri Virulu Alaya' a temple of heroes. There were no idols. But there was performance of Nity Neivedya Diparadhana, the offering of animal sacrifices and distribution of these offerings amongst the assembled audience. The rice distributed at the end of the ceremony was carried home by them and scattered in their fields in the belief that it would make the fields more productive. The facts of that case do not disclose that the 66 stones representing the heroes were installed according to Agama Sastras and that prana pratishta or Kumbabhishekam or samprokshana was performed to them. In those circumstances, the learned Judges held that that institution was a temple under the definition in the Act.

16. In Ramaswami Servai v. Board of Commissioners, H. R. E. Madras 1950-2 Mad LJ 511, at p. 533 = (AIR 1951 Mad 473 at p. 490), Viswanatha Sastri, J. to whom the case was referred to, as there was difference of opinion between two learned Judges of the Court, held as follows:—

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"Consecration according to the ceremonial rites prescribed by the Agama Sastras is not a legal requisite, though it is a sacredotal necessity according to the views of the orthodox. The test is not whether the installation of an idol and the mode of its worship conform to any particular school of Agama Sastras. If the public or that section of the public who go for worship consider that there is a Divine presence in a particular place and by offering worship at that place, they are likely to be the recipients of the bounty or blessings of God, then you have got the essential features of a temple as defined in Section 9 Cl. (12) of the Act."

That was a case where no idols were installed and the temple was under construction and the founder dedicated the temple for public worship and endowed properties for the upkeep and maintenance of the temple.

17. Subsequently, a Division Bench of the Andhra High Court consisting of Satyanarayana Raju, J., as he then was and Venkatesan, J. in Venkataramana Murthi v. Sri Rama Mandiram, 1964-2 Andh WR 457 = (AIR 1966 Andh Pra 197) followed the aforesaid two decisions of the Madras High Court and held that the existence of an idol and a dhwajasthambham are not absolutely essential for making an institution a temple, and so long as the test of public religious worship at that place is satisfied, it answers the definition of a temple within the meaning of Section 6 (17) of the Madras Hindu Religious and Charitable Endowments Act, 1951.

18. In the present case, we are concerned with the installation of idols of nalvars in the temple of Sri Kalyanasundareswarar at Avaniyapuram. The nalvars are Saints of Saivism in South India. They propagated Saivite religion by having sung devotional songs in praise of Lord Siva, the images of which were installed in various places in Saivite temples in South India under various names. Those devotional songs were known as Thevaram and Thiruvachakam. They were believed to have lived during Chola and Pandia period in South India. The Saints like Alwars of Vaishnavite religion and nayanmars of Saivite religion propagated bhakti and that that was the only means to get liberation. They themselves sought for their liberation. These saints lived as human beings and sang in praise of the various presiding deities infused spiritually in the idols, installed and consecrated according to Hindu Agama Sastras. Though they were religious Saints of the highest order they cannot be equated with the deity infused in idols worshipped by the very same Saints. The Hindu authorities have prescribed various ceremonies to be performed to give efficacy to the idols of Hindu Puranic Gods. The Agama Sastras, as far as we could see, do not prescribe such ceremonies to be performed to the idols representing the Saints or other persons who lived dedicating their lives to the service and worship of Hindu Gods. In this context, it is significant to note the following statement from the Hindu Law of Religious and Charitable Trust, by Bijan Kumar Mukherjea—vide pages 152 and 154:—

"The Gods that are worshipped by the Hindus at the present day are mostly Pouranic Gods whose legends are given in the various Purans, though there are some divinities of Tantric origin..... Though the Purans are by no means uniform, the legends associated with the various Gods are fairly well known and have been the basis of a considerable mass of poetic literature in later times. One cardinal principle underlying idol worship you would always bear in mind—and this has some bearing on the law relating to gift of property to idols—that whichever God the devotee might choose for purposes of worship and whatever image he might set up and consecrate with that object, the image represents the Supreme God and none else. There is no superiority or inferiority amongst the different Gods. Siva, Vishnu, Ganapati or Surya is extolled, each in its turn as the creator, preserver and supreme lord of the universe. The image simply gives a name and form to the formless God and the orthodox Hindu idea is that conception of form is only for the benefit of the worshipper and nothing else.

Along with the establishment of idol worship, in Hindu religion, elaborate rites and ceremonies, it seems, were introduced by Brahminical writers in regard to building of temples and consecration and purification of idols."

It is, therefore, clear from this passage that the idols installed, consecrated and worshipped by the Hindu community represent the Supreme God and none else and only such idols alone are required to be consecrated and installed for worship according to the rites and ceremonies prescribed by Agama Sastras. The images of saints or devotees though revered and worshipped by the Hindu community, do not represent God or deity, the idols of which are installed and consecrated in temples. It, therefore appears that though the ceremonies enjoined by Agama Sastras are necessary for installation and consecration of idols representing God, such ceremonies are not the essential requisites for installation of images of Saints like nalvars. The in-

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stallation of images of Navanmars or Nalvars can be rightly called Bhaktha pradishta. It is a well known fact that people who go to temples for religious worship of presiding deities also worship the other images kept in the said temples and the images of Nalvars are of the latter category.

19. It may be, as pointed out by learned counsel Mr. M. S. Venkatarama Iyer, that in some places even the idols of Navanmars like those nalvars might have been installed and consecrated with certain ceremonies. For instance, the image of Appar, one of the nalvars, was installed and consecrated recently at Thiruvamur, the birth place of the said saint, by and at the instance of Dharmapuram Adheenam, a well known Saivite Mutt in South India, after performing certain ceremonies followed in cases of installation and consecration of idols representing God. This is done more for the reason that certain section of the Hindu community believe that religious efficacy could be obtained even in respect of images of Saints, by installing and consecrating them following the traditions of performance of certain ceremonies prescribed for installation and consecration of idols representing God and not for the reason that such ceremonies to such images are enjoined by Agama Sastras. We are, therefore, of the view that the performance of ceremonies such as prana pratishta-kumbabhishekam etc., are not essential for the installation of the nalvar idols and if such idols had been worshipped by the public as of right without let or hindrance, that would be sufficient to bring the place where the idols are kept within the meaning of 'temple' under the ct. An endowment can be created by making a dedication pure and simple without any provision for performance of ceremonies.

20. The Supreme Court in Deoki Nandan v. Murlidhar, 1956 SCR 756, 768 = (AIR 1957 SC 133 at p. 140) has held as follows:—

"It is settled law that an endowment can validly be created in favour of an idol or temple without the performance of any particular ceremonies, provided the settlor has clearly and unambiguously expressed his intention in that behalf. Where it is proved that ceremonies were performed, that would be valuable evidence of endowment, but absence of such proof would not be conclusive against it." At p. 767 (of SCR) = (at p. 140 of AIR), it was further held,

".....proof of user by the public without interference would be cogent evidence that the dedication was in favour of the public."

In the present case, a careful examination of Ex. A.1 would show that there is no specific provision that the dedication is to be done by due performance of ceremonies; but on the other hand, the dedication is made pure and simple for worship of the nalvars by the Hindu community. The preamble to Ex. A.1 states that the settlor Chockalingam Pillai was about 75 years of age, that he was sick and ailing, that he had no heirs and that, therefore, he was making a dedication of the properties. The deed later states that Muthukaruppa Pillai, an intimate friend and relative of his was doing for about 4 or 5 years several Thiruppanis of Sri Kalyanasundaraswamigal devastanam and made idols of Gods such as Vinayaka for installing them in the aforesaid place and was making arrangements for the performance of kumbabhishekam and that he asked the aforesaid Muthukaruppa Pillai, on account of his desire for getting salvation to meet the expenses of making the four idols of Sri Appar, Sundarar, Manickavachagar and Sambandamurthi and for constructing temples for them, and he having acceded to his request, had completed the aforesaid entire works and, as per his longstanding wish and as per the promise, he made to the aforesaid Muthukaruppa Pillai for the contrivance of the performance of daily pooja in the name of the aforesaid Swamigal permanently, the pooja, neivedhanam and Shodasa Upacharams shall be performed within the limit of Rs. five separately for each idol and Guru pooja shall be performed once in a year within the limits of Rs. ten. The deed further provides the details for the performance of the charities and unequivocally mentions that the entire properties mentioned in the deed were dedicated for the charities mentioned in the said deed and for that purpose, the trustees mentioned in the deed were appointed. By the said deed, Chockalinga Pillai appointed (1) Muthukaruppa Pillai who completed the work as desired by him, (2) Pichai alias Chockalingam Pillai the plaintiff herein and the grandson of his elder brother; and (3) one Gopala Iyer, a stranger, as trustees. The recitals in the deed, as pointed out earlier indicate that Muthukaruppa Pillai completed the work in respect of making of idols and installing them in a temple as desired by Chockalingam, that according to the promise made by Chockalingam, he dedicated all his properties for the performance of daily puja, neivedyam, Shodasa upacharams, gurupooja etc., and that to carry out the trust created by him, he appointed three persons at the first instance, one of them being a stranger belonging to a different community. The settlor has not expressly stated that the dedication must be done by perform-

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ance of any particular ceremony. It is true that kumbabhishekam was not performed. But the deed does not provide for such kumbabhishekam of the four idols. The worship of four idols installed in the temple of Sri Kalyanasundareswarar, which admittedly is a place of public religious worship by the Hindu community, and the daily pooja to such idols are clearly indicated in Ex. A.1 itself. It is contended by the plaintiff that there was no installation of idols of Nalvars; nor was there daily pooja, that the idols were not worshipped by the Hindu community and that they were kept in a store room. It was, therefore, contended that there was no public religious worship in respect of the four idols, to bring it within the definition of "temple." We have already mentioned that in Ex. A.1 itself it was stated that the entire work in respect of the installation of idols was completed and that, therefore, the dedication of properties was made in favour of idols for the due performance of pooja, neivedyam etc. Even if there is a doubt from the recitals in Ex. A.1, that the installation of the idols was not completed at the time of dedication, it is clear from the evidence of D. W. 1, Somasundara Sastrigal, the Archaka of Sri Kalyanasundareswarar temple that the nalvar idols were installed even before 1953.

21-22. We shall now refer to the oral evidence of witnesses examined in the case.

(After discussion of evidence his Lordship proceeded:). The substance of the evidence of these witnesses would show that the idols of Nalvars were installed in the temple and daily poojas were being done to them and the public worship those idols and the place where the idols were installed is used by the public as of right for religious worship.

23. A clinching circumstance in this case is that the plaintiff himself admitted in the compromise effected in O. S. 84 of 1951 on the file of the Sub-Court, Madurai, that there was a dedication by Chockalinga for public religious worship, that the properties endowed by him belonged to Chockalinga Pillai Trust and that he was the Managing Trustee and as such he would maintain accounts. This admission is a clear indication that Chockalingam Pillai had endowed his properties to four idols and created an endowment. We hold that the dedication of properties by Chockalingam in favour of the four idols installed in the mantapam of Sri Kalyanasundareswarar temple is for the benefit of the Hindu community and for the religious worship and that the Hindu community used the said place as of right for public religious worship.

24. The learned counsel for th appellant relied upon a decision in Sar swathi Ammal v. Rajagopala Iyer, 19 SCR 277 = (AIR 1953 SC 491). In th decision, it was held that a perpetu endowment of properties for the purpo of Samadhi Kainkaryam i. e. worsh of and at the Samadhi (tomb) of a pers is not valid under Hindu law and th to the extent that any purpose is clain ed to be a valid one or perpetual ded cation on the ground of religious mer though lacking in public benefit it mu be shown to have a Shastraic basis s far as Hindus are concerned. That w a case where properties were endowe by a widow for the worship of the tom of her husband and the expenses to b incurred from the properties were exclu sively for samadhi kainkaryam and n for any other religious or charitable pu pose. It was held that a kainkarya done to the samadhi was for the spiritu benefit of the deceased, somewhat ana logous to the worship of ancestors at sradh. The Supreme Court observed tha if such a worship is made for the rel gious merit of an individual it must b shown to have a Shastraic basis. In th present case, we are not concerned wit the tombs and, therefore, this decisio will not apply to the facts of this cas

25. In the result, we find tha the settlement deed dated 24-10-1924 ex ecuted by Chockalingam Pillai created religious endowment in favour of tem ple where four idols were installed, tha the Deputy Commissioner of Religiou Endowments had power to frame scheme for the said endowment and tha the scheme framed by him on 20-2-196 as modified by the order of the Com missioner dated 30-11-1960 is valid an not liable to be set aside.

26. The appeal, therefore, fail and is dismissed with costs.

VENKATARAMAN, J.:— 27. I respectfully agree with my learne brother. The only objection taken befor us on behalf of the appellant by hi learned counsel, Mr. M. S. Venkataram Iyer, is that the Deputy Commissione and the Commissioner have no jurisdic tion to frame the scheme. The powe to frame a scheme is contained in Sec tion 64 (1) of the Madras Hindu Religi ous and Charitable Endowments Act (Madras Act XXII of 1959), the relevan portion of which states—

"When the Deputy Commissione has reason to believe that in the inter ests of the proper administration of a institution a scheme should be settle for the institution.....and if.....h is satisfied that it is necessary or de sirable to do so, he shall, by order settl a scheme of administration for the insti tution."

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The Explanation says:

"For the purpose of this section, 'institution' means a temple or a specific endowment attached to a temple".

The argument, therefore, is that there is no institution here within the meaning of the Explanation. The definition of "temple" is contained in Sec. 6 (20) of the Act and runs thus:

" 'Temple' means a place by whatever designation known used as a place of public religious worship, and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of public religious worship."

The definition of 'specific endowment' is contained in Section 6 (19) and runs thus:—

" 'Specific endowment' means any property or money endowed for the performance of any specific service or charity in a math or temple or for the performance of any other religious charity, but does not include an inam of the nature described in Explanation (1) to clause (17)."

Now it is not disputed that Kalyanasundareswarar temple within the precincts of which the idols of the four Nayanmars are situate is a temple satisfying the definition in Section 6 (20). If the properties endowed under Ex. A.1 could be construed to have been endowed for the performance of a specific service in the temple of Sri Kalyanasundareswarar, it would be a specific endowment within the meaning of Section 6 (19) of the Act and it would be an institution within the meaning of the explanation to Section 64, giving jurisdiction to the Deputy Commissioner, and the Commissioner to frame a scheme. It seems to me that Ex. A.1 could well be said to be a specific endowment for the performance of the specific service of worship of the Nayanmars in the temple and would, therefore, amount to a specific endowment within the meaning of Section 6 (19). This is also the finding of the learned Subordinate Judge in para 16 of his judgment. But the point was not argued before us on behalf of the respondents and I do not wish to rest our judgment on this aspect alone. The question, therefore, which remains to be considered is whether the place where the four idols are found will itself satisfy the definition of 'temple' in Section 6 (20). My learned brother has answered the question in the affirmative and I agree with him.

28. The definition of 'temple' in Madras Act XXII of 1959 is the same as the definition contained in Sec. 9 (12) of the Madras Hindu Religious and Charitable Endowments Act, 1926 (Madras Act II of 1927) which was interpreted by the Supreme Court in the Poohari Fakir Sadavarthi of Bondilipuram v. Commr., H. R. and C. E., 1962 Supp (2) SCR 276 = (AIR 1963 SC 510), as follows:

"The institution in suit will be a temple if two conditions are satisfied. One is that it is a place of public religious worship and the other is that it is dedicated to, or is for the benefit of, or is used as of right, by the Hindu community or any section thereof as a place of religious worship."

This definition has been followed in the decision of the Andhra Pradesh High Court in 1964-2 Andh WR 457 = (AIR 1966 Andh Pra 197) quoted by my learned brother. We have thought it convenient to give a further expanded definition rewriting the provisions in one of three possible ways:

(i) 'temple' means a place by whatever designation known used as a place of public religious worship and dedicated to the Hindu community or any section thereof as a place of public religious worship; or

(ii) 'temple' means a place by whatever designation known used as a place of public religious worship and dedicated for the benefit of the Hindu community or any section thereof as a place of public religious worship; or

(iii) 'temple' means a place by whatever designation known used as a place of public religious worship and used as of right by the Hindu community or any section thereof as a place of public religious worship.

29. There is no real difference between what we have stated and the definition as paraphrased by the Supreme Court. The point to be noticed is that in the second condition laid down by the Supreme Court, there is a distinction between dedication on the one hand, and user as of right by the Hindu community or any section thereof as a place of religious worship, on the other. This distinction has been incorporated in the Act, because it may not be possible in a given case to prove the actual dedication. That is why it has been enacted that proof of user as of right is sufficient.

30. It is perhaps possible to rewrite Section 6 (20) as follows:—

(i) 'temple' means a place by whatever designation known used as a place of public religious worship and dedicated to the Hindu community or any section thereof as a place of religious worship; or

(ii) 'temple' means a place by whatever designation known used as a place of public religious worship and dedicated for the benefit of the Hindu community or any section thereof as a place of religious worship; or

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(iii) 'temple' means a place by whatever designation known used as of right by the Hindu community or any section thereof as a place of religious worship.

It will be noted that the difference between this and the expanded definition given earlier consists in the third branch and the words "used as a place of public religious worship" have been omitted. To that extent this way of rewriting the section may be more elegant, but in substance it comes to the same thing, and the important thing to be noted is the difference between the dedication and user as of right.

31. Now the evidence clearly shows that the place where the idols of the four Nayanmars have been installed has been used as of right by the Hindu community as a place of religious worship. My learned brother has discussed the evidence and it is unnecessary to traverse the same ground. It is sufficient to say that there is no reason to reject the evidence of the defendants' witnesses, which shows that the four idols have been there at least from some time before 1953 and that the place has been used as of right by the Hindu community as a place of religious worship. In this view it becomes immaterial to find when exactly the idols were installed. I find from Ex. A.2, the judgment dated 16-11-1944 in O. S. 19 of 1944 on the file of the District Munsiff's Court Madurai taluk—which was a suit instituted by Sesha Iyer, son of Gopala Iyer, one of the trustees under Ex. A.1, that Sesha Iyer admitted (see page 15 of the typed papers and para 14 of the judgment) that the deities of the Nalvars had not been installed and consecrated by the performance of kumbabhishekam either by Muthukaruppa Pillai or any one till 30-8-1940, and he deposed that on 30-9-1940 he installed the deities and performed Kumbabhishekam of 29 deities including the deities of the Nalvars. He stated that he incurred an expenditure of Rs. 11 for this purpose. The learned District Munsif, who tried the suit, disbelieved the evidence, pointing out inter alia that the sum of Rs. 11 would not have been sufficient. He observed—

"It appears that the said deities have been fixed in some place in the inside of the temple, but that alone is not enough."

In his view Pranaprathishtai and Kumbabhishekam had to be performed, but they were not done.

32. The statement of Sesha Iyer that he installed the deities only in 1940, if admissible as true, would mean that the recital in Ex. A.1 that Muthukaruppa Pillai had 'completed the aforesaid entire works' could not be in accordance with the facts. It may be noted in this connection (vide Ex. A. 2) that the present plaintiff in his written statement in that suit, O. S. No. 19 of 1944 raised the contention that the recitals were made only in the expectation that Muthukaruppa Pillai would instal the deities and perform kumbabhishekam. That stand was taken by the plaintiff as early as in 1944. But, strictly speaking, the deposition of Sesha Iyer in that suit, O. S. 19 of 1944, is not evidence in the present suit. Further, even if it is admissible, it may not necessarily be true. Further, even if it is true it would only mean that he installed the deities on 30-9-1940 and the further statement that he performed kumbabhishekam may not be true. But the mere fact of installation of the idols on 30-9-1940 is enough for our purpose.

33. I entirely agree with my learned brother that kumbabhishekam for the said idols is not necessary. The real point is that the place has been used as of right by the Hindu community at least from 1953 as a place of public religious worship. I therefore agree with my learned brother that the appeal has to be dismissed with costs.

Appeal dismissed.

AIR 1971 MADRAS 413 (V 58 C 84)

RAMANUJAM, J.

N. K. M. Kader Saheb, Petitioner v. Alwar Thevar and others, Respondents.

Civil Revn. Petns. Nos. 2181 etc. of 1969, D/- 15-2-1971 against orders of Sub Collector, Ramanathapuram in M. C. T. P. No. 61 etc. of 1963.

(A) Tenancy Laws — Madras Cultivating Tenants Protection Act (25 of 1955), Section 3 (4) (a) — The fact, that the parties are agitating their claims for ryotwari patta before the Settlement Officer under the Madras Inams Abolition Act (26 of 1963), cannot preclude the Revenue Court from disposing of an application for eviction and deciding the question of ownership incidentally. (1957) 2 Mad LJ 369 and (1970) 2 Mad LJ 314, Followed. (Para 2)

(B) Tenancy Laws — Madras Cutivating Tenants Protection Act (25 of 1955), Section 4 (B) — It cannot be said that the tenant can have benefit of the Act only if the tenancy agreement has been made in the particular form prescribed under Section 4 (B). The tenancy agreement may be express or implied. (1965) 78 Mad LW 363. Followed. (Para 3)

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mutation application which speaks of the beginning of Kartik. I can scarcely believe that Jagarnath meant the 21st Kartik when he said that Sahodra died in the beginning of Kartik. On the other hand the plaintiffs prove an account-book kept in the regular course of business in the firm of Bishunath Mahton, which shows that certain presents were sent to Jagarnath on the occasion of the shradh ceremony of his mother. The date of the entry is 22nd November 1899, and it is urged that Sahodra could not have died earlier than 7th November, because the ceremony cannot, in Hindu families, take place later than 15 days after the death. No doubt this entry is entitled to some weight as corroborative evidence; but it is not admissible as independent evidence because Sri Kishen, the writer, has not been called, and it has not been proved that he is dead or that he cannot be produced. Now accepting the entry as corroborative evidence, it merely raises a possibility or a presumption that the articles were sent some time before 22nd November and that the death took place not earlier than 7th November. In my opinion this evidence, taken with the oral evidence produced on behalf of the plaintiffs, fails to rebut the evidence of the entry in the mutation application. I would hold therefore that the suit is barred by limitation.

There remains only one other point which has been urged by the learned vakils for the respondents. They say that plaintiff is not entitled to succeed to the whole of the claim in the present suits because in a previous consent decree he made a compromise with one Chamru agreeing to give to Chamru a certain share in the properties in suit. An examination, however, of the agreement shows that the properties now in suit are not affected by the agreement, because one of the conditions of the agreement was that Chamru was to get a share in respect of those properties, for the recovery of which he advanced money to the plaintiff Jagarnath. As Chamru does not appear to have paid anything for the recovery of the present properties he has no title in them. The result, therefore, is that the appeals fail and are dismissed with costs.

V.S./R.K. *Appeals dismissed.*

A. I. R. 1916 Patna 146

MULLICK AND ATKINSON, JJ.

Sapneswar Pujapanda and *others*—Plaintiffs—Appellants.

v.

Ratkanar Mahapatra and *others*—Defendants—Respondents.

Second Appeal No. 1687 of 1912, Decided on 24th July 1916, from a decision of Dist. Judge, Cuttack, D/- 20th March 1912.

Hindu Law—Religious office—Puja Pandas—Civil P. C. (1908), S. 9.

The Puja Pandas are not entitled to claim chanda in a respect of chhatrabhog at the temple of Lingaraj at Bhubhaneswar. [P 149 C 1]

Dwarka Nath Mitter and *Satish Chandra Bose*—for Appellants.

M. S. Das, *Subodh Chandra Chatterjee* and *Suresh Chandra Chakravarty*—for Respondents.

Mullick, J.—The plaintiffs style themselves as Puja Pandas of the temple of deity named Lingaraj Mahaprabhu at Bhubaneshwar. The principal defendants style themselves as the Suar Pandas of the same temple. It is admitted by both parties that when a certain kind of offering called chhatrabhog is made by a pilgrim to the God it is the custom for the Suar Pandas to keep one-fourth for labour spent by them in cooking the food. The remainder of the cooked food is then handed to the Puja Pandas, who consecrate the same by means of incantations and ceremonies and return it to the pilgrim. The plaintiffs claim that out of the one-fourth share kept by Suar Pandas they, the plaintiffs, are entitled to keep one-fourth by way of remuneration for their labour, that is to say, the plaintiffs claim to keep 1/16th of the total offering of every pilgrim who offers chhatrabhog. There is another kind of offering called dalabhog, in respect of which a similar prayer is made. In the present suit the plaintiffs ask for the following reliefs: (i) That it may be declared that the plaintiffs are entitled to receive the 1/16th share of the chhabhog and dalabhog, the said share being commonly called chanda. (ii) That it may be declared that the principal defendants 1 to 9 have no right to offer daladhog. (iii) That a perpetual injunction may be issued restraining defendants 1 to 9 from taking chanda due to the plaintiffs. (iv) That a decree may be passed

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awarding the plaintiffs damages to the extent of Rs. 2,400.

The learned Subordinate Judge made a declaration that defendants 1 to 9 have no right to offer dalabhog, but he did not expressly declare that the plaintiffs were entitled to claim 1/16th in respect of this kind of offering. But in regard to chhatrabhog the learned Subordinate Judge held that the plaintiffs were not entitled to claim 1/16th share on account of chanda. He declined to grant the remaining prayers of the plaintiffs. On appeal the District Judge made an express declaration that the plaintiffs were entitled to 1/16th share as chanda in respect of dalabhog, but in other respects he affirmed the Subordinate Judge's decree. The present second appeal is preferred by the plaintiffs, and the only question before us is whether or not the plaintiffs are entitled to claim 1/16th of the chhatrabhog by way of chanda. The plaintiffs base their case, firstly, upon the ancient Shastras and secondly, on custom. Both Courts have found that the alleged custom has not been proved. The learned vakil for the appellants admits that he cannot go behind this finding and, therefore, has argued his case only on the basis of the Shastras. He contends that although the plaintiffs have failed to prove the custom alleged by them, still they are entitled to a decree if they can prove that the Shastras recognize their right. It is necessary, therefore, to examine the various texts upon which the parties rely.

Both parties admit that Lingaraj Maha-prabhu is one of the manifestations of Siva; that the ordinary pilgrim is not permitted to partake of the bhog or offering made to an image representing a manifestation of Siva if that manifestation is attended by an Upadevata or attendant deity named Chanda or Chandeshwar. According to Hindu mythology, Siva is in certain cases attended by Chandeswar who is located in the north-east corner of the temple. After the bhog is offered to Siva 1/16th of the shown is shown to Chandeshawar, but no partofthat bhog can be eaten by any one except a Siva Bhakta or votary of Siva. When Siva appears in the form of a Linga he may do so either as a Ban Linga, or a Linga made of jewels, copper, silver, gold iron; and in these cases "the bhog can be partaken by all with devotion." The Swayambhu Siva is the Siva who is self-existent, whose origin cannot be traced, who is unborn and eternal. It is admitted that he is never accompanied by Chandeshwar. It is the case of the defendants that the term chanda is derived from the worship of Chandeshwar and that where there exists such worship, it is the right of the Puja Panda to claim 1/16th of chhatrabhog; where there is no such worship the Puja Panda has no such right. The lower Courts have found that it is the custom of all classes of pilgrims, whether special votaries of Siva or not, to eat the chhatrabhog offered to Lingaraj of Bhubaneshwar, they find that there can be no worship of Chandeshwar at this temple and it follows, therefore, that there can be no chanda for the plaintiffs in respect of chhatrabhog. The Courts arrive at the same result by another process. They find that Lingaraj is a Swayambhu Siva and that a Swayambhu Siva according to to the Hindu Shastrrs is not attended by Chandeswar. Therefore the plaintiffs are not entitled to chanda. If, therefore that defendants can establish that Lingaraj at Bhubaneshwar is Swayambhu Siva, the plaintiffs' claim in respect of chhatrabhog must fail. Ex. E, a text from Lingaraj Puja Paddhati, runs as follows:

> Out of no portion of the food already offered should offering be made to Chandeswar, It is said in the Shaivagam 'in the case of Ban Linga Swayambhu Linga made of metal, and in the case of all images, Chanda has no right,' From this text Chandra Rudra has no right in connection with the worship of the great Swayambhu Lingaraj. It should simply be offered as to Krishna."

This text shows that Lingaraj is a Swayambhu Siva. Again, Ex. G is a text from the Ekambra Puran. I consider it established that Ekambra has been identified with Bhubaneshwar. Apparently the name owes its origin to the fact that a Bhubaneshwar there was only one mango tree, and the texts cited both by the plaintiffs and the defendants show that the temple of Lingaraj at Ekambra is the temple of Lingaraj at Bhubaneshwar. Ex. G runs as follows:

> "The God who gives protection to those who are worthy of it, the God who is the lord of millions of Lingas, who is without end, whose virtues have no end, who knows no decline or destruction, who is Swayambhu, peace-giver, supreme, grantor of boons and auspicious, in whom all conceptions meet. Who does not worship such a God."

This text again, therefore, describes Lingaraj as Swayambhu. I next refer to

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an extract from Ex. 21, Swarnadri Mahodaya the whole of which is devoted to the worship of Lingaraj Mahaprabhu. This text runs as follows.

"I am describing a large Linga who is giver of all fruition, a chief God in the north-east and near to Bhubanesha, who being round and very beautiful and having the form of a laddu, Brahma in ancient time referred to under the appellation of Laddukeswar. Oh, good Bhrahmans, very near him is Bhubanesh, him-self who is blessed above the blessed, worshipable, giver of all desires, perfect, chief Linga, beautiful, Swayambhu and remover of all sins. Thereafter touching seeing and bowing to Sakreshwar Linga a man is freed from all sins and attains the region of Indra. This Sakreshwar has been of yore worshipped by Sakra who is very powerful, bright and giver of boons to the faithful. The above is the description of the virtues of the Lingas inside the enclosure walls."

The learned vakil for the appellants contends that the translation submitted by the learned vakil for the respondents is incorrect and that the correct translation of the words,

Tatra sannihita sakhyat

is "in him directly present." He contends that the passage means that in Laddukeshwar Bhubanesha is directly present, and that the term Swayambhu applies not to Lingaraj of Bhubaneshwar but to Laddukeshwar. In my opinion the translation given by the learned vakil for the respondents is the most suitable to the context. I observe also that neither before the learned Subordinate Judge nor before the learned District Judge was objection taken to this interpretation of the text. On the contrary, the learned Subordinate Judge states in his judgment that the texts are in simple Sanskrit and were understood by the vakils of both sides. If there had been any doubt as to whether the term Swayambhu was or was not applicable to Lingaraj of Bhubaneshwar, I am certain that the interpretation now given by Mr. Mitter on behalf of the appellants would have been mentioned either before the Subordinate Judge or the District Judge. Then the appellants rely upon another text in the Siva Mahapuran for the purpose of showing that Lingaraj of Bhubaneshwar is not a Swayambhu. This text runs as follows:

"Somenath is in Sourashtra, Mulikarjuna in Sir Saila, Mahakal in Ojein, Chaureshwar in Ongkar, Kedar in the Himalayas, Vimasankar in Dakini, Bishweshar in Benares, Triambaka on the bank of the Goutami. Baidyanath in Chitabhumi, Nagesh in Dwarka forest, Ramesh in Setubandha and Ghushmesha in Sibalaya. These are the twelve avatars of Swayambu. The sight and touch of these confer all happiness on men."

It is contended that a Swayambhu Siva, being self-existent and unborn, must be synonymous with an avatar of Siva, and as Lingaraj of Bhubaneshwar is not included in the above list of avatars he cannot be Swayambhu. I am not impressed with this argument. I do not believe that Swayambhu is synonymous with avatar. I prefer the interpretation that Swayambhu, which means self-existing, is capable of application to a Siva, the origin of which is lost in antiquity, in contradistinction to a linga which was established by some known person. Moreover, if the interpretation that there can be no Swayambhu Sivas except these twelve avatars be accepted, then the interpretation given by Dr. Mitter to the text regarding Laddukeshwar must necessarily be wrong; for according to him, Laddukeshwar is a Swayambhu and admittedly Laddukeshwar is not mentioned at all in the list of twelve avatars. I agree therefore with the Courts below that Lingaraj of Bhubaneshwar is a Swayambhu, and if that is so, then the plaintiffs' claim must fail. The texts above cited also show that where the general public is permitted to partake of the bhog there can be no Chanda. It is found as a fact that the general public at the temple of Lingaraj is permitted to partake of the bhog.

Therefore also the plaintiffs' claim must fail. But Dr. Mitter further contends that the right of the plaintiffs to chanda in chhatrabhog has no connexion with the worship of Chanda, and that it is a mere coincidence that the share prescribed in the Lingaraj Siva Puja and the Sive Chintamani as due to Chanda is identical with the share prescribed by the Niladri Mahodaya as the share of the Pujaka or Acharya. He contends that the Niladri Mahodaya is authority for the proposition that in respect of all nirmalya offerings made to Siva, the Pujaka, i. e. the priest, is entitled to 1/10th or 1/16th. The reply to this is that the Niladri Mahodaya is not an authority which applies to the temples at Bhubaneshwar. It is a book compiled for the worship of the idols at Puri and the invocation:

"Oh King, you should always satisfy the Pujaka with 1/10th or 1/16th of the offering of the supporter of the world"

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is applicable only to the Raja of Puri. The argument that the text is of general application to all Hindus in India does not commend itself to me. If therefore this text be rejected as not being applicable, the defendants' case that the grant of Chanda is always co-existent with the worship of Chanda remains unrebutted. I therefore think that on a consideration of the text the plaintiffs are not entitled to claim Chanda in respect of chhatrabhog at the temple of Lingaraj of Bhubaneshwar. Moreover, their failure to establish that their claim is prescribed by custom tends to corroborate the interpretation which the defendants seek to place upon the Shastras. The result therefore is that the appeal fails and is dismissed with costs.

Atkinson, J.—I concur.

V.S./R.K. *Appeal dismissed.*

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CHAMIER, C. J. AND SHARFUDDIN, J.

Mahadeo Agarwalla—Defendant—Appellant.

v.

Ganesh Lal and *another*—Plaintiff and Defendants—Respondents.

Appeal No. 2544 of 1915, Decided on 9th August 1916, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 21st June 1915.

(a) Contract Act (1872), S. 83—Property—Suit for price of goods sold does not lie unless property has passed.

A suit for the recovery of price of goods sold does not lie unless the property in the goods has passed to the purchaser. [P 149 C 2]

(b) Contract Act (1872), S. 83—Appropriation—Plaintiff sending goods ordered by defendant to railway station for despatch—Defendant's agent examining goods before despatch and rejecting them—Plaintiff's suit for price cannot lie as there is no such appropriation as to property in goods to defendant.

Defendant ordered a certain quantity of catechu from plaintiff who sent the required number of bags to the railway station for despatch to the former. Before the bags were despatched the defendant's agent arrived, saw the catechu and rejected it. Plaintiff sued the defendant for the price of the catechu:

Held: that there had not been such an appropriation of the catechu for the purposes of the contract as was required by S. 83, Contract Act, and that, therefore, the property in the catechu not having passed to the defendant, the plaintiff could not sue for their price. [P 150 C 1]

Pugh and *Siva Nandan Rai*—for Appellants.

Ali Imam, *Abani Bhusan Mukherji* and *Fakaruddin*—for Respondents.

Chamier, C. J.—This appeal arises out of a suit brought by the respondents Ganesh Lal and Keshri Lal for the price of 250 maunds of black telia catechu said to have been bargained and sold to the appellant. In the Court of first instance the appellant did not appear and the case was decided ex parte. The facts are to be found in the evidence of the respondent Ganesh Lal himself. He said:

"I deal in catechu. Defendant 2 Chhagan Mal wrote to me from Neemuch asking the price of catechu in Jeth last. I replied. He asked for sample. I sent them. He sent a telegraphic order for 27 bags at Rs. 4 per maund. I agreed to sell at Rs. 3-14-0. Then he sent a letter asking for 41 bags. I sent 231 maunds in 92 bags to the station but did not despatch them as the money was not sent. Finally a joint letter from both defendants with two half notes for Rs. 500 each came ordering 250 maunds at Rs. 4. I sent 19 maunds more to the station on 6th August in 8 bags. Then a man Fateh Lal came to see the catechu and saw it and rejected it and asked for the return of the half notes."

Ganesh Lal states also that there was no good reason for rejecting the catechu and in this he was supported by the evidence of Chagan Mal, the man mentioned in the evidence of Ganesh Lal. It must be taken then that the appellant was not justified in refusing to take delivery of the catechu. The question for decision in this appeal is whether the plaintiffs-respondents are entitled to maintain a suit for the price of the catechu and some items such as the cost of gunny bags. It is contended on behalf of the appellant that a suit of this description does not lie unless the property in the goods passed to the purchaser; that in the present case the property in the goods did not pass to the purchaser inasmuch as the goods were not ascertained at the time of the agreement for sale, and no goods answering the description in the agreement were ever subsequently appropriated by the sellers for the purposes of the agreement, and that even if the sellers did appropriate catechu for the purposes of the agreement there was no assent to that appropriation on the part of the purchaser, therefore, the goods were never ascertained within the meaning of S. 83, Contract Act, the sale was never complete and the property in the catechu never passed. It is conceded by the learned counsel for the plaintiffs-respondents, and it is clear on the authorities, that a suit of this description cannot be maintained unless the property in the goods has passed. Therefore, the only question

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APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

MANOHAR GANESH TA'MBEKAR AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* LAKHMIRA'M GOVINDRA'M AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.* 1887. *May* 3.

Charity—Public charity—Trust—Public charitable or religious trust—Offerings made to an idol—Liability of persons in possession of an idol's property—Account—Jurisdiction of Civil Courts in cases relating to public charities—Right to sue—Civil Procedure Code (Act X of 1877), Sec. 539—"Direct interest", meaning of—Practice—Application to put in evidence in appeal which applicant refused to produce at first hearing.

1. A trust for a Hindu idol and temple is to be regarded in India as one created "for public charitable purposes", within the meaning of section 539 of the Code of Civil Procedure (Act X of 1877).

2. The Hindu law recognizes not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious, or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty, or at least protect it. A trust is not required for this purpose as it is by English law.

3. Those who take charge of gifts made to a religious or charitable institution—whether such gifts consist of cash, jewels, or land—incur thereby a responsibility for their due application to the purposes of the institution. They are answerable as trustees would be, even though they have not consciously accepted a trust; and a remedy may be sought against them for mal-administration by a suit open to any one interested as under the Roman system in a like case by means of a *popularis actio*.

The plaintiffs, as relators, filed this suit, under section 539 of the Code of Civil Procedure (Act X of 1877), against the defendants as trustees of the temple of Shri Ranchhod Ráiji at Dákor. The plaintiffs were five in number. The first plaintiff was the hereditary manager of the temple and its appendant villages. The other plaintiffs were priests residing at Dákor, who ordinarily took charge of pilgrims visiting the shrine, and performed worship of the idol on their behalf. The defendants were the *sheváks* or ministers of the idol—about one hundred and fifty in number—who took office by hereditary descent. They remained in constant attendance on the idol, performed the daily services at the temple, collected all the offerings made at the shrine, and kept them in a *bhandár* or store-room.

The god Shri Ranchhod Ráiji was held in great veneration by the followers of the Vaishnava religion throughout Western India. Every full moon, thousands of pilgrims resorted to the shrine, and made offerings to the deity, of cash, ornaments, clothes, and other articles, amounting in value to about a lákh of rupees

*Appeal No. 19 of 1883.

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in the course of a year. Besides these offerings the temple enjoyed a grant, in perpetuity, of the revenues of several *inám* villages, of which Dákor and Kanjri yielded the largest income.

The plaintiffs sued as persons interested in the maintenance of this public religious and charitable institution, and prayed that the Court would make the defendants, as recipients of the offerings at the idol's shrine, accountable, as trustees, for the right disposal of the property thus acquired. The plaintiffs alleged that the income of the temple had largely increased, and had been wrongly appropriated by the defendants to their personal purposes. They, therefore, prayed for an account, for the appointment of a receiver, for the removal of the *shevaks* from their office, and for the settlement of a scheme of future management.

The defendants answered *(inter alia)* that the plaintiffs had not such a direct interest in the institution as to entitle them to sue under section 539 of Act X of 1877; that they themselves were owners of the idol and of the idol's property, and that, as such, they were not liable to render an account of the offerings they had collected at the shrine. They also contended that they were not liable to be removed from their offices, which they and their ancestors had held for several centuries past.

The District Judge dismissed the suit, on the preliminary ground that, except the first plaintiff, who was a hereditary manager of the temple, the other plaintiffs had not such a direct interest in the charity as to entitle them to sue under section 539 of the Code of Civil Procedure (Act X of 1877).

Held, reversing the decision of the District Judge, that plaintiffs Nos. 2—5, as priests residing at Dákor and taking part in the worship of the idol, were directly interested in its due performance and its maintenance. Though they might not be trustees, they were clearly among those who, in practice, benefited by the execution of the trust. They had thus an undeniable *locus standi* as relators, and the suit could proceed at their instance.

Held, further, that the *shevaks* were not the owners of the offerings made to the idol. As recipients of those offerings, they were responsible for their due application to the purposes of the foundation. They were liable, as trustees, to render an account of their management.

The Court accordingly directed the District Judge (1) to take steps either by appointing a receiver, or otherwise, in his discretion, for guarding the property of the temple; (2) to take an account of the property and of the receipts and disbursements of the temple; (3) to make the requisite orders for recovering property appropriated by the *shevaks*; and (4) to draw up a scheme for the future management of the temple and its funds, regard being had to the established practice of the institution and to the position of the *shevaks* and of other persons connected with it.

The jurisdiction of the Civil Courts in matters of this kind discussed.

The plaintiffs had applied, during the hearing of the case in the Court of first instance, for the production of certain books of account of the defendants. The defendants resisted the application, and the Court refused to order the books to be

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produced. The suit having been dismissed, the plaintiffs appealed, and in the Court of appeal the defendants applied to be permitted to put in evidence the books which they had refused to produce.

Held, that the evidence could not be admitted.

APPEAL from the decision of S. H. Phillpots, District Judge of Ahmedabad, in Suit No. 23 of 1880.

This was a suit filed with the consent of the Advocate-General, under section 539 of the Code of Civil Procedure (Act X of 1877), against the defendants as trustees of the temple of Shri Ranchhod Ráiji at Dákor.

The plaintiffs were five in number; of these the first plaintiff, Manohar Ganesh Támbekar, was the hereditary manager of the temple. The other plaintiffs were the *gors*, or priests, residing at Dákor, whose duty was to conduct the pilgrims, who were their *yajmáns*, or patrons, to the shrine, and perform the worship of the idol on their behalf.

The defendants were a numerous body, (about one hundred and fifty in number), of *shevaks*, or ministers of the idol, succeeding to their offices by hereditary descent; they remained in constant attendance on the idol, performed the daily services, and kept in their custody all the cash, ornaments, clothes, and other offerings dedicated to the deity. They were paid Rs. 150 a year out of the revenues of the foundation.

Evidence was given that the god Shri Ranchhod Ráiji was held in great veneration by the followers of the Vaishnava religion throughout Western India. Every full moon, thousands of votaries visited the shrine and made offerings of cash, clothes, ornaments, and other moveable as well as immoveable property, amounting in value, in the course of a year, to about a lákh of rupees.

The temple enjoyed, in perpetuity, the revenues of several villages, of which the principal were Dákor and Kanjri, granted in *inám* by native princes and chiefs for the support of an institution which had been in existence for nearly seven hundred years. The idol's throne has lately been covered with gold and silver by His Highness the Gáekwár at a cost of Rs. 1,25,000.

The present temple was built in 1772 A. D. by Gopál Jagannáth Támbekar, ancestor of the first plaintiff, at a cost Rs. 1,00,000.

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Ever since that date the management of the temple and its appendant villages had been carried on by the Támbekar family. In the same year in which the temple was built, the whole body of *shevaks* passed an agreement, in writing, to the manager of the institution, by which they bound themselves to observe certain rules in the performance of the daily services at the temple, and for the preservation of the offerings made to the idol. This agreement (exhibit 4) runs as follows :—

"*Let Shri Ranchhod Ráiji be propitious.*

"To

"Shrimant Rájeshri Gopál Nark Támbekar, written by *shevak* Najirám Jádurám and Aditrám Vanchidás and Bhuldás Manoredás and Purbhudás Máneckji and Velji Rangji and Kalyán Náthji, and the whole body of *shevaks* (officiating priests) of Máiji Dákorji—to wit: for the purpose of the worship and adoration in the temple of Shri Ranchhod Ráiji we, the whole body of the *shevaks*, do hereby with our own will and pleasure give in writing that in the temple of the *shriji* (deity) we shall enter after bathing and purifying ourselves, and any *yajmán*, or patron, whom we may bring in for offering worship will also conform to the same restrictions; we are never to enter the temple, even for a moment, with uncleanliness or without bathing, nor are we to take the *yajmán* in that condition. And there are three classes among us, namely, the *shrigods*, *kherawals*, and *tapodhans*. Of these three classes each man is to remain in attendance whenever his turn comes on; the *tapodhans* are to enter the temple taking the key and to take the stand there; while the Bráhmins of each of the two divisions, one of each, *i.e.*, two at a time, are to do worship and service of the deity, and at the end of eight days the money, presents, and offerings that might have been collected, will be accounted for by those in whose turns they were respectively received, and under no inducement are to misappropriate or steal out of them, and will not permit any violation in the worship and service on any account, and if we do so we are guilty of Shri Ranchhod Ráiji, and offenders against the law of the Government. 2ndly. In the cooking of the sacred food for the deity, three persons of the three divisions are to remain

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there, and not a fourth person can be tolerated there; and if we make any sort of confusion in respect of cooking the victuals, we are offenders against the law of the Government.

"In this manner we *shevaks*, having assembled in a body, have agreed [to the above] of our own pleasure; we and our sons are to observe and conform to this from generation to generation. For all these promises the *shriji* (God) is the guarantee. This agreement will be carried out in the spirit of the word of our father.—Dated and written on Monday, *Chaitra Shud*, 3rd, *Samvat*, 1828" (A.D. 1772).

* * * * * *

"What is written above is true and binding.

"As to the dresses and jewels of Shri Ranchhod Ráiji, we are not free to sell in any way. Thirdly. In the village of Dákor, if any Bráhmins or Shudras or Jamádárs or any person of the whole village or some one of the outside visitors are found to misbehave, or to act in an improper manner, we are never to espouse his or their cause. You can get the punishment he or they deserved, inflicted by the Government. We are not to take their side, and if we should do so, we will be guilty before God (Ranchhodji) or before the ruling power. Again, if any one out of the body of our *shevaks* were found to offend in any way, then, too, we are not to join together or make any quarrel; if we do, we are guilty before God, and offenders against the ruling powers."

The plaint alleged that the defendants had frequently acted in contravention of the rules laid down in the aforesaid document, that they had latterly set up a proprietary title to the offerings made at the shrine, that they had appropriated part of those offerings to their own use, and that they refused to render an account of the property held by them in trust for the idol.

The plaintiffs, therefore, prayed as follows:—

1. That an account might be taken, by and under the directions of the Court, of all sums of money, ornaments, cattle, and all other moveable and immoveable property which had come into the hands of the defendants as trustees of the idol.

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2. That the defendants might be ordered to pay into Court whatever on taking accounts might be found due by them to the funds of the temple.

3. That, if necessary, the defendants might be removed from their office of *shevaks*, or worshippers, and new *shevaks*, or worshippers, be appointed in their stead.

4. That a scheme might be settled by, and under the directions of the Court, for the management of the temple and of the funds thereof.

5. That an injunction might be issued restraining the defendants from removing, alienating, or otherwise disposing of the cash, clothes, ornaments, and other moveable as well as immoveable property dedicated to Shri Ranchhod Ráiji.

6. That a receiver might be appointed to take charge of the said property of the idol.

7. That all books, papers, and documents relating to the said offerings and to the disposal thereof might be directed to be forthwith brought into the custody of the Court.

In their written statement the defendants replied *(inter alia)*, that the plaint was not sufficiently stamped; that the plaintiffs had not such direct interest in the temple, or in the property appurtenant to the temple, as to entitle them to sue under section 539 of the Code of Civil Procedure (Act X of 1877); that the suit was barred by limitation; that the *shevaks* were not the servants of the temple, but owners of the idol and its property; that as owners and proprietors they and their predecessors had carried on the management of the temple uninterruptedly for more than seven hundred years; that they had never rendered any account of their management to the plaintiff Manohar or his ancestors, or to any other person; that the agreement of A.D. 1772 was not a genuine document, and even if its genuineness were established, it was not binding on them; that they had appropriated to their use such offerings as it had been their practice to appropriate for hundreds of years past; that they were not trustees of the *devasthán*; that they had not abused any trust, and were not liable to be removed from their office and position as *shevaks*; and that

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the plaintiffs had no right to demand an account of their management.

As to the first objection, that the plaint was not sufficiently stamped, the District Judge held, following the decision of the High Court at a former stage of this case[1], that the plaintiffs were at liberty to fix what sum they pleased, which they had apparently fixed at Rs.. 130; but as they alleged three distinct causes of action, and sought three distinct remedies, they were ordered to pay Rs. 10 for each relief sought.

The District Judge, however, dismissed the suit, on the preliminary ground that the plaintiffs Nos. 2—5 had *not any direct* interest in the trust in question so as to entitle them to sue under section 539 of the Code of Civil Procedure (Act X of 1877).

With regard to this section he observed as follows:—"There must be two persons having a direct interest in the trust. It is clear that the first plaintiff has such an interest. In exhibit 300 he is styled manager and hereditary patron of the temple, and as the descendant of the builder of the temple in which the idol now is, and as the hereditary manager of the estates belonging to it, and as the supplier from those estates of money and other things for the use of the temple, he has an undoubted direct interest in the trust; but, as regards the other plaintiffs, the case is very different. They allege in their plaint that they are trustees of the temple, but that is manifestly false; they are only *gors*, or *upádias*, whose duty it is to conduct their clients to worship, to perform certain ceremonies there, and to receive what their clients give them. The only interest they have in the temple is that they get certain sums deposited by their clients before the god, and the only interest they profess to have in the trust is to see that the ornaments and clothes presented by their clients are put on the god at certain times, but this does not make them trustees of the temple. Any Bráhmin can be a *gor* if he can only get clients to employ him. The second and fifth plaintiffs have just as much interest in the temple as other Vaishnavas, and no more. It is true a good deal of their income depends on the

(1) *Vide* Printed Judgments for 1877, p. 244.

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prosperity of the temple and the repute in which the idol is held, but that pecuniary interest is shared by the lodging house-keepers and shop-keepers of Dákor; and if being interested in the prosperity of the temple made a person a trustee, then the B. B. & C. I. Railway, which gets more money in the year than probably the whole body of *gors* put together, should be a trustee of the temple. *Dhadphale* v. *Gurav*[1] shows that the mere fact, that plaintiff has sustained some pecuniary loss from the non-performance of the service of the temple, does not give him a cause of action. And as the Advocate-General's sanction is necessary for a suit of this kind, it is necessary for the plaintiffs to prove the cause of action on which they got that sanction.

"In the plaint, which was sanctioned by the Advocate-General, the plaintiffs Nos. 2, 3, 4, 5 are thus described—'residents of the village of Dákor and trustees of the temple.' It cannot for a moment be argued that every resident of Dákor has a direct interest in the trust; and that the plaintiffs Nos. 2, 3, 4, 5 are trustees of the temple is, as I have above shown, distinctly false."

Against this decision the plaintiffs appealed to the High Court.

Telang (with him *Shántárám Náráyan*) for the appellants.

Macpherson (Acting Advocate General) (with him Ráv Sáheb *Vásudev J. Kirtikar* and *Gokuldás Kahándás Parek*) for the respondents.

Macpherson:—The Court below has disposed of the suit on a preliminary point. It has not recorded its findings on the principal issues. We desire to put in further evidence, consisting principally of our books of account. These books are necessary to establish our case.

Telang:—Even if the books be material, it is too late to put them in. The defendants refused to put them in in the lower Court, and successfully resisted our application for their production.

[WEST, J.:—We think the proposed further evidence should not be admitted.]

Telang:—The plaintiffs on behalf of the persons interested in this religious and charitable institution at Dákor claim an

(1) I. L. R., 6 Bom., 122.

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account from the defendants, who are the hereditary *shevaks*, or ministers of worship at the temple. The defendants collect the offerings made to the idol, and keep them in a *bhandár* or store-house. The property in their hands belongs, not to themselves, but to the idol. It is the subject of a religious and charitable trust. *Shevaks* are the trustees. As such they cannot appropriate the offerings to their own use. They have bound themselves by exhibit 4, a document passed so far back as A.D. 1772, to preserve the offerings for the use and benefit of the idol. The original of exhibit 4 was produced in a previous litigation between the parties. In execution of a decree against the ancestor of the first plaintiff, two villages belonging to the temple were attached. The *shevaks* sought to raise the attachment; on that occasion the attaching creditor used the original against the *shevaks*, and the attachment was upheld. A certified copy of the original was then filed in a subsequent litigation between the Támbekars and the *shevaks*. The *shevaks* of the present day represent, as a class, the whole body of *shevaks* who had originally passed the document, and against whom it had been used in former litigation. The document is, therefore, binding on them—*Jenkins* v. *Robertson*,(1) and *Anandráo Bhikáji Phadke* v. *Shanker Dáji Chárya*(2). Under this document the *shevaks* admit their responsibility as trustees holding the offerings for the use and benefit of the deity. In the face of this document it is not open to the *shevaks* to contend that they are owners of the idol and of the idol's property. The idea of ownership set up by the defendants is a wholly novel idea, irreconcileable with the central theory of Hindu law, which regards an idol as a juridical person capable of holding property, and possessing rights which require special protection at the hands of the Sovereign—West and Bühler, (3rd ed.), pp. 185, 201, 203. In *Rupá Jagshet* v. *Krishnáji Govind*(3) it was held that lands granted for the purpose of keeping up the worship of a household idol constituted a religious endowment, and were, therefore, not liable to attachment or sale in execution of a decree against the grantee. The grantee was a

(1) L. R. 1 Ap. Ca. (Sc.), 117. (2) I. L. R., 7 Bom., 323.
(3) I. L. R., 9 Bom., 169.

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trustee and not an owner of the dedicated lands. So, too, the *shevaks* must be held to be trustees, and not owners, of the offerings dedicated to the god Shri Ranchhod Ráiji. The temple is a public temple, to which large numbers of Vaishnavas resort every full moon, and make valuable offerings to the deity. The evidence shows that the ruling authorities have interfered from time to time to guard these offerings against waste and misappropriation. The oral evidence shows that the devotees make offerings for the benefit of the idol, and not of the *shevaks*. The *shevaks* themselves admitted through their pleader in exhibit 242 that they used to divide only small coins offered at the shrine, whilst the rest was reserved for the exclusive use of the deity. In exhibit 264, which is an application made by the *shevaks* to Government for exempting the income of the temple in their hands from the income-tax, they distinctly admit that they divide only the little surplus that remains after providing for the daily worship and ceremonies at the temple. The *status* of the *shevaks* has been already determined and adjudicated upon in former suits between the parties. In S. A. No. 448 of 1870—*Ganpatráv Manohar* v. *Rámádhindás Vimaldas*(1)—it is held that the *shevaks* are not the owners or even managers of the temple, but mere votaries or worshippers of the idol. And this decision is followed in S. A. 245 of 1871—*Gunpatráo Manohar* v. *Anoprám Bechar*(2). As votaries, the *shevaks* have no beneficial interest whatsoever in the offerings made to the deity. They are bound to account for all the property they hold in trust for the idol.

Macpherson:—In the previous suits the question as to the ownership of the offerings made at the shrine was not raised or decided. The decisions in those suits have, therefore, no bearing on the points at issue in the present case. We say that the offerings are entirely distinct from the temple and its appendant villages. The offerings at first were not so large as at present. The first object was to provide for the maintenance of the ministers at the shrine. As costly presents came in, the practice arose of storing them for the idol. But this was a

(1) Printed Judgments for 1874, p. 258.

(2) Printed Judgments for 1879, p. 361.

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practice of an optional character, or merely a moral obligation. The *shevaks* from time to time distributed the gifts among themselves under no limitation except that of prudence and a sense of propriety. The ancestors of the *shevaks* have established the worship and distributed the income among themselves. Exhibit 4 is not proved. Nobody has seen the original, or accounts for its loss. It is not to be found on the record of the case to which reference is made. Nor has it ever been acted upon. It was not produced in the suit of 1834, which we filed against the first plaintiff's ancestor. The documents referred to by the other side merely show that the executive authorities sometimes interfered to prevent disorder or a breach of the peace in the temple. Our witnesses say that the *shevaks* are entitled to take the offerings as representatives of the idol. The donors say that the *shevaks* are the owners of the offerings. The practice at this temple also establishes their right to take the offerings. This practice should be recognized and acted upon. Refers to *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*[1], and West and Bühler (3rd ed.), p. 201.

WEST, J:—At an early stage of the hearing of the present case we ruled that the defendants, the *shevaks* of the temple at Dákor, could not be allowed now to put in as evidence the account books which they had in the Court of first instance refused to produce. After succeeding in his resistance to the production of documents, a party cannot be allowed, when the hearing has been finished and when his adversary has perhaps been driven to establishing his case on a quite different footing, to turn round and request that the document may be admitted. The precedents cited do not warrant such an indulgence, and it would certainly tend to the encouragement of chicanery and the defeat of justice.

The plaintiffs come forward in the present case in the character of relators as persons interested in the religious foundation of the temple of Dákor dedicated to the deity called Shri Ranchhod Ráiji. As persons interested in the maintenance of the institution and the due celebration of the worship, they pray

(1) L. R., 4 I. A., 76.

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that the Court will make the defendants, as recipients of the offerings at the idol's shrine, accountable, as trustees, for the right disposal of the property thus acquired. The income of the temple having, as they say, largely increased, and being wrongly or unduly appropriated by the defendants, called generally the *shevaks* (or ministers), to their personal purposes, they pray for the appointment of a receiver for the exaction from the defendants of accounts of their management, for the delivery up by them of all property appertaining to the temple, for an inquiry into their conduct as ministers of the idol, and for the construction of a scheme of future management.

The defendants take the position that they, as a body, are the owners, for all secular purposes, of the idol, whom, in the spiritual sense, they serve. The offerings made at the shrine, the cattle, and even the land presented by devotees are, they assert, their property free from any secular obligation, as none has ever in practice or in the intention of the donors been annexed to the gifts by which religious merit was sought and gained. They hold the property thus acquired, and have for centuries held it, as a sort of sacred guild, with hereditary succession to the several members. It is not held on any trust for the support of ceremonies or with any obligation annexed to it that can be enforced in a secular Court. The duty of providing a regular worship for the deity is of a purely moral kind, which they discharge merely to satisfy their consciences, one the nature and limits of which have never been settled otherwise than by their own will and judgment.

The District Judge rejected the suit, on the ground that the plaintiffs, other than Manohar Ganesh Támbekar, had not the position which they claimed of joint trustees of the temple. They were not, he found, even directly interested in the institution. The plaintiff Manohar was interested, but then he sued merely out of spite at a decree having been passed against him in favour of the *shevaks*, the present defendants.

It has not been contended before us that, if the property in question is a trust at all, the plaintiffs have not such an interest in its right administration as enables them to fill the part of relators.

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As to Manohar, the District Judge recognized his capacity, and the motives that actuated him do not affect his capacity. The other plaintiffs are priests who take part in the ceremonies in so far that they take charge of votaries, conduct them through the solemnities, and receive certain offerings with which to a larger or smaller amount the pilgrims must requite their services. Taking part in the worship they are directly interested in its due performance and its maintenance. They may not be trustees, but they clearly are amongst those who in practice benefit by the execution of the trust, supposing there is a trust. They have thus an undeniable *locus standi* as relators, and the suit, if maintainable, may proceed at their instance.

There is no difficulty in conceiving the existence of a society having property and receiving gifts from its own members or from strangers, which it then disposes of simply for its own benefit or at its own discretion. The guilds and companies in manufacturing and trading cities held and still hold estates without the attendant obligations of a charitable trust. The property is their own, distributable amongst the members or at the pleasure of the governing body of the society, not held for the benefit of any class outside the society or for the promotion of any purpose of recognized public utility. The latter characteristic is essential to a public charity, but in its absence there may be a corporation existing by royal grant, prescription or legal allowance, holding property for other than charitable purposes. Whether the association exists for charitable purposes or not, it cannot, according to the English law, without incorporation in some shape, become vested with property as a mere fluctuating and undefined aggregate—*Goodman* v. *Mayor of Saltash*[1]. If its purposes are such as are contemplated by section 26 of the Indian Joint Stock Companies' Act, VI of 1882, the society may get itself constituted accordingly under the Act. Otherwise, though the individual members may have certain rights and privileges as members of a class or answering to a certain designation, these advantages must be realized, as against the world at large, through the proprietary or *quasi*-proprietary right of some other person or corporation.

(1) L. R., 7 Ap. Cas. 633 at p. 646.

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The defendants in the present case put themselves forward, not merely as entitled to the enjoyment of particular benefits to be taken by them individually as members of a class, but as a body of proprietors holding a small estate in the shape of immoveable property, but a much larger one in the form of the accumulated offerings of articles of value laid at the feet of the idol and of the revenue arising from this source. The questions are whether they can and do take this property and this revenue absolutely as their own without any trust or annexed duty, and whether, if they enjoy by a kind of agency or representation of the idol conceived as a personality, they fulfil the duty they owe to this ideal person in merely revelling on the growing revenues, or are bound to widen the range of the deity's beneficence in proportion to the expansion of his mundane means.

As to the jurisdiction of the Civil Courts in matters of this kind, it is too late now to raise any contention. Under the native system of government though it was looked on as a heinous offence to appropriate to secular purposes the estate that had once been dedicated to pious uses, (W. & B., H. L., 202, 817), yet the State in its secular executive and judicial capacity habitually intervened to prevent fraud and waste in dealing with religious endowments. It was quite in accordance with the legal consciousness of the people that the Bombay Regulation XVII of 1827 gave to the Collector a visitatorial power enabling him to enforce an honest and proper administration of religious endowments. The connexion of the Government in its executive capacity with Hindu and Mahomedan foundations was brought to an end for Bombay by Bombay Act VII of 1863 and for Bengal and Madras by Act XX of 1863. But the existence of sacred property and of the rights and obligations connected with it as objects of the jurisdiction of the Civil Courts is recognized by the laws just referred to. In the southern part of the Bombay Presidency, dedicated estates are expressly made inalienable by Bombay Act II of 1863, sec. 8. Questions arising under these laws between individuals with reference to proprietary and pecuniary rights and as to alleged misappropriations and defalcations must necessarily be dealt with by

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the Civil Courts, which only can bring the requisite sanctions to bear on the enforcement of an honest discharge of their duty by the holders of dedicated estates. The mere incidental cognizance of a religious or caste question, the recognition of the settlement of such a question by the competent authority, is involved in the exercise of this jurisdiction, and does not stand in the way of it—*Krishnasami Chetti* v. *Virasami Chetti*(1). It is recognized by the indigenous customary law that an affair, in which the castes could not or would not give relief, is a proper subject of adjudication by the ordinary Civil Courts(2). The cases in which Hindu foundations and charitable (including religious) trusts have been enforced and the persons connected with them made accountable by the Civil Courts are too numerous to mention. Reference may be made to *Mahárance Shibessouree Debia* v. *Mothooranath Acharjo*(3); *Mohunt Burm Suroop Dass* v. *Khashee Jhá*(4); *Juggodumba Dossee* v. *Puddomoney Dossee*(5); *Dhurrum Singh* v. *Kissen Singh*(6). If, then, there is, in the present case, a public purpose, for the fulfilment of which, a class of persons, for whose benefit, in a way admitted by the State as deserving protection, the property of the Dákor temple is held and its revenues are received by the defendants, the defendants become by these mere circumstances amenable to the jurisdiction we are now called on to exercise. The religion of the Hindu population being jurally allowed, the duties and services connected with it must be deemed objects of public concern, and at least as to their physical and secular elements, enforceable like other obligations.

The evidence recorded in the case, including that of many donors to the idol Shri Ranchhod Ráiji, shows that having discharged a religious duty or gained religious merit by a gift to the deity, the votary is but little interested in what afterwards becomes of the offering(7). Still he must needs be and is concerned in the maintenance of a decent and orderly worship. He

(1) I. L. R., 10 Mad., 133, 144; W. & B., H. L., 599 n.

(2) West and Bühler, H. L., p. 1007 n (c); Steele L. C., 185, 186 and 267.

(3) 13 Moore's I. A., 270.

(4) 20 Calc. W. R. Civ. Rul., 471.

(5) 15 Beng. L. R., 318.

(6) I. L. R., 7 Calc., 767.

(7) West and Bühler, H. L., pp. 197, 411; Vya. May. Ch. IV, s. 1, pa. 8.

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is interested, too, in the honour and respect of the deity he reveres. He does not intend to pander to unrestricted licentiousness or mere ignorant sensuality which must bring his deity and its worship into contempt. He desires a regular and continuous or at least a periodical round of sacred ceremonies, which might fail if the offerings of past years were all squandered, while those of any given year fell short. The *shevaks* seem to have received the offerings, both of immoveables and of moveables, with a consciousness, though but a hazy consciousness, that they were bound, out of the funds thus coming to them, to provide for the worship of the idol and the convenience of the pilgrims who resort to the temple. In the document No. 4, dated in 1772, the *shevaks* admit their responsibility to the then manager of the villages with which the temple had been endowed. The document No. 4 is a copy agreeing with an earlier copy of the original which has been taken from our records for comparison. It was filed nearly half a century ago in the course of execution proceedings against the temple property by the judgment-creditor; and though the original has disappeared, there seem to be reasonable, though not perhaps conclusive, grounds in favour of the genuineness of the copy filed in 1831, and then admitted as evidence. As the admission of the copy was not, so far as appears, resisted, we may properly act on it as evidence. The *shevaks* of to-day, who claim by a continuity of rights as the representatives of the *shevaks* for several centuries back, must submit to a like succession of responsibility, and thus the document, exhibit 4, is evidence against them, as though it were of but recent date.

The document, (exhibit 210), dated in 1793, shows the native governor of the fort of Pávghar exercising a visitatorial power to prevent waste of the temple property by either the Támbekar managing the dedicated villages, or the *shevaks* holding the accumulated offerings at the shrine. In 1818, exhibits 243, 256 are orders of the English Collector exercising an authority like that formerly exercised by the native governor. The *shevaks* are allowed to take the offerings in cash; but articles of value, such as clothes and jewels, are to be consigned to the charge of the *bhandári* or store-keeper. Again in 1829 (exhibit 322) and in

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1831 (exhibit 244) the Collector intervened to preserve order and to prevent mismanagement, with a threat that neglect would be followed by an adoption of the measures authorized by Regulation XVII of 1827. Coming down to a more recent time, we find the *shevaks* in 1861 (exhibit 264) petitioning the Government of Bombay for a remission of income-tax, on the ground that the revenue derived from the offerings was primarily the property of the idol. An idol, the *shevaks* contend, is not subject to taxation. The necessities of the ceremonial worship had first to be provided for, and only the surplus was distributed amongst the *shevaks*. Again, in 1878, the pleader of the *shevaks*, instructed to answer for them in the previous suit, stated distinctly that the claims of the idol,—that is, debts incurred on behalf of the idol,—must be satisfied before claims of the *shevaks*. Clothes and valuables presented by votaries were, he said, presented for the idol; but small coins were distributed amongst the *shevaks*, about one hundred and fifty in number. Some months afterwards, it is true, the *shevaks* sought to withdraw these admissions and set up an absolute proprietary right to all that had been offered or dedicated to the idol, but the motive of this contradiction is evident, while the prior deliberate statement derives force from its conformity with the previous history of the institution and with the religious system of the Hindus.

The Hindu law, like the Roman law and those derived from it, recognizes, not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations[1]. A Hindu, who wishes to establish a religious or charitable institution, may, according to his law, express his purpose and endow it[2], and the ruler will give effect to the bounty, or at least protect it so far, at any rate, as it is consistent with his own *dharma* or conceptions of morality[3]. A trust is not required for this purpose: the necessity of a trust in such a case is indeed a peculiarity and a modern peculiarity of the English law[4]. In early

(1) West and Bühler, H. L., 201, 185, 553, 555.
(2) West and Bühler, H. L., 99, 197, 216.
(3) West and Bühler, H. L., 33; Manu VIII, 41; Coleb. Dig., B. III, Ch. II, T. 28.
(4) Spence Eq. Juris., 440; Sav. Syst., s. 88.

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times a gift placed, as it was expressed, "on the altar of God" sufficed to convey to the church the lands thus dedicated(1). Under the Roman law of pre-Christian ages such dedications were allowed only to specified national deities(2). After Christianity had become the religion of the empire, dedications to particular churches or for the foundation of churches and of religious and charitable institutions were much encouraged(3). The officials of the church were empowered specially to watch over the administration of the funds and estates thus dedicated to pious uses(4), but the immediate beneficiary was conceived as a personified realization of the church hospital or fund for ransoming prisoners from captivity(5). Such a practical realism is not confined to the sphere of law; it is made use of even by merchants in their accounts, and by furnishing an ideal centre for an institution to which the necessary human attributes are ascribed—*Dhadphale* v. *Gurav*(6)—it makes the application of the ordinary rules of law easy as in the case of an infant or a lunatic(7). Property dedicated to a pious purpose is, by the Hindu as by the Roman law, placed *extra commercium*(8), with similar practical savings as to sales of superfluous articles for the payment of debts and plainly necessary purposes(9). Mr. Macpherson admitted for the defendants in this case that they could not sell the lands bestowed on the idol Shri Ranchhod Ráiji. This restriction is like the one by which the Emperor forbade the alienation of dedicated lands under any circumstances(10). It is consistent with the grants having been made to the juridical person symbolized or personified in the idol at Dákor. It is not consistent with this juridical person's being conceived as a mere slave or property of the *shevaks* whose very

(1) See Elton's Ten. of Kent, 17, 18.

(2) W. & B., H. L., 185 (*b*) Ulpian Fr. XXII, s. 6. They were thus placed *extra commercium*. Sav. Syst., sec. 88 (c c).

(3) Sav. Syst., sec. 88; comp. W. & B., 197.

(4) Sav. Syst., sec. 88. (5) Sav. Syst., sec. 88. (6) I. L. R., 6 Bom., 122.

(7) Sav. Syst., sec. 90; comp. *Kinlock* v. *Secretary of State for India in Council*, L. R., 15 Ch. Div., at p. 8.

(8) W. & B., H. L., 185, 197.

(9) See Cod. Lib. I, Tit. 2, Fr. 21; W. & B., H. L., 555, 557. See also *Rupá Jagset* v. *Krishnáji Govind*, I. L. R., 9 Bom., p. 169.

(10) Vyav. May., Chap. IV, S. VII, p. 23; Nov. 120, cap., 10.

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title implies not ownership, but service of the god. It is indeed a strange, if not wilful, confusion of thought by which the defendants set up the Shri Ranchhod Ráiji as a deity for the purpose of inviting gifts and vouchsafing blessings, but, as a mere block of stone, their property for the purpose of their appropriating every gift laid at its feet. But if there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of the foundation, this artificial subject of rights is as capable of taking offerings of cash and jewels as of land. Those who take physical possession of the one as of the other kind of property incur thereby a responsibility for its due application to the purposes of the foundation—compare *Griffin* v. *Griffin*[1]; *Mullallen* v. *Marum*[2]; *Aberdeen Town Council* v. *Aberdeen University*[3]. They are answerable as trustees even though they have not consciously accepted a trust, and a remedy may be sought against them for mal-administration[4] by a suit open to any one interested, as under the Roman system in a like case by means of a *popularis actio*.

The evidence of the witnesses in the case, even of the defendants who were examined, supports the view of the Dákor temple and of the *shevaks'* connection with it which has just been stated. The gift, (exhibit 238), is of land to the deity for daily food. The grant (exhibit 237) for feeding sacred cows is of a like kind. It is generally admitted that rich offerings, such as the silver throne presented by the Gáekwár, have been stored in the temple treasury. Defendant Kalidás (exhibit 133) says that for seven hundred years the *shevaks* have appropriated what could no longer be applied to the use of the deity. Their proprietorship, he says, subsists only through Shri Ranchhod Ráiji. The defendant Bechar Mádhavrám (exhibit 137) insists strongly on the *shevaks'* right even to sell the temple lands, but he gives no instance of it; and Lakshman (exhibit 139) admits that offerings are dedicated to the deity, though still he says the *shevaks* take them as owners. "While the idol is present," this witness says, "the shrine is his. In his absence it is ours." This is another instance of the confusion of thought or want of power of abstraction, which, more

(1) 1 Sch. & Lef., 352.
(2) 3 Dr. & War., 317.
(3) L. R., 2 Ap. Cas., 544.
(4) Comp. Ind. Trusts Act II of 1882, ss. 88, 95.

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perhaps than any positively dishonest intention, has led the *shevaks* to commit themselves to a false and untenable position. The witness Shivlál (exhibit 157) says, the *shevaks* take all the offerings, but still "as representatives of the deity." Jamnádás (exhibit 197), a bountiful donor to the temple, says, the offerings are made to the god, though the *shevaks* divide them at their discretion. This is what the *shevaks* would naturally do, even as managers, unless called to account by some superior authority. It by no means necessitates the conclusion that they are and have always been owners of the idol as a juridical person—*Juggodumba Dossee* v. *Puddomoney Dossee*(1). They are a numerous body, about one hundred and fifty in number, succeeding to their offices by hereditary descent. It is admitted that they are entitled to a fair provision for their needs and to maintain the service of the temple. For a period extending over several centuries the revenues of the temple seem to have but slightly, if at all, exceeded the outlay required to maintain its services, but recently these revenues have very largely increased. The law which protects the foundation against external violence guards it also internally against mal-administration, and regulates, conformably to the central principle of the institution, the use of its augmented funds. It is only as subject to this control in the general interest of the community that the State through the law courts recognizes a merely artificial person(2). It guards property and rights as devoted, and thus belonging, so to speak, to a particular allowed purpose only on a condition of varying the application when either the purpose has become impracticable, useless or pernicious, or the funds have augmented in an extraordinary measure. This principle is recognized in the law of England as it was in the Roman law, whence indeed it was derived by the modern codes of Europe. It is equally consistent with the Hindu law, which, as we have seen, undoubtedly recognizes artificial juridical persons,(3) such as the institution at Dákor, and could not, any more than any other law, support a foundation merely as a means of squandering in waste or profligacy the funds dedicated by the devout to pious uses.

(1) 15 Beng. L. R., 318.
(2) See Sav. Syst., sec. 89.
(3) See *Rupá Jagset* v. *Krishnáji Govind*, I. L. R., 9 Bom., p. 169.

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For the reasons we have given, we must reverse the decree of the District Court, and order that the costs of the suit and appeal be borne by the defendants. The District Judge will take steps, either by appointing a receiver, or otherwise, in his discretion, for guarding the property of the temple without disturbance of its services. He will take an account of the property and of the receipts and disbursements of the temple, such latter account being carried back to the year 1872, and beginning with such property as can be ascertained to have been then in existence. He will make the requisite orders for recovering property misappropriated and sums due to the foundation as well from others as from the *shevaks* or any of them. He will draw up a scheme for the future management of the temple and its funds, giving due consideration to the established practice of the institution and to the position of the *shevaks* and of other persons connected with it. Lastly, should there appear to be a surplus of revenue that may reasonably be counted on as durable, he will frame a scheme for the disposal of such surplus or a part thereof consistently with the general purpose of the foundation and complementary to the arrangements made under this Court's orders in *Manohar* v. *Keshavrám*[1] on the appeal in the suit brought by the *shevaks* against Ganesh Manohar as defendant.

Decree reversed and case remanded.

(1) *Manohar* v. *Keshavrám*.—This suit was at first filed in the Court of the First Class Subordinate Judge at Ahmedabad by the plaintiff Manohar Ganesh Támbekar alone without the consent of the Advocate-General. The suit was dismissed in appeal No. 11 of 1878(1), for the reason stated in the following judgment of Mr. Justice West :—

"It appears that the suit, in which the injunction in question was granted, was clearly one by Manohar, the plaintiff, as a person having an interest in an alleged trust. He came forward, not in the assertion of any right of private property, which he averred to have been infringed by the defendants, but to enforce the performance by them of duties connected with the shrine of Ranchhod Ráiji, the worship at that shrine, and the revenues arising from offerings made by worshippers at it. This is the kind of case contemplated by section 539 of the Code of Civil Procedure. As a dissenting chapel in England may be the subject of an information by the Attorney General as a charitable institution (*Attorney General* v. *Fowler* (2)) so we think that a trust for a Hindu idol and temple is to be

(2) 15 Ves., 85.

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regarded in India as one 'created for public charitable purposes'. If that is so, a suit relating to the temple of Ranchhod Rájji was not competent to Manohar alone or without the consent, in writing, of the Advocate-General. Moreover, it could not be instituted in a Court inferior to the District Court. The Court of the Subordinate Judge no longer has jurisdiction in such cases.

"For these reasons, we must refuse to restore the injunction set aside by the Subordinate Judge. His predecessor seems to have had no authority to make it." (Printed Judgments for 1878, page 252.)

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *June* 20.

ZIULNISSA' LA'DLI BEGAM SA'HEB, (ORIGINAL DEFENDANT), APPELLANT, *v.* MOTIDEV RATANDEV, (ORIGINAL PLAINTIFF), RESPONDENT.*

Limitation Act (XV of 1877), *Sec.* 19—*Oral evidence of acknowledgment—Advisability—Acknowledgments made before the coming into fore of Act XV of* 1877 *—Evidence.*

Under section 19 of the Limitation Act, XV of 1877, oral evidence of the contents of an acknowledgment cannot be received, nor is there any saving of acknowledgments received or given back before the Act came into operation.

SECOND appeal from the decree of S. Hammick, District Judge of Surat, confirming the decree of Khán Báhádur B. E. Modi, First Class Subordinate Judge of Surat, in Suit No. 201 of 1883.

The plaintiff sued to recover the sum of Rs. 775, with interest, being the balance of an account for moneys lent and advanced to the defendants Nos. 1 and 2 through their agent, defendant No. 3.

The original loan was made in 1876. At the end of every year the account was adjusted, a balance was struck, and a new receipt or acknowledgment was passed by defendant No. 3 as agent for defendants Nos. 1 and 2. The last of such acknowledgments was dated 3rd November, 1880. Within three years from this date the present suit was filed in 1883.

The plaintiff produced the last acknowledgment only in support of his claim. The previous ones, he alleged, had been

* Second Appeal, No. 24 of 1885.

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Bumper Development Corp Ltd v Commissioner of Police of the Metropolis and others (Union of India and others, claimants)

COURT OF APPEAL, CIVIL DIVISION
PURCHAS, NOURSE AND LEGGATT LJJ
3–6, 9–13, 16–20 JULY 1990, 13 FEBRUARY 1991

Practice – Parties – Foreign party – Entitlement to sue in English courts – Foreign legal institution – Institution having no animate content – Hindu temple – Whether institution having sufficient legal personality entitling it to sue in English courts.

Conflict of laws – English proceedings – Entitlement of party to sue in English courts – Foreign religious institution – Institution having no animate content – Hindu temple – Whether comity of nations and public policy permitting institution without animate content to sue in English courts.

Evidence – Foreign law – Proof – Whether court can reject expert witnesses' agreed evidence as to effect of foreign law and make finding on foreign law according to its own researches.

Since it accords with the principle of the comity of nations and does not offend English principles of public policy to permit a foreign institution with no animate content to sue in the English courts to recover its property, a foreign religious institution, eg a Hindu temple, which has legal personality under the law of the country where it is situated and which is empowered by that law to sue by an officer properly appointed under the foreign law to protect and recover objects belonging to it is entitled to sue through its proper officer in the English courts to recover an object belonging to it even though due to lack of any animate content in the institution English law itself would not recognise the institution as having legal personality entitling it to sue. Furthermore, its proper officer may be made responsible in the English proceedings for such matters as security for costs and discovery. The fact that RSC Ord 80 (which contains procedural rules for parties under disability) makes no provision for proceedings by a foreign religious institution is not a reason for objecting to the institution being a party to English proceedings, since the court can regulate the proceedings under its inherent jurisdiction (see p 648 *b* to *h*, post); dicta of Cardozo J in *Loucks v Standard Oil Co of New Jersey* (1918) 224 NY 99 at 111 and of Viscount Simonds in *National Bank of Greece and Athens SA v Metliss* [1957] 3 All ER 608 at 612 applied.

In regard to proof of foreign law in an English court, the court may not reject the evidence of expert witnesses if they agree as to the effect of the foreign law and instead conduct its own researches into the effect of that law by recourse to textbooks and foreign law reports: the court must base its findings on the effect of that law on the evidence given by the expert witnesses (see p 646 *e*, post).

Notes

For the general rule as to parties to proceedings, see 37 *Halsbury's Laws* (4th edn) para 215, and for cases on the subject, see 37(2) *Digest* (Reissue) 341–343, *2128–2138*.

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For which law governs who is capable of suing or being sued, see 8 *Halsbury's Laws* (4th edn) para 772, and for cases on the subject, see 11 *Digest* (Reissue) 626–628, *1648–1666*.

For the duty of the court in regard to expert evidence on the effect of foreign law, see 17 *Halsbury's Laws* (4th edn) para 94, and for cases on the subject, see 22(1) *Digest* (2nd reissue) 181–182, *2122–2132*.

Cases referred to in judgment

Dalmia Dairy Industries Ltd v National Bank of Pakistan [1978] 2 Lloyd's Rep 223, CA.

Di Sora (Duchess) v Phillipps (1863) 10 HL Cas 624, 11 ER 1168.

Fuld's estate, Re (No 3), Hartley v Fuld (Fuld intervening) [1965] 3 All ER 776, [1968] P 675, [1966] 2 WLR 717.

Hip Foong Hong v H Neotia & Co [1918] AC 888, PC.

Lazard Bros & Co v Midland Bank Ltd [1933] AC 289, [1932] All ER Rep 571, HL.

Loucks v Standard Oil Co of New York (1918) 224 NY 99, NY Ct of Apps.

National Bank of Greece and Athens SA v Metliss [1957] 3 All ER 608, [1958] AC 509, [1957] 3 WLR 1056, HL.

Nelson (Earl) v Lord Bridport (1845) 8 Beav 527, [1843–60] All ER Rep 1032, 50 ER 207.

Parkasho v Singh [1967] 1 All ER 737, [1968] P 233, [1967] 2 WLR 946, DC.

Reddy v Reddy AIR 1967 SC 436, Ind SC.

Sussex Peerage Case (1844) 11 Cl & Fin 85, [1843–60] All ER Rep 55, 8 ER 1034, HL.

Vikrama Das v Daulat Ram AIR 1956 SC 382, Ind SC.

Appeal

By a writ issued on 24 September 1982 the plaintiffs, Bumper Development Corp Ltd (Bumper), claimed as against the defendants, the Commissioner of Police of the Metropolis and two of his officers, delivery up of a twelfth century bronze sculpture of Siva, King of the Dancers, known as the Nataraja, and damages arising from its detention. Following claims to the Nataraja made by (1) the Union of India, (2) the State of Tamil Nadu, (3) Thiru R Sadagopan, suing as the fit person and/or next friend of the Arul Thiru Viswanatha Swamy Temple (the temple), and (4) the temple, a juristic entity under Indian law by its fit person, custodian or next friend the third claimant, Master Waldman ordered on 7 February 1983 trial of the preliminary issue whether (1) the so-called London Nataraja and Pathur Nataraja were one and the same object and (2) if it was established that they were one and the same object, whether any of the claimants had a title to the Nataraja claimed by Bumper superior to Bumper's title. The Sivalingam, a stone relic which was an idol of the temple, being a juristic entity under Indian law, was subsequently added as fifth claimant. On 17 April 1989 Ian Kennedy J gave judgment on the preliminary issue holding that the London Nataraja and the Pathur Nataraja were one and the same and declaring that the temple, alternatively the Sivalingam or in the further alternative the State of Tamil Nadu had proved a title to the Nataraja superior to Bumper's title. The judge awarded the temple damages of £5 against Bumper. Bumper appealed, seeking (i) an order that the London and the Pathur Natarajas were not one and the same and also that its title to the Nataraja was superior to that of the second to fifth claimants and (ii) a declaration that those claimants had failed to prove they had any title which would be recognised in the English courts. The claimants cross-appealed, asserting that the judgment should be upheld on metallurgical

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evidence which was not relied on by the judge and seeking an award of damages of £236,250. The facts are set out in the judgment of the court.

David Calcutt QC and *John Stephens* (instructed by *Stewarts*) for Bumper.
Adrian Hamilton QC and *B Y Ghorpade* (instructed by *Zaiwalla & Co*) for the claimants.

Cur adv vult

13 February 1991. The following judgment of the court was delivered.

PURCHAS LJ.

General introduction

In August or September 1976 an Indian, variously described as a 'coolie' or 'landless labourer', called Ramamoorthi who lived in a hut near the site of a ruined Hindu temple at Pathur in the State of Tamil Nadu was excavating sand or similar material when his spade struck a metal object. There was a suggestion that it might have been a year earlier, but this was not accepted by Ian Kennedy J, whose finding has not been questioned. The place where he was excavating was close to the hut in which he lived and was either immediately adjacent to or formed part of the site of the temple. The name of the temple was the Arul Thiru Viswanatha Swamy Temple, to which we shall refer as 'the temple'. The object which Ramamoorthi struck formed part of a series of bronze Hindu idols later identified as members of a 'family' and was a major idol known as a Siva Nataraja. We shall refer to the Siva Nataraja as the 'Pathur Nataraja' and the assembly of idols as the 'Pathur bronzes'. The overwhelming probability is that they formed part of the religious objects in the temple which had been endowed in the late thirteenth century by a Hindu notable called Avui Thiru Viswanatha. It was later accepted by all parties that the temple had lain in ruins and unworshipped for a matter of centuries.

Notwithstanding his lowly status Ramamoorthi realised that he had discovered objects of value. He reburied them temporarily in the same pit and contacted a friend called Dorai. Dorai came to Pathur, inspected the find and departed saying that he would find a buyer. A few days later Dorai returned with two men, Pillai and Meivel, who proposed to take the Nataraja away to sell it. This was not acceptable to Ramamoorthi unless he was paid for it. The three men departed but a few days later they returned again, this time accompanied by a dealer called Chandran, for whom Meivel was a 'runner'. Chandran was not called to give evidence, but two others, who were in the party, were called as witnesses. These were Hussain, who was a part-time dealer in stolen idols and a local government official, and Balraj Nadur, who was a major dealer in stolen idols. Of the objects discovered by Ramamoorthi, the Nataraja attracted particular attention from the dealers and was quickly sold, first to Chandran, who sold it on down the line via Hussain and Balraj Nadar. The last identified buyer was a man called Valar Prakash, who has not been traced but was last known to be in Madras.

Of the religious objects discovered by Ramamoorthi which were recognised as being of the Chola period it is necessary only to describe the Nataraja in detail. The Siva Natarajas are representations of the Hindu god Siva, who is found in various forms. The Siva Nataraja can be described in a thumb-nail sketch as the god standing with his right foot upon a dwarf and surrounded by a 'halo' which represents the flames issuing from the mouths of two crocodiles situated to the left and right of the dwarf. At the top of the halo in some Natarajas there is to be

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found a design either in the form of a mask or a rosette or similar adornment known as a 'Kurti Muka'. Round the halo there are a number of 'flames' issuing radially from the halo. Depending upon the period when and the area in which they were made the Siva Natarajas vary in many respects. The one with which this appeal is concerned is circular; but many others are oval in shape. The Nataraja with which this appeal is concerned had a lotus base mounted on a square-shaped peedam or pedestal.

Returning to Siva, the design again varies according to date and place. The Chola Natarajas have a number of identifying features, some of which are relevant and to which it would be convenient to refer in outline. The god has two right and two left arms and hands but only two legs, right and left. He has on each side of his head horizontally flowing hair described as jettas. Various objects and representations are imposed upon or incorporated in the jettas, including a particular one called a 'ganga'. In one of his right hands and around the wrist there is coiled a snake—a cobra. In one of his left hands he holds another flame. This very brief description will suffice for the moment.

Between 1974 and 1977 there were circulating in London at least two and almost certainly more Siva Natarajas. It was common ground that throughout the world there are many hundreds if not thousands of Siva Natarajas, most of which were, of course, associated with the many Hindu temples and which over the centuries have been objects of worship both in India and in other places where the inhabitants embraced the Hindu religion. There were and are Siva Natarajas in many leading museums and in the present century at least they have been recognised and valuable artefacts dealt in by those who specialise in Eastern religious items. However, it may fairly be assumed that there were not very many Siva Natarajas circulating in the London market in the 1970s and fewer which showed signs of having been buried for centuries. There were certainly two which had been traced as having been stolen from temples in India in current worship and which were impounded by the Metropolitan Police and returned to their appropriate owners. The Siva Nataraja or Natarajas with which this appeal is concerned were, however, objects which had long been buried and had accordingly deteriorated as a result.

Returning to the position in London in the years 1974–77 an 'antique Nataraja', that is to say one which had been buried and had suffered accordingly, was, according to the evidence of Dr Presencer, shown to him in May 1976 in London. We will refer to this as 'the London Nataraja' since there seems to be little dispute that this was the same Nataraja that was bought by the plaintiffs, Bumper Development Corp Ltd (Bumper). If this was true then it would establish that the London Nataraja could not have been the one excavated by Ramamoorthi. There is now, as a result of additional evidence which was admitted during the appeal, further evidence of an antique Nataraja being offered on the London market as early as Easter 1974. This evidence came from an American dealer who specialised in these objects named Robert Ellsworth.

Information came to the state officials in Tamil Nadu as a result of which criminal investigations were put in hand. Statements were taken from Ramamoorthi and the others about the discovery and subsequent history both of the Pathur Nataraja and of the Pathur bronzes. The statements taken in India from Ramamoorthi, Hussain and others have formed part of the evidence at the trial from which this appeal results.

On 10 June 1982 Bumper purchased in good faith the London Nataraja from a dealer called Sherrier. It is common ground that Sherrier produced a false provenance of the Nataraja for the purpose of the sale. It was whilst it had been sent to the British Museum for appraisal and conservation that the London

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Nataraja was seized by the Metropolitan police as part of a policy of returning religious artefacts, which it was thought had been stolen, to their owners in India. Bumper brought the action against the Commissioner of Police of the Metropolis and two of his officers in detinue and conversion claiming the return of the Nataraja and damages. The present proceedings result from the position taken by the defendants as interpleaders and the addition of others as 'claimants' to the London Nataraja. Returning to the temple site at Pathur, amongst the surviving ruins and materials there was a stone object of religious worship known as a Sivalingam. In the normal Hindu temple of this period this stone would have been positioned in the sanctum and would be the focus of religious worship. It is a carefully fashioned stone object representing a phallus. It has survived and was discovered amongst the ruined remains of the temple. Since the inception of these proceedings it has been reinstated as an object of religious worship at the site of the temple.

Current proceedings

The court has before it an appeal by Bumper from an order of Ian Kennedy J made on 17 April 1989 as a result of a judgment delivered by him on the trial of a preliminary issue. The claimants are the Union of India as first claimant, the State of Tamil Nadu as second claimant, Thiru Sadagopan who claims as the 'fit person' of the temple on his own behalf as third claimant and on behalf of the temple itself as fourth claimant. The Sivalingam was added as fifth claimant at a late stage of the trial of the issue. The nature and locus standi of the fifth claimant will be described subsequently in this judgment. Although the Union of India now makes no claim to the London Nataraja, it underwrites any liability in costs which may be incurred by the other claimants in the present proceedings.

The issue which was tried by the judge related to the title possessed by the various parties to the London Nataraja. The matter fell for consideration into two separate stages, namely (1) were the London Nataraja and the Pathur Nataraja one and the same object? and (2) if, and only if, it was established that they were, did any of the claimants have a title to the Nataraja superior to Bumper's? The judge delivered his judgment in two parts accordingly and in this court the argument has been dealt with in the same way.

The claimants' case was based upon the evidence of Ramamoorthi and others who were involved with the Pathur Nataraja in India in 1976 and who purported to identify the London Nataraja as being the same as the Pathur Nataraja. The claimants' case was supported by expert evidence relying upon a stylistic similarly between the London Nataraja and the Pathur bronzes and by expert metallurgical and geological and entomological evidence intended to support a connection between the Pathur bronzes and the London Nataraja. Bumper's case depended upon the direct evidence of Dr Presencer, who identified the London Nataraja as an object which he saw in London on 13 May 1976. This date was some four or five months prior to the excavation of the Pathur Natarajas and, if established, effectively disposed of the claimants' case. This evidence was supported by a soil analysis which demonstrated that material attached to or inside the base of the London Nataraja was geomorphologically incompatible with the geology of the excavation site. Bumper in its turn relied upon metallurgical evidence to show not similarity but dissimilarity between the London Nataraja and the other Pathur bronzes.

After a trial lasting some 34 days between 17 November 1986 and 26 April 1987, Ian Kennedy J reserved judgment, which he delivered on 17 February 1988.

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On the question of identity the judge preferred the evidence of the claimants and rejected the evidence of Dr Presencer. On the second stage the judge held that the fourth claimant, namely the temple, suing by its fit person, custodian or next friend, the third claimant, had proved a title to the Nataraja superior to that of the title of Bumper. Alternatively, the judge held that the 'pious' intention of the twelfth century notable who gave the land and built the Pathur temple remained in being and was personified by the Sivalingam of the temple, which itself had a title superior to that of Bumper. Finally he held that the second claimant had a superior title to that of Bumper. This was based upon the state's right under local legislation.

With the consent of the parties, Ian Kennedy J further assessed damages flowing from the alleged conversion and detinue of the Nataraja by Bumper and ordered damages in the sum of £5 to be paid to the fourth claimant. Bumper appeals against the finding that the London Nataraja was the same as the Pathur Nataraja. They further appeal against the findings that they did not have a title to the London Nataraja superior to the claimants and claim a declaration that each of the plaintiffs in the issue (claimants) had failed to prove that it had any title which would be recognised by the English court; alternatively, Bumper seeks an order for a retrial of the issue; in the further alternative, Bumper seeks a retrial of that part of the trial of the issue relating to the legal capacity in India of the temple and/or the Sivalingam to hold title to property and pursue an action in England either directly or through the third claimant in respect thereof. In addition, Bumper applied for leave to adduce further evidence in support of their appeals against the judge's order.

On their part the claimant respondents cross-appeal, firstly asserting that the judgment ought to be upheld on metallurgical evidence which was not relied upon by the learned judge. They further appeal against the judge's order in damages, seeking an award in the sum of £236,250. It is now convenient to deal with the two stages independently.

[His Lordship considered the evidence regarding the identity of the Natarajas and, having said that the test which an appellant had to satisfy in order to achieve a retrial in circumstances such as those before the court was that stated by Lord Buckmaster in delivering the judgment of the Privy Council in *Hip Foong Hong v H Neotia & Co* [1918] AC 888 at 894, stated that the court was of the opinion that Ian Kennedy J had reached the right conclusion, namely that the London Nataraja and the Pathur Nataraja were one and the same object. Accordingly, the court dismissed Bumper's appeal on that issue. His Lordship then considered the second issue, whether, if it was established that the London Nataraja and the Pathur Nataraja were the same object, any of the second to fifth claimants had established a better title than Bumper to the Nataraja. His Lordship went on to refer to the grounds of appeal, to the events at Pathur and in Tamil Nadu consequent on the discovery of the Nataraja and the Pathur bronzes, and to the relevant Hindu legislation, and continued:]

Proof of foreign law

It is clear that the true status in Hindu law of the third, fourth and fifth claimants in the sense that they can enjoy a title to the Nataraja is central to the issues raised. We propose to use the expression 'juristic entity' as being a person, body of persons or object who or which is recognised by the law concerned as being capable of enjoying legal possession of or title to an object and of suing or being sued in respect thereof.

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Ian Kennedy J reviewed at length not only the evidence of Hindu law as set out by textbook writers and in judgments delivered in the Indian courts, but also the oral evidence given before him by the expert witnesses before reaching his conclusions as to which claimants would be acceptable as juristic entities in the courts of Tamil Nadu, and whether, and if so in what circumstances, such a party could claim a title to the Nataraja. However, before coming to consider the evidence on this aspect of the case, it is convenient to consider the position in the English courts. It is trite law that foreign law in our courts is treated as a question of fact which must be proved in evidence. In the absence of any evidence to the contrary, it is to be assumed to be the same as English law. It is however the duty of the judge when faced with conflicting evidence from witnesses about a foreign law to resolve those differences in the same way as he must in the case of other conflicting evidence as to facts.

What is not so plain, however, is how he should deal with documentary evidence in the form of textbooks and reports of judgments and decisions in foreign courts. Ian Kennedy J expressed a firm view when rejecting the evidence upon one issue over which both expert witnesses were agreed. This was to the effect that the third claimant did not have a sufficient continuity of association with the temple to qualify as a 'de facto' trustee:

> 'I think they are both mistaken, and have failed to read in their true import the judgments to which I have just referred [*Reddy v Reddy* AIR 1967 SC 436 and *Vikrama Das v Daulat Ram* AIR 1956 SC 382]. It is well settled that the English courts will take the exposition of its own law by the Supreme Court of another jurisdiction as wholly authoritative, and an opinion to be preferred to that of any witness; that I do.'

Unfortunately, the learned judge did not refer to any authority for this proposition, nor were we in argument referred to any such authority. Mr Calcutt QC attacked this part of the judgment and in our view rightly so. This proposition as stated without qualification does not find any support in Dicey and Morris *The Conflict of Laws* (11th edn, 1987) r 18, p 217:

> '(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means. (2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.'

The propositions in the notes to this rule, so far as relevant to this appeal, are based on well-established authority, especially the judgment of Lord Langdale MR in *Earl Nelson v Lord Bridport* (1845) 8 Beav 527, [1843–60] All ER Rep 1032. In our judgment the following extracts from the notes in *Dicey and Morris* accurately set out the relevant aspects of English law in regard to the proof of a foreign law.

(1) 'An English court will not conduct its own researches into foreign law' (*Dicey and Morris* p 222)—see *Duchess Di Sora v Phillipps* (1863) 10 HL Cas 624 at 640, 11 ER 1168 at 1175 per Lord Chelmsford:

> 'It seems, however, rather questionable whether the Judge has a right to resort to the foreign law itself for information, when the evidence of the witnesses is not satisfactory to his mind. The witnesses are at liberty to adduce, in support or confirmation of their testimony, text books, decisions of the foreign courts, or rather authorities, which, becoming a part of their evidence, may enable the Judge to form his own opinion upon the particular text of foreign law thus laid before him. But it seems contrary to the nature

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of the proof required in these cases, that the Judge should be at liberty to search for himself into the sources of knowledge from which the witnesses have drawn, and produce for himself the fact which is required to be proved as a part of the case before him. As my noble and learned friend, Lord *Brougham*, said in the *Sussex* Peerage Case ((1844) 11 Cl & Fin 85 at 115, [1843–60] All ER Rep 55 at 62), "the Judge has not organs to know and to deal with the text of the foreign law, and therefore requires the assistance of a lawyer who knows how to interpret it."'

(2) 'If the evidence of several expert witnesses conflicts as to the effect of foreign sources, the court is entitled, and indeed bound, to look at those sources in order itself to decide between the conflicting testimony' (*Dicey and Morris* p 223)—see *Earl Nelson v Lord Bridport* (1845) 8 Beav 527 at 537, [1843–60] All ER Rep 1032 at 1036 per Lord Langdale MR:

'Such I conceive to be the general rule; but the cases to which it is applicable admit of great variety. Though a knowledge of foreign law is not to be imputed to the Judge, you may impute to him such a knowledge of the general art of reasoning, as will enable him, with the assistance of the bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness were required in every case, justice might often have to stand still; and I am not disposed to say, that there may not be cases, in which the Judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially, if there should be a variance or want of clearness in the testimony.'

This was the approach made by Scarman J to a mass of conflicting expert evidence on German private international law in *Re Fuld's estate (No 3), Hartley v Fuld* [1968] P 675 at 700–703 (not reported on this point in [1965] 3 All ER 776).

(3) The Court of Appeal, whilst slow to interfere as in all cases where the decision involves findings of fact, may in appropriate cases be somewhat more ready to question the trial judge's conclusions than in normal cases—see *Parkasho v Singh* [1967] 1 All ER 737 at 746, [1968] P 233 at 250 per Cairns J giving the leading judgment:

'We are asked by the wife to say that that decision was wrong; that the justices were wrong in their interpretation of the foreign law. The question of foreign law being a question of fact in our courts, must this court regard itself as bound by the findings of the justices on this matter? In my view, the question of foreign law, although a question of fact, is a question of fact of a peculiar kind, and the same considerations do not apply in considering whether and to what extent this court should interfere with the decision of the magistrates, as in the case of the ordinary questions of fact which come before a magistrates' court. It is not, I think, inappropriate to bear in mind that, under the provisions of s. 102 of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided that an issue of foreign law in a case which is being tried by a jury is a question of fact for the judge and not the jury. Bearing that in mind, and bearing also in mind the provisions of r. 73(7) of the Matrimonial Causes Rules, 1957 (SI 1957/619), which enable this court to draw any inference of fact which might have been drawn in the justices' court, I think that it is our duty in this case to examine the evidence of foreign law which was before the justices and to decide for ourselves whether that evidence justifies the conclusion to which they came.'

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Later in his judgment in *Parkasho v Singh* [1967] 1 All ER 737 at 747, [1968] P 233 at 250 Cairns J referred to the speech of Lord Wright in *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289 at 298, [1932] All ER Rep 571 at 576–577, where reference is made to the *Sussex Peerage Case* (1844) 11 Cl & Fin 85 at 116, [1843–60] All ER Rep 55 at 62, and then to the passage from the judgment of Lord Langdale MR in *Earl Nelson v Lord Bridport* (1845) 8 Beav 527 at 537, [1843–60] All ER Rep 1032 at 1036 cited above.

The approach of the Divisional Court in *Parkasho v Singh* was approved in the Court of Appeal in *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 at 286 per Megaw LJ:

> 'But a finding of fact on an issue of foreign law is a finding of fact of a very different character from the normal issue of fact: we would adopt as correct the observations of Mr. Justice Cairns (as he then was) in *Parkasho v. Singh* ([1967] 1 All ER 737 at 746, [1968] P 233 at 250) as to the position of an Appellate Court on a matter of this kind. An Appellate Court must not by uncritical acceptance of a trial Judge's conclusions of fact shirk its function of considering the evidence afresh and forming its own view of the cogency of the rival contentions, whilst of course always remembering that the trial Judge had the undoubted initial advantage of having seen and heard the witnesses.'

With these authorities in mind we have come to the conclusion that the learned judge was not entitled to reject the evidence of the experts to the effect that Sadogopan did not have a sufficient continuity of association with the temple to qualify as a 'de facto' trustee. Furthermore, we have also come to the conclusion that Mr Calcutt was correct in submitting that Ian Kennedy J was not entitled to rely upon his own researches based on passages from Mukherjea *Hindu Law of Religious and Charitable Trusts* (1951) without having the assistance of the expert witnesses and the submissions of counsel. However, when the transcript of the evidence of one of Bumper's three witnesses, a Mr Yadivelu, a commissioner and secretary to the government of Tamil Nadu, is considered, it is clear that the paragraphs to which the judge referred had already been referred to by Mr Vadivelu in his reports and were adopted by him in evidence. There is therefore admissible evidence in support of the paragraphs in the textbook upon which the judge's research was based. Mr Calcutt's submission therefore becomes largely academic.

[His Lordship then considered the evidence relating to the third claimant and to the claim of the temple and stated that in the court's judgment there was sufficient evidence before Ian Kennedy J to justify his findings that under Hindu law the temple (the fourth claimant) was a juristic entity and the third claimant, Thiru Sadagopan, had the right to sue and be sued on behalf of the temple. His Lordship continued:]

The English courts

Having held that the temple is a legal person under the law of Tamil Nadu acceptable in the courts of that state as a party which, with the third claimant acting as representative, could have sued for the recovery of the Nataraja, we must now decide whether, as the judge held, it is likewise acceptable in the courts of this country.

The question whether a foreigner can be a party to proceedings in the English courts is one to be determined by English law (as the lex fori). In the case of an individual no difficulty usually arises. And the same can be said of foreign legal

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persons which would be recognised as such by our own law, the most obvious example being a foreign trading company. It could not be seriously suggested that such a company could not sue in the English courts to recover property of which it was the owner by the law of the country of its incorporation.

The novel question which arises is whether a foreign legal person which would not be recognised as a legal person by our own law can sue in the English courts. The particular difficulty arises out of English law's restriction of legal personality to corporations or the like, that is to say the personified groups or series of individuals. This insistence on an essentially animate content in a legal person leads to a formidable conceptual difficulty in recognising as a party entitled to sue in our courts something which on one view is little more than a pile of stones.

There is an illuminating treatment of legal personality in *Salmond on Jurisprudence* (12th edn, 1966) pp 306–308, from which we take two passages:

> 'Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, are of comparatively few types. Corporations are undoubtedly legal persons, and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations . . . No other legal persons are at present recognised by English law. If, however, we take account of other systems than our own, we find that the conception of legal personality is not so limited in its application, and that there are several distinct varieties, of which three may be selected for special mention. They are distinguished by reference to the different kinds of things which the law selects for personification. 1. The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals who thus form the *corpus* of the legal person are termed its *members* . . . 2. The second class is that in which the *corpus*, or object selected for personification, is not a group or series of persons, but an institution. The law may, if it pleases, regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself. Our own law does not, indeed, so deal with the matter. The person known to the law of England as the University of London is not the institution that goes by that name, but a personified and incorporated aggregate of human beings, namely, the chancellor, vice-chancellor, fellows, and graduates. It is well to remember, however, that notwithstanding this tradition and practice of English law, legal personality is not limited by any logical necessity, or, indeed, by any obvious requirement of expediency, to the incorporation of bodies of individual persons.'

Thus *Salmond* recognises the possibilities, which may not be far-fetched, of (say) a foreign Roman Catholic cathedral having legal personality under the law of the country where it is situated; and, in order to make the concept more comprehensible, let it be assumed that it is given that personality by legislation specifically empowering it to sue by its proper officer for the protection and recovery of its contents. It would, we think, be a strong thing for the English court to refuse the cathedral access simply on the ground that our own law would not recognise a similarly constituted entity as a legal person. The touchstone for determining whether access should be given or refused is the comity of nations, defined by the *Shorter Oxford English Dictionary* (3rd edn, 1944) as:

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'The courteous and friendly understanding by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests.' a

Arguing from the example of a Roman Catholic cathedral and in the belief that no distinction between institutions of the Christian church and those of other major religions would now be generally acceptable, we cannot see that in the circumstances of this case there is any offence to English public policy in allowing a Hindu religious institution to sue in our courts for the recovery of property which it is entitled to recover by the law of its own country. Indeed we think that public policy would be advantaged. As Cardozo J said in *Loucks v Standard Oil Co of New York* (1918) 224 NY 99 at 111: b

'The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.' c

As Viscount Simonds said in *National Bank of Greece and Athens SA v Metliss* [1957] 3 All ER 608 at 612, [1958] AC 509 at 525, in reference to a comparable question of private international law: d

'... in the end and in the absence of authority binding this House, the question is simply: What does justice demand in such a case as this?'

The form of Viscount Simonds's question suggests that it is undesirable for us to go further than is necessary for a decision in this case. We emphasise that it is essential to our decision that the third claimant, although not himself a competent party, is empowered by the constitution of the temple to take all necessary steps in the proceedings on its behalf, very much as they would be taken by the next friend or guardian ad litem of a minor or a patient. Steps for which the third claimant is responsible will therefore include giving security for costs, affording discovery and doing other acts at interlocutory stages and in course of the trial itself. It is, however, no objection to the temple's participation in the proceedings that RSC Ord 80 makes no provision for such a case. The court will provide for all necessary steps to be taken under its inherent jurisdiction to regulate its own procedure. e f g

We therefore hold that the temple is acceptable as a party to these proceedings and that it is as such entitled to sue for the recovery of the Nataraja.

We are fortified in reaching this conclusion since it accords with what we consider to be the intent and purpose behind the principles of comity. Furthermore, it avoids the danger of there being any fetter of an artificial procedural nature imported from the lex fori which might otherwise stand between a right recognised by and enforceable under the lex causae. h

[His Lordship considered the claim of the Sivalingam and said that in view of the court's conclusion that the fourth claimant (the temple) had a title to sue it was unnecessary to decide whether the Sivalingam was a juristic entity for the purpose of English law. His Lordship then considered whether any of the claimants' claims was defeated by the provisions of the Limitation Act 1980 and upheld Ian Kennedy J's conclusion that in taking and keeping the idols he had found Ramamoorthi acted dishonestly so as to bring his conduct within s 4(5) of the 1980 Act. Finally, his Lordship considered the effect of the Indian Treasure Trove Act 1878. He concluded as follows:] j

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For the reasons set out in this judgment we dismiss the appeal on the ground that Ian Kennedy J correctly decided that the temple had a title to the Nataraja superior to that enjoyed by Bumper.

Appeal dismissed; cross-appeal allowed. Leave to appeal to the House of Lords refused. Stay of order pending petition to House of Lords.

21 May. The Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Ackner and Lord Lowry) refused leave to appeal.

Wendy Shockett Barrister.

R v Rowley

COURT OF APPEAL, CRIMINAL DIVISION
TAYLOR LJ, IAN KENNEDY AND MORLAND JJ
4 JULY 1991

Criminal law – Public decency – Act outraging public decency – Common law offence – Act not in itself lewd, obscene or disgusting – Appellant leaving notes in public places with intention of luring boys for immoral purposes – Notes not themselves lewd, obscene or disgusting – Whether evidence of appellant's motive or intention admissible – Whether appellant guilty of committing act outraging public decency.

Criminal law – Attempt – Acts preparatory to offence – Act no more than merely preparatory to commission of offence – Gross indecency with child – Attempted incitement to commit act of gross indecency – Appellant leaving notes in public places with intention of luring boys for immoral purposes – Notes not containing any proposition or incitement – Whether appellant doing more than merely preparatory act – Whether appellant guilty of attempted incitement of child to commit act of gross indecency.

The appellant left notes in public places over a period of three weeks offering money and presents to boys. The Crown alleged that the notes were designed to lure boys for immoral purposes, but there was nothing lewd, obscene or disgusting in the notes. The appellant was charged with committing acts outraging public decency and attempted incitement of a child under the age of 14 years to commit an act of gross indecency contrary to s 1(1)[a] of the Criminal Attempts Act 1981. Entries were found in the appellant's diary indicating a desire for sexual activity with boys and linking him with the notes. At his trial he submitted that the writing and placing of the notes could not support charges of outraging public decency and that with regard to the attempted incitement to commit gross indecency the acts done were no more than preparatory to the commission of an offence. The judge rejected those submissions, admitted the dairy entries in evidence and directed the jury in his summing up that they were entitled to look at the purpose behind the notes in deciding whether they were lewd or disgusting. The appellant was convicted on five counts of committing acts outraging public decency and one count of attempted incitement to commit gross indecency. He appealed on the grounds that the judge had erred in holding that writing and

a Section 1(1) is set out at p 654 c, post.

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***78 Union of India, State of Tamil Nadu and Others v. Bumper Development Corporation Limited**

Image 1 within document in PDF format.

Before the Alberta Court of Queen's Bench (Calgary District)
19 April 1995

[1996] I.L.Pr. 78

(Mr Justice R. P. Fraser)
19 April 1995

Analysis

Application for relief against registration of an English judgment.

Enforcement of judgments. Unjust enrichment. It may be that on the facts an action by a plaintiff is unjust and enriches him unfairly, but where it does this pursuant to a judgment given by a court to the jurisdiction of which the defendant has submitted, there is juristic reason for the enrichment and an application to enforce that judgment cannot fail on the ground of unjust enrichment. [49]

Enforcement of judgments. Public policy. UNESCO Convention. Parties. Works of art. Where both the plaintiff State in an action for the return of works of art and the State enforcing a judgment for such return are parties to the UNESCO Convention , but the judgment State is not, the Convention cannot apply so as to relieve an innocent defendant from the burden of losing the action. There are thus no public policy grounds on which enforcement of the judgment may be refused. [54], [58]

Enforcement of judgments. Locus standi in original action. Locus standi in enforcing State. Comity. Where the judgment sought to be enforced has held that a party to the original action is a legal person capable of taking legal action in the State which is the main plaintiff to that action, and has been accepted as such in the judgment State under the principles of comity, that decision is highly persuasive to the enforcing court and will not be used by it as a reason not to enforce the judgment in the absence of clear authority. [68] .

Enforcement of judgments. Interest. The judgment of a court of competent jurisdiction gives rise to a legal obligation to pay the judgment debt. In an action upon such a judgment interest, if by the law of the judgment itself it carries interest, is treated as an integral part of the judgment debt. Thus, an enforcing court has no alternative but to award interest on a judgment debt that carries it in the judgment State. [71], [73]

- T.A. Livesley v.E. Clemens Horst Co., Supreme Court of Canada: [1924] S.C.R. 605, applied . *79

The defendant, a company wholly owned by a Canadian art lover and philanthropist in good faith purchased an Indian temple bronze from a London dealer. Export permits were applied for and granted by the United Kingdom government, but while the bronze was undergoing restoration work at the British Museum, it was seized by the Metropolitan Police who believed (it transpired wrongly) that the bronze had been stolen from a Swiss art collector. The defendant sued the Police for its return, and the Indian High Commission then alleged that it had been stolen from land belonging to a ruined temple in Tamil Nadu. The Police's interpleader resulted in a trial of the question whether India had a better title to the bronze than the defendant.

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India's evidence was contradictory as to the provenance of the bronze; there was a possibility that the Indian witnesses had been coached and of collusion between India and its witnesses. However, the judge found for the ruined temple, awarding it £5 damages and 3/5 of its costs. The Court of Appeal dismissed the defendant's appeal, increasing the damages to £1,000. A petition for leave to appeal to the House of Lords was refused.

The bronze was returned to India. Canada contacted India with regard to the defendant's claim for compensation for loss of the bronze, but India did not reply. India then sought to have the judgment recognised and enforced in Canada. The defence was that the judgment was contrary to Canadian public policy and that the defendant was entitled to be compensated for loss of the bronze. It was common ground that the English courts had jurisdiction and that the judgment in question was final and conclusive, and for a sum which was certain or easily capable of ascertainment. The defendant, however, argued that the judgment was unenforceable as obtained by fraud; that the pursuit of the costs and damages was inequitable; that the only plaintiff to be awarded damages (the ruined temple) did not have *locus standi* before the Canadian courts to enforce its claim; and that India was not entitled to interest on the judgment debt or costs.

On the fraud allegation, the defendant did not put forward any material not placed before the English court. Its arguments had all been fully dealt with in the English judgment. The Court found that, while the defendant would have the right to plead fraud in England, it did not have that right under the governing authorities in Canada. The defendant's claim that it was in Canada's public interest not to enforce the judgment also failed, as did the claim of lack of *locus standi.* Interest was part of the judgment debt, and so the Court could not direct that it be not paid. The counterclaim also had to be dismissed.

The following cases were referred to in the judgment:

Canadian courts

- 1. Leeds v. Alberta (1989) 98 A.R. 178 (C.A.)
- 2. Cerny v. Canadian Industries Ltd [1972] 6 W.W.R. 88 .
- 3. View West Construction Ltd v. City of Calgary (1978) 7 Alta. L.R. (2d) 58 (S.C.T.D.).
- 4. Holt v. Thomas (1987) 79 A.R. 131 (Alta. Q.B.).
- 5. Roglass Consultants Inc. v. Kennedy, Lock and Kennedy, Lock & Willett Inc. (1984) 65 B.C.L.R. 393 (C.A.).
- 6. Stevenson, Doell & Co. v. Yorath and Horder (1987) 18 B.C.L.R. (2d) 354 (C.A.).
- 7. 351061 Alberta Ltd v. Mega Tech Industries, 15 May 1990, not yet reported (Alta. Master in Chambers).
- 8. Jacobs v. Beaver
- 9. Pettkus v. Becker [1982] S.C.R. 834 (S.C. Can.).
- 10. Penikett v. the Queen (1987) 43 D.L.R. (4th) 324 .
- 11. Zingre v. the Queen [1981] 2 S.C.R. 392 (S.C. Can.).
- 12. Boardwalk Regency Corp. v. Malouf (1992) 88 D.L.R. (4th) 612 (Ont. C.A.).
- 13. T.A. Livesley v. E. Clemens Horst Co. [1924] S.C.R. 605 (S.C. Can.).
- 14. Allied-Signal Inc. v. Dome Petroleum Ltd (1991) 122 A.R. 321 (Q.B.).

English courts

- 15. Abouloff v. Oppenheimer & Co. (1882) 10 Q.B.D. 295 (C.A.).
- 16. Vadala v. Lawes (1890) 25 Q.B.D. 310 (C.A.).

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- 17. Owens Bank Ltd v. Bracco [1992] 2 All E.R. 193, [1993] I.L. Pr. 24 .
- 18. Talbot v. Berkshire County Council [1993] 4 All E.R. 9 (C.A.).

New Zealand courts

- 19. Keele v. Findley (1991) 21 N.S.W.L.R. 444 (S.C. N.S.W.).

Representation

- K.J. Warren of Code Hunter Wittmann appeared for the plaintiffs.
- D.W. Lutz and D.C. Rolf of Parlee McLaws appeared for the defendant. ***80**

JUDGMENT
R.P. FRASER J.:

[1] This action arises from judgments of the English Court of Appeal affirming trial judgments which held that the title of an Indian temple to a twelfth century bronze sculpture (the "bronze") known as a "Nataraja" was superior to that of the defendant, Bumper Development Corporation Ltd ("Bumper"). The latter was held by the English Courts to have purchased the bronze in good faith from a London, England, dealer. The judgments, as well as that of the House of Lords (which refused leave to appeal), awarded to the Temple damages of £1,000 and to the plaintiffs jointly and severally, costs, which amount in the agregate to £303,489,67. The plaintiffs have sued to obtain an Alberta judgment on the English judgments involved (the "judgment").

[2] Bumper defends this action on the grounds that the judgment was obtained through fraud and that the granting of judgment in Alberta for the amounts owing under the judgment would be contrary to public policy. Bumper counterclaims, among other things, for $3,017,377.63 as compensation for loss of the bronze under the Convention on the ***81** Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 November 1970 (the " UNESCO Convention ").

[3] Her Majesty the Queen in Right of Canada was also named as a defendant in the counterclaim. Prior to the hearing of these applications, that claim was withdrawn.

[4] These reasons respond firstly to the application by the plaintiffs for an order of summary judgment in the action taken on the judgment in Alberta, for damages, costs and interest. They respond secondly to the cross-application by the defendant for security for costs, and thirdly to the application by the plaintiffs for summary judgment dismissing the counterclaim by the defendant.

[5] The defence of Bumper to the action on the judgment is based on fraud, public policy, unjust enrichment, the lack of status or standing of the plaintiff Temple (the "Ruined Temple") to sue in Alberta and the argument that the award of interest, if made in Alberta, should be based on Alberta rather than English law. Those defences are rejected and summary judgment is granted

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to the Ruined Temple for its damage claim and to the plaintiffs for costs. In addition, the plaintiffs are granted judgment for interest. The reasons for those decisions follow.

Factual background

[6] As Ian Kennedy J., the English trial judge, noted [1] :

> [Bumper] is incorporated under the laws of the Province of Alberta in Canada. Its history goes back to 1952. Since 1968 it has been controlled by a Mr Robert Bordon [sic] and his family interests. He (and I include his family) has long been interested in works of art: he first bought an antiquity in 1973, and he now has a very substantial collection. Some of his purchases are made by Bumper. His and Bumper's collections are in the main on public display. There is an exhibition of Indian material, principally of Buddist origin, at the Glenbow Museum in Calgary, which town is his base; and a second collection of Hindu artifacts is in the Edmonton Art Gallery. Other works have been lent to the National Gallery in Ottawa and to other galleries in Canada and the United States. In time many of his and Bumper's acquisitions will be given absolutely to public museums and galleries ... Mr Bordon [sic] is, in my judgment, a collector of art and antiquities with a strong public and philanthropic motive. In a case where few witnesses have escaped charges of dishonesty, inaccuracy and bias no such suggestion has been made against him. His actions, and those of Bumper, are not to be faulted.

[7] Bumper purchased the bronze on 10 June, 1982, along with three other pieces of Indian art, with the philanthropic object of donating all four pieces for display in Canadian museums. Having considered the *bona fides* of this purchase, Kennedy, J. expressly found: ***82**

> The question is whether Mr Michael Dollard, as the Defendant's agent, was acting in good faith ... I therefore record that I am quite satisfied that Mr Dollard bought the Nataraja in good faith.

[8] Bumper obtained export permits from the government of the United Kingdom for all four of its purchases and, while the bronze (intended for the National Gallery in Ottawa) was sent to the British Museum to undergo conservation measures, the other three pieces were immediately shipped to Canada where they were donated to the Glenbow Museum, the Edmonton Art Gallery and the National Gallery in Ottawa.

[9] The bronze was seized from the British Museum by the London Metropolitan Police who believed that it might have been stolen from a Swiss art collector. The police subsequently determined that this was not the case.

[10] On 24 September 1982 Bumper caused a writ to be issued against the Metropolitan Police seeking to recover the bronze.

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[11] On 3 November 1982 India, through its High Commission in London, wrote to the Metropolitan Police alleging that the bronze had been stolen from land belonging to a temple in Tamil Nadu, India, and demanded that it be returned to India. The Metropolitan Police interpleaded before the English court seeking directions from the court. On 10 February 1983 Master Waldman directed the trial of an issue, namely: "Whether the State of Tamil Nadu can prove that it has a title to the Bronze which is superior to the title of the Bumper Development Corporation to the Bronze." India, the Ruined Temple, the Shiva Lingam (a stone carving lying amidst the temple ruins) and Mr Sadagopan (suing as the next friend of the Temple) were subsequently "added as claimants and as plaintiffs in the issue."

[12] In his written judgment of some 199 pages, given after a trial of some 34 days, Kennedy J. noted that India was the "real energy behind the ... claim." India instructed the claimants' solicitors and paid the fees and disbursements incurred on the trial of the issue through its High Commission in London.

[13] Ms Sunita Mainee is a solicitor with the London law firm which at the time of the trial was the solicitor of record in the interpleader action in England. While Ms Mainee refused to answer questions respecting the reasons why the Indians changed solicitors several times during the English action, it may be relevant to the application for security for costs to note that Exhibit SM 1 to the affidavit of Ms Mainee sworn 5 November 1987 is a telex from her firm, Zaiwalla and Co., to Mr Someshwar at the India High Commission in London. It reads in part:

> The trial is due to start in 6 weeks time and we are gravely concerned that the High Commission has so far failed to make any payments to Brooke Blain Russell.

[14] India underwrote the costs of the English action. Twice, by *83 letters dated 8 June 1983 and 6 April 1987, India undertook to discharge any order as to costs made in favour of Bumper by the English courts. India paid the fees and disbursements of its solicitors, at least from July 1986 when Ms Mainee became involved with the Indian claim.

[15] During the pre-trial discovery of the English action (from 1983 to 1986) and even when the trial commenced in November 1986, the Indians maintained that the bronze they were claiming had been worshipped as recently as 48 years earlier. Only after the trial had commenced did the Indians allege that the bronze they were claiming had been buried for centuries. During the trial the Indians relied upon evidence that the bronze was worth at least $250,000 ($Can), which figure was accepted by Kennedy J. as the "best estimate of its value."

[16] At all times material both India and Canada were signatories to the 1970 UNESCO Convention . The United Kingdom has never been a signatory to the UNESCO Convention , on behalf of England or at all. Because both India and Canada were signatories to the UNESCO Convention , Robert Borden deposes in his affidavit in this action that he believed, as an innocent purchaser of the bronze, that India was responsible for its own expenses of establishing its 3 November 1982 claim for the bronze to be returned to India *and* that, if India was successful in establishing its claim for the return of the bronze. India would be responsible for paying Bumper just compensation for its loss of the bronze. He does not state a factual basis for that belief.

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[17] In a number of passages in his written judgment, Kennedy J. addressed suspicions which either he formed himself during the course of the trial or which were raised by counsel for Bumper during the trial respecting the possibility that the Indian's witnesses had been coached and the possibility of collusion between the Indians and their witnesses. Notwithstanding those suspicions, he found for the Ruined Temple.

[18] Kennedy J. gave a further judgment on 17 April 1989 awarding the Ruined Temple £5 in damages, awarding the Indian plaintiffs jointly and severally 3/5 of their costs of the issue, awarding the Ruined Temple its costs of the damages issue from 22 March 1988 to 13 February 1989 and awarding Bumper its costs of the damages issue thereafter. The Indians' costs pursuant to this judgment were, apart from the costs awarded to Bumper, taxed at $197,870 on 17 February 1994.

[19] Subsequently, in response to the Indians' solicitors' request that his Lordship reconsider some of the comments in his written judgment, Kennedy J. gave a "final judgment" in the spring of 1989.

[20] On 13 February 1991 Bumper's appeal from the Kennedy decision was dismissed by the Court of Appeal with costs. The Indians' cross-appeal from the Kennedy damages decision was allowed and the ***84** Ruined Temple's damages were increased to £1,000, but Bumper was awarded its costs of the cross-appeal. There is an indication in argument that those costs are under appeal. The Indians' costs of the appeal were on 17 February 1994 taxed at £105,989.54.

[21] Bumper's petition for leave to appeal to the House of Lords was dismissed with costs on 21 May 1991. The Indian's costs of that application were on 21 November 1991 taxed at £630.00. The aggregate of the costs taxed to the plaintiffs in the action was therefore £304,489.54, a sum equal to about $700,000.00 ($Can) at rates of exchange in effect at the date of these Reasons. Interest is claimed in addition from the dates of the respective judgments at the rate of 15 per cent *per annum* as prescribed by English law. The aggregate amount of interest claimed to 15 July 1994 is £209,574.84, which is equivalent to $482,022.13 ($Can) at the same rate of exchange. Bumper was awarded costs in the sum of £6,983.36 ($16,061.73 Can) in the English action. Those costs are stated in argument to be under appeal.

[22] The bronze was subsequently returned to India. Ms Mainee's evidence was that it was returned with a view to having it reconsecrated to the temple.

[23] Following Kennedy J.'s decision, Canada contacted India with respect to Bumper's claim for compensation for its loss of the bronze but India has never responded to Canada and Bumper has never received compensation from India for the loss of the bronze. Mr Borden had on cross-examination no knowledge of any request made by India to Canada respecting the recovery or return of the bronze. Further, he had no knowledge whether Canada ever raised with India the UNESCO Convention .

The history of the present action

[24] On 5 April 1994 the Indians commenced this action in Alberta, where at all material times Bumper has been resident and carrying on business. They seek recognition and enforcement of the judgment.

[25] On 27 April 1994 Bumper's Statement of Defence and Counterclaim was filed, alleging *inter alia* that the judgment is, in these peculiar circumstances, contrary to public policy in Canada as evidenced by *inter alia* its acceptance of the UNESCO

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Convention . Bumper also claims compensation from India for its loss of the bronze and pleads by way of alternative defence to the judgment for costs and damages the right to set off that compensation and its own English taxed costs against the Indians' claims.

[26] The Indians replied to Bumper's Statement of Defence on 20 May 1994. Bumper joined issue with the Indians on 1 June 1994 alleging *inter alia* in its joinder of issue that the judgment had been obtained by fraud on the court. The present applications were then made by both parties. ***85**

The plaintiffs' application for summary judgment

[27] There is no disagreement that summary judgment is available to a plaintiff where there are no triable issues raising any real questions of law or fact. [2]

[28] The plaintiffs argue that there are no triable issues with respect to the enforcement in Alberta of the judgment for damages, cost and interest. In advancing that argument the plaintiffs cite the decision of O'Leary J. in Holt v. Thomas [3] in which he said that:

> A foreign in personam money judgment will be recognized and enforced in Alberta if the foreign court had jurisdiction over the subject-matter of the claim and the person of the defendant in accordance with principles of private international law, the judgment is final and conclusive under the foreign law and is for a sum which is certain or capable or favourable or [sic] ascertainment by mathematical calculation. Those requirements are satisfied here. A defendant in an action on such a judgment may, however, raise three possible defences: (i) fraud in procuring the foreign judgment; (ii) that the foreign proceedings giving rise to the judgment were contrary to the principles of natural justice; and (iii) that recognition and enforcement of the foreign judgment would be contrary to the public policy of the court.

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[29] As was the case in Holt v. Thomas , Bumper does not dispute in argument that the English courts had jurisdiction over the matters before it, or that the judgment of the English courts (with the exception of an appeal as to one of the orders giving Bumper judgment for costs) is final and conclusive under English law and is for a sum which is certain or capable of ascertainment by mathematical calculation. Bumper submits, however, that it has arguable defences to the registration of the English judgment in Alberta, which are that: (a) the ***86** judgments of the English courts are unenforceable in Alberta as they were obtained by fraud on the English courts; (b) India cannot, in equity, pursue this claim against Bumper for the costs and damages awarded by the judgment; (c) the judgments of the English courts are unenforceable in Alberta as they are contrary to public policy; (d) the Ruined Temple, one of the named Indian plaintiffs, which was the only entity awarded damages under the English judgments, has no status or standing before this Court to enforce its claim for those damages; and (e) (in the alternative) the Indians are not entitled to any interest on the English judgment debts for costs and damages.

Fraud

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[30] The first defence argued by Bumper to registration of the judgment in Alberta is that it was obtained by fraud on the English courts. There is no argument by Bumper in respect of this defence that there are new or newly discovered material facts which were not before the English courts. Nor is there any proof that fraud deprived Bumper of an adequate opportunity to present its case to the English courts. Those conclusions are based:

(a) On an examination of the decision of the Court of Appeal in the English action (the "English Appeal Judgment"). [4] In that report it is stated that:

> • His Lordship considered the evidence regarding the identity of the Natarajas and, having said that the test which an appellant had to satisfy in order to achieve a retrial in circumstances such as those before the court was that stated by Lord Buckmaster in delivering the judgment of the Privy Council in Hip Foong Hong v. H. Neotia & Co. [1918] A.C. 888 at 894, stated that the court was of the opinion that Kennedy, J. had reached the right conclusion.

The test to which His Lordship referred is that:

> •When an application is made for a new trial on the ground of discovery of new evidence ... it must at least be such as is presumably to be believed, and if believed would be conclusive.

It may be taken from the opinion of the Court that Kennedy J. had reached the right conclusion that Bumper's argument before the Court of Appeal about new evidence was rejected by the Court of Appeal and had accordingly dismissed Bumper's appeal on that issue. There is no indication in the report of the nature of the new evidence.

(b) On rejection of the submission of Bumper in the pleadings in the case at bar, that it was fraudulent to call as witnesses in the English trial persons who were facing criminal charges in India in relation to the theft of the Nataraja. The submission is rejected because examination of the English trial judgment *87 indicates that the facts surrounding these criminal charges were fully explored in the trial of the English action as indicated in the following findings of Kennedy J., the English trial judge:

> • (i) S. Ramamoorthi was assessed as a potentially credible witness and Kennedy J. undertook what appears to be a detailed analysis of all of his evidence and the surrounding circumstances of that evidence.
> • (ii) R. Meivel was assessed as a witness "whose evidence had to be approached with great care, but one who could be telling the truth."
> • (iii) Kennedy J. specifically addressed the issue of the coaching of Meivel and Ramamoorthi. He concluded that although he could not rule out the possibility of coaching, he believed it was very unlikely.
> • (iv) Magvool Hussain's evidence was wholly rejected by Kennedy J. where he held that "he is a man whose honesty cannot be relied on."
> • (v) R. M. Balraj Nadar's evidence was also rejected where Kennedy J. held "my conclusion is that he is a dishonest man, a practised receiver of stolen goods, and not one upon whose evidence I can rely."

(c) The next consideration relates to the alleged failure of the plaintiffs to call several witnesses at the trial of the English action. This complaint was made at trial with respect to the failure of the plaintiffs to call, among others, Mr Chandran. Kennedy J. clearly rejected this complaint, stating:

> •I do not consider it the least bit sinister or suspicious that he has not been called. It could well have been that his evidence would have carried no weight. If it had been superficially attractive, I have no doubt that the Defendant would have reminded me that he might be skilled and playing a part. I attach no importance to the Plaintiff's failure to call him.

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He also observed with respect to Bumper's complaint of the failure to call police officers who allegedly assaulted Mr Ramamoorthi that:

> •In a case in which no expense has been spared it would have been precticable (sic) for the defendants to have made arrangements to have these officers interviewed in India if they wished to.

(d) The next consideration is Bumper's allegation that Bumper's expert was not allowed access to other idols between the June 1986 adjournment and the November 1986 commencement of the trial in the English action. This allegation appears to be in error as Bumper's forensic expert, Dr Seeley, stated in his report that he travelled to Madras, India, and examined the other idols on 28 July 1986. His report also indicated that he took soil and metal samples from these bronzes. Dr Seeley's ***88** examination of the bronzes in Madras occurred during the adjournment of the trial, 3½ months prior to the trial resuming on 5 November 1986. Dr Seeley's report was rendered 10 October 1986. Further, India argues that the eight bronze images referred to in Dr Seeley's report were present in the court room for many months during the trial. It argues that it was therefore open to Bumper to apply to the court for any further tests which it wished to make yet no applications were made. Bumper does not argue otherwise.

(e) The last reason for the conclusion referred to above is that neither the affidavit of Robert Borden dated 18 May 1994 nor any other material filed in respect of this application makes any mention of any new or newly discovered material facts which were not before the English court.

[31] Bumper's argument that the judgment is unenforceable because it was obtained by fraud is based primarily on the decision of the English Court of Appeal in Abouloff v. Oppenheimer & Co.. [5] In that case Oppenheimer's defence as described was that the foreign plaintiff, Mrs Abouloff, and her husband "acting in collusion" fraudulently represented and also concealed certain facts from the foreign court. The Court of Appeal held that this was indeed a good defence to the action on the foreign judgment. Subsequent judgments of the English courts have recognised the principle that in an action on a foreign judgment the English court cannot go into the merits which have been tried in the foreign court unless the judgment of the foreign court was obtained by fraud. In that event the party alleged to have committed the fraud cannot prevent the question of fraud being litigated in the courts of England. [6] That is so even though it will be necessary in the English court to go into the very facts which were investigated and which were in issue in the foreign court. See the judgment of Lindley L.J. in Vadala v. Lawes. [7]

[32] In a recent decision of the House of Lords in Owens Bank Ltd v. Bracco, [8] it was recognised that the decisions in Abouloff and Vadala have been critised by academic writers and have not been followed by the Canadian courts. [9] In this respect, the judgment of Lord Bridge in the Owens decision canvassed the arguments against the Abouloff and Vadala principle and went on to say [10] :

> I recognise that, as a matter of policy, there may be a very strong case to be made in the 1990s in favour of according to overseas judgments the same finality as the courts accord to English judgments. But enforcement of ***89** overseas judgments is now primarily governed by the statutory codes of 1920 and 1933. Since these cannot be altered except by further legislation, it seems to me out of the question to alter the common law rule by overruling Abouloff v. Oppenheimer and Vadala v. Lawes . To do so would produce the absurd result that an overseas judgment creditor, denied statutory enforcement on the ground that he had obtained his judgment by fraud, could succeed in a common law action to enforce his judgment because the evidence on which the judgment debtor relied did not satisfy the English rule.

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> Accordingly, the whole field is effectively governed by statute and, if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it.

[33] The Canadian authorities to which Lord Bridge referred in Owens include decisions of the appellate courts of three provinces, being Ontario, Nova Scotia and British Columbia. The reference in *Dicey and Morris* to which Lord Bridge referred, states in part as follows:

> the view of the Canadian courts is different (to that of the English courts in Abouloff and Vadala) and is best indicated by the words of Garrow J. in Jacobs v. Beaver (1908) 17 O.L.R. 496 , 506. The fraud relied on must be something collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the court and so passed on into the limbo of estoppel by the judgment. This estoppel cannot be disturbed except upon the allegation and proof of newly material facts, or newly discovered material facts which were not before the former court, and from which are to be deduced the new proposition that the former judgment was obtained by fraud.

[34] The principle involved has recently been discussed in Canada in the decision of the British Columbia Court of Appeal in Roglass Consultants Inc., v. Kennedy, Lock and Kennedy, Lock & Willett Inc. [11] The decision of MacFarlane, J.A. of that Court states:

> The respondents submit that the Ontario judgment was obtained by fraud. A judgment obtained by fraud may be impeached, but it is extrinsic fraud, that is, a fraud of the type which deprives a person of an adequate opportunity to present his case in court which will vitiate a judgment. It is not fraud of the nature described in the affidavits filed by the respondents, which is intrinsic fraud at the most, that is, allegations going to the existence and substance of the cause of action.

MacFarlane J.A. went on to say:

> Woodruff v. McLennan (1887) 14 O.A.R. 242 at 254–55, discussed examples of the type of fraud which will vitiate a judgment:
>
> > "Throughout all the older cases it strikes me the vitiating fraud spoken of was not the direct contradictory statements on oath of the parties or their witnesses on one side asserting that the other had given untrue against his true statement of disputed fact, but rather that the recovery was collusive, that the defendant had never been served with process, that the suit had been undefended without defendants default, that the defendant had been fraudulently persuaded by plaintiff to let judgment go by default, as suggested in Ochsenbein v. Papelier,

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> L.R. 8 Ch. 695 , or some fraud to defendant's prejudice committed or allowed in the proceedings of the other court, and other instances cited by Lord Selborne from Mr Justice Story, vol. 2, 732."

This is not the type of fraud that is suggested in this case.

[35] Bumper argued to this Court that while Mr Borden's affidavit does not address the fraud defence, he testified on oath in the cross examination on his affidavit that Bumper's "position" was that there had been fraud on the English court. An examination of the questions and answers referred to by Bumper in support of that argument does not indicate any basis of complaint which was not before the English trial court or was not refuted on the examination. Put another way, those questions and answers on which Bumper apparently now relies to support the allegation of fraud do not appear to be supported by any factual proof which was not before the English court.

[36] A further submission of Bumper in support of its fraud argument is that it cannot be said that Kennedy J, was "fully cognisant of the circumstances," *i.e.* that he did not have all of the evidence of the circumstances. Again, there is no evidence before this Court that there is new evidence or evidence which Bumper could not have placed before Kennedy J, if it had chosen to do so. If therefore the Abouloff principle is held not to be the law of Alberta, Bumper is not entitled to re-argue its case on the basis of the evidence that was before the English courts or could have been put to the trial court if Bumper had desired to do so.

[37] Bumper argued further that this Court should not summarily deprive Bumper of the right of discovery in this action on the issue of fraud, citing Stevenson, Doell & Company v. Yorath and Horder [12] and 351061 Alberta Ltd v. Mega Tech Industries . [13] With respect, neither of those decisions contains any suggestion that the allegations which were to be the subject of the new discoveries had previously been litigated as were the allegations of fraud before the English courts in the Bumper's matter. The cases cited can be distinguished on this basis. They do not stand as authority for the proposition that Bumper is entitled in this action to a second round of discoveries as such in respect of matters previously litigated in the English court.

[38] Bumper also referred in argument to the following extract from the Civil Procedure Guide (1992) [14] :

> There cannot be summary judgment if the defendant swears to facts which, if believed, would give a valid defence: Provincial Treasurer of Alberta v. Zama Contractors Ltd *et al.* (1988) Alta C.A. unreported Appeal #8603–0181–AC.

The problem with applying that principle to the case at bar is that Mr Borden on behalf of Bumper has not sworn to facts which were not ***91** before the English court and which would give Bumper a ground for getting a new discovery.

[39] The decision in the English action against Bumper was based on the finding that the bronze which had been purchased by Bumper was the same bronze which had been found in the temple. That finding was based on acceptance by the English

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court of the evidence of individuals who had been involved with the bronze in India supported by expert evidence as to the style of the bronze and on other matters. That evidence was preferred over the evidence of a London expert who testified he had seen the bronze in London prior to the date it had, according to the Indian witnesses, been excavated in India, and other expert evidence as to soil analysis and metallurgical evidence.

[40] Bumper relied in argument in this Court on quoted excerpts from the English trial judgment. None were from the appeal judgment. That supports the conclusion that facts which might support an allegation of fraud or collusion were before the English trial court and considered by it. There is no basis for argument or allegation that evidence existed which was not known and therefore not called. On the basis of the principle quoted from Jacobs v. Beaver , there are no new or material facts or newly discovered material facts which were not before the former court, and from which are to be deduced a new proposition that the former judgment was obtained by fraud.

[41] The Jacobs v. Beaver principle is consistent with the law of *res judicata* which was argued by the plaintiffs. That law was discussed in Talbot v. Berkshire County Council, [15] where Stuart-Smith L.J. began his discussion of the law as follows:

> In Henderson v. Henderson (1843) 3 Hare 100 at 114–115, [1843– 60] All E.R. Rep. 378 at 381–382 Wigran V.-C. stated the law thus:
>
> > 'In trying this question I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

[42] The rule is thus in two parts. The first relates to those points which were actually decided by the court; this is res judicata in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second is not a true case of *res judicata* but ***92** rather is founded upon the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation; the court will stay or strike out the subsequent action as an abuse of process: see per Lord Wilberforce in Brisbane City Council v. A.–G. for Queensland [1978] 3 All E.R. 30 at 36, [1979] AC 411 at 425.

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[43] The application of the *res judicata* principle would therefore rule out the introduction of evidence of fraud by Bumper unless it is new or was not available at the time of the original trial.

[44] Bumper also argues that there is sworn evidence of fraud before this Court, presumably in the form of Mr Borden's answer in his cross-examination that he has alleged fraud in relation to the English action. Bumper argues that care must be taken to see that where the defendant cannot himself know the facts, he is not prejudiced by reason of his personal ignorance and that if he swears to facts which give him a good ground for getting discovery, there should not be summary judgment. There are, with respect, no facts to which he has sworn which he could not have submitted to the English court. Given that the entire matter has been litigated there and decided, he is not with respect entitled to another discovery.

[45] In considering all of the factors outlined above, it is clear that Bumper would have the right under the present law of England to plead in this action the defence of fraud. It does not do so under the governing authorities in Nova Scotia, Ontario or B.C. There is no appellate authority in this province on the point. It will ultimately remain for the Alberta Court of Appeal or the Supreme Court of Canada to make that decision. Nevertheless, on an application for summary judgment, the parties are entitled to an answer if in the opinion of the court the matter is beyond doubt. Here in view of the respectable line of Canadian judicial authority, the Canadian authorities appear to represent the proper view. The historical evolution of the state of the English authorities explains how the difference in law came about. It is therefore held that the Abouloff principles do not apply in the case at bar in Alberta. In reaching this decision consideration has also been given to the decision of the Supreme Court of New South Wales in Keele v. Findley. [16]

[46] In the result, the submission of Bumper that the judgments of the English courts are unenforceable in Alberta because they were obtained by fraud on the English court is rejected, because there is no new evidence or evidence which Bumper could not have put before the English trial court if it had chosen to do so.

Equity as a Defence

[47] Bumper's next defence to registration of the judgment is that India cannot, in equity, pursue this claim. The equitable principle *93 argued is that the Union of India has been unjustly enriched through the return of the bronze to the temple.

[48] The basis of a claim of unjust enrichment was stated by Dickson J. (as he then was) in the decision of the Supreme Court of Canada in Pettkus v. Becker [17] as follows:

> How then does one approach the question of unjust enrichment ... In Rathwell I ventured to suggest that there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach it seems to me is supported by general principles of equity that have been fashioned by the courts for centuries
>
> ...

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[49] Applying the tests drawn from the Pettkus decision to the facts before this Court, it is clear that there was an enrichment of India and its co-plaintiffs. Bumper suffered a deprivation in having paid for the bronze it lost it because of the judgments of the English courts. However, it is equally clear that the judgment given by the English courts to the jurisdiction of which Bumper had submitted constituted a juristic reason for the enrichment. The Union of India therefore submits that in this case a fully litigated trial and appeal led to a ruling that the Temple was entitled to the bronze. That circumstance provides a juristic reason for any enrichment of the Temple and is a complete answer to Bumper's defence on this ground. The equitable defence is accordingly also rejected.

Public Interest

[50] As was noted above, both Canada and India are signatories to the UNESCO Convention . Britain was not. The Convention defines cultural property. Article 7 of the Convention reads in part as follows:

> The States Parties to this Convention undertake:
>
> ...
>
> (b)
>
> • (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned...
>
> • (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both states concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser ... Requests for recovery and return shall be made through diplomatic officers ... All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.

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[51] Canada was and is a signatory to the Convention. It has pursuant to the Convention adopted the Cultural Property Export and Import Act (the "Cultural Statute"). That statute provides that it is illegal to export into Canada any foreign cultural property that has ***94** been illegally exported from a reciprocating State; that on request of a reciprocating State, the Attorney General of Canada may institute an action in a Canadian court for the recovery of the property of the reciprocating State; that where it is established that the person in control of the cultural property is a *bona fide* purchaser for value of the cultural property and had no knowledge that the property had been illegally exported from the reciprocating State, the Canadian court may fix such amount to be paid as compensation as the court considers just in the circumstances; and that the court may, subject to the payment of the compensation so fixed, order the return of the cultural property to the reciprocating state. Neither Canada nor the Cultural Statute played any part in the return of the bronze to India.

[52] Bumper, an Alberta corporation, was determined by the English courts to have been an innocent purchaser of the bronze which was held to have a value of a minimum of $250,000 by Kennedy J. It incurred very substantial expense of an unknown

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amount in trying in the English court action to retain the bronze. Such expense included the costs payable under the judgment which now amount to more than $700,000 ($Can). Faced with these expenses and with the claim for interest, Bumper seeks in its defence of this action, on the basis of the public policy of Canada as expressed in the Convention and the Cultural Statute , to avoid payment of these costs.

[53] The judgment of the English trial court upheld on appeal was that the Temple had proved a title to the bronze superior to that of the title of Bumper. Judgment was awarded for costs and damages of £1,000. The Convention played no part in the outcome of that action.

[54] In considering the defence of public policy, it is relevant to note that under Article 7(b)(ii) of the Convention, "just compensation" is only payable to an innocent purchaser by the requesting State in circumstances in which the foreign cultural property has been imported into the importing State. There is no evidence that the bronze was imported into or sent to Canada. It was returned to India from England. Further, the Union of India has never made a request for the return or the recovery of the bronze through its diplomatic offices to either the United Kingdom or Canada. Rather, it obtained the return by means of the English legal action based on the claim of ownership of the idol by the Temple. Arguably therefore the Convention has no application in this action. Further, there has been no use or application of the Cultural Statute in the recovery of the idol.

[55] Section 37(3), (5) and (6) of the Cultural Statute provides respectively as follows:

> 37 (3) Where the government of a reciprocating State submits a request in writing to the Minister for the recovery and return of any foreign cultural property that has been imported into Canada illegally by virtue of subsection (2) and that is in Canada in the possession of or under the control of any person, institution or public authority, the Attorney General of Canada may institute an action in the Federal *95 Court or in a superior court of a province for the recovery of the property by the reciprocating State.
>
> ...
>
> (5) A court in which an action has been taken under this section on behalf of a reciprocating State may, after affording all persons that it considers to have an interest in the action a reasonable opportunity to be heard, make an order for the recovery of the property in respect of which the action has been taken or any other order sufficient to ensure the return of the property to the reciprocating State, where the court is satisfied that the property has been illegally imported into Canada ... and that the amount fixed under subsection (6), if any, has been paid to or for the benefit of the person, institution or public authority referred to in that subsection.
>
> (6) Where any person, institution or public authority establishes to the satisfaction of the court in which an action under this section is being considered that the person, institution or public authority.
>
> - (a) is a *bona fide* purchaser for value of the property in respect of which the action has been taken and had no knowledge at the time the property was purchased by him or it that the property had been illegally exported from the reciprocating State on whose behalf the action has been taken, or
> - (b) has a valid title to the property in respect of which the action has been taken and had no knowledge at the time such title was acquired that the property had been illegally exported from the reciprocating State on whose behalf the action has been taken,
>
> the court may fix such amount to be paid as compensation by the reciprocating State to that person, institution or public authority as the court considers just in the circumstances.

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There has been no establishment pursuant to section 36 of that Statute of the status of Bumper as a *bona fide* purchaser for value of the bronze. The taking of that action as well as the receipt of a request from India under section 37(3) are conditions precedent to the grant to any purchaser of a right of recovery of the compensation. Given that such actions have not been taken, Bumper would not have a right of recovery of compensation under the statute.

[56] The question remains whether the right of compensation given to or recognised for the benefit of an innocent purchaser by the Convention gives rise to a principle or right recognised by public policy in Canada which would, apart from the claim at common law on the basis of which the judgment was given, allow Bumper to claim compensation. In that regard a quotation from the decision of McDonald J. in Penikett et al v. The Queen et al; Sibbeston et al., Intervenors [18] is helpful. It reads:

> However useful a court may find a convention or treaty which binds Canada internationally, in the interpretation of the Charter or some ordinary statute, the 'constitutional rule' is 'that conventional international law is not part of the law of the land unless it is incorporated or implemented by legislation': cohen and bayefsky, *op. cit.*, at p. 288. 'Generally speaking, a treaty will only be part of the law of Canada if it is implemented by legislation'; *ibid.* at p. 292. See also Hogg, *Constitutional* ***96** *Law of Canada,* 2nd edn. (1985), p. 246; Chaney v. Conn (Inspector of Taxes) [1968] 1 W.L.R. 242 , and Capital Cities Communications et al. v. Canadian Radio-Television Com'n et al. (1977) 81 D.L.R. (3d) 609 at p. 631, 36 C.P.R. (2d) 1, [1978] 2 S.C.R. 141 at p. 173 , where Laskin, C.J.C. speaking of the Inter-American Radio Communications Convention of 1937 to which Canada was a party, would give rise to ' *no domestic, internal consequences unless they arose from implementing legislation giving the Convention a legal effect within Canada* '. This high authority, incidentally, is sufficient to dispose of Re Drummond Wren [1945] 4 D.L.R. 674, [1945] O.R. 778 as authority for a court's placing reliance upon a treaty to which Canada is a party as a basis for recognizing a right in Canadian law which otherwise would not be required. (This is not to say that there will never be any situation in which a court will be entitled to refer to such a treaty as an aid to deciding whether, domestically, there is some rule of public policy which is relevant to the exercise of the court's equitable jurisdiction.) [Emphasis added.]

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[57] The principle discussed in Penikett and emphasised above (the " Penikett principle") should be distinguished from that discussed in Zingre v. The Queen et al. , [19] which was cited by Bumper. There the Supreme Court of Canada considered an appeal from a decision of the Manitoba Court of Appeal to issue a commission authorising two Swiss investigating judges to take testimony in Canada in respect of the prosecution in Switzerland of three Swiss nationals for crimes allegedly committed in Manitoba. The Swiss nationals could not, under Swiss law, be extradited from Switzerland. The Swiss government had therefore been requested by Canada to prosecute the three Swiss in Switzerland pursuant to an 1880 treaty between Switzerland and Great Britain (now binding on Canada) which, among other things, obliged Great Britain to cause "commissions of examination" of witnesses in Britain (in this case Manitoba) to be executed. As the court noted, Canada had forced Switzerland pursuant to that treaty to undertake criminal proceedings because Canada was unable to extradite the Swiss nationals from Switzerland. Switzerland therefore was now asking Canada for assistance in those proceedings. The treaty was held by the Court to place Canada under a specific obligation to comply with the Swiss request.

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[58] The Supreme Court of Canada held that the commission should issue on the basis [20] that the court was giving effect to a duty to which Canada under international law was subject, by treaty. It noted that none of the cases cited to it (in argument against the issue of the commissions authorising the taking of testimony) involved a situation in which Canada was under obligation to provide assistance to foreign authorities. Bumper argues that in the case at bar, Canada has, by becoming a signatory of the UNESCO Convention , undertaken a duty to India. The creation of that duty would not however, having regard to the Penikett principle quoted above, have had any domestic internal consequences other than those established by the Cultural Statute . *97 That Statute has, for the reasons discussed above, no application to this matter. No principle of public authority therefore exists under Canada law which would provide a defence to Bumper against enforcement of the judgment in Alberta.

[59] Bumper submits in its written argument that an inference can and should be drawn that India, in 1982, made a conscious decision not to pursue its claim for the return to India of Bumper's Nataraja in Alberta, where Bumper was incorporated. That conscious decision was made so as to avoid any application of the UNESCO Convention and the equities that underlie that international agreement and the Canadian statute. The decision was made, it is argued, because the "convention, statute and the underlying equities not only deny the Indians the very cost of the proceedings establishing their claim for the return of the Nataraja which they are now asking this Court to enforce, but they also impose upon India the obligation of paying Bumper compensation for losing the Nataraja if found to be an innocent purchaser" .

[60] Inferences may not, as a matter of law, be drawn if there are other reasonable inferences which may be drawn from the facts in question. The inferences referred to in the previous paragraph are rejected because there were other reasons why it may reasonably and logically be inferred that the Indians pursued the legal action in England instead of taking action in Canada under the UNESCO Convention statute. First, the bronze was in England, the courts of which therefore had clear jurisdiction to deal with it which the Canadian court did not have in view of the fact that the bronze was not in Canada. Second, the Indian claimants arguably had a better legal title under the common law than did Bumper to the bronze and therefore a valid claim at common law, independent of the UNESCO Convention which arguably had no legal status in England. In any event apart from argument based on inference, the election of India was, as was its right, to take action in England and the making of that election does not of itself give rise to any right in equity for Bumper to claim compensation from the Indian plaintiffs. No authority has been cited by Bumper which would ground such right.

[61] Apart from the right of the Indians to pursue their claim in England and the application of the Penikett principle discussed above, there is substantial doubt on general grounds about the use of public policy to ground a defence for Bumper against the enforcement of the judgment in Alberta. As was stated by Carthy J.A. of the Ontario Court of Appeal in Boardwalk Regency Corp. v. Malouf [21] :

> The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consistent with our system of justice and general moral outlook to *98 countenance the conduct, no matter how legal it may have been where it occurred.

[62] The conduct under consideration was the taking of legal action to recover possession against an innocent purchaser of an historic religious artifact on the ground that the claimant had a better legal title to it than did the innocent purchaser. The principle on which that right of recovery stands is recognised in Alberta law. It does not involve any conflict with an established

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principle of Alberta law or the concepts of justice which govern it. The same recognition applies to the practice of awarding costs to the winner against the loser in civil litigation. Given those reasons, as well as what has been termed the Penikett principle above, the defence of Bumper based on public property is also rejected.

[63] In reaching the decision to reject the defence of public policy, reference is also made to the judgment of O'Leary J. in Holt v. Thomas , and in particular paragraph 26 thereof, which reads as follows:

> The authors of Dicey and Morris, *The Conflict of Laws* (1980) point out at p. 83 that in private international law the invocation of public policy to refuse recognition and enforcement of foreign judgments should be kept within narrow limits:
>
> > 'In English domestic law it is now well settled that the doctrine of public policy should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.
> >
> > In the conflict of laws it is even more necessary that the doctrine should be kept within proper limits, otherwise the whole basis of the system is liable to be frustrated.'
>
> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges to suit the individual notion of expediency of fairness. They do not close their doors unless help will violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.

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[64] The loss of the bronze to Bumper and the costs which it has incurred are extremely regrettable. However, the decision of the English courts underlying the judgment is based on the finding that the Ruined Temple had a title to the bronze superior to that of Bumper. That determination was made on the basis of legal principles as to title which are similar if not identical to those in force in Alberta. Their enforcement would therefore not violate any fundamental principle of Alberta justice. On the contrary, it would seem that a decision made on the basis of public policy not to enforce the judgment would constitute such a violation.

[65] With all of the considerations set out above in mind, the defence of public policy is also rejected.

Status and standing

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[66] The next ground of defence to the enforcement of the judgment in Alberta is that the Ruined Temple was the only entity awarded *99 damages under the judgment and has no status or standing before this Court to enforce its claim for the damages. Bumper therefore submits that "the decision of Mr Justice Kennedy to permit a centuries old ruined temple to appear before him does not preclude this court, in the governance of its own procedures, from determining that it will not entertain an action by the ruins."

[67] A review of the English Appeal judgment indicates that a similar argument was made to that Court. That decision contained the following statement:

> [His Lordship] then considered the evidence relating to the third claimant and to the claim of the temple and stated that in the court's judgment there was sufficient evidence before Ian Kennedy, J. to justify his findings that under Hindu law the temple (the fourth claimant) was a juristic entity and the third claimant. Thiru Sadogopan, had the right to sue and be sued on behalf of the temple.

Having held that the Temple is a legal person under the law of Tamil Nadu acceptable in the courts of that State as a party which, with the third claimant acting as representative, could have sued for the recovery of the Nataraja, the court went on to hold that it was likewise acceptable in the courts of England. In doing so it considered among other things the comity of nations which, it noted, is defined by the *Shorter Oxford English Dictionary* [22] as:

> The courteous and friendly understanding by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests.

[68] While this Court may not be legally bound by the decision of the English Court of Appeal in the case then before it, the decision is highly persuasive. No authority is cited to suggest that the law which was applied in England would not be applied here. The argument of Bumper as to lack of status or standing was fully considered and rejected by the English courts. For the same reasons and because Alberta and Canada also respect the comity of nations, the argument of Bumper that the Ruined Temple has no status or standing to enforce the judgment is also rejected.

Interest

[69] The last argument put by Bumpers in its defence is that the Indians are not entitled to any interest on the English judgment debts.

[70] The plaintiffs based their claim for interest on the English law that: "Every judgment debt carries interest at the statutory rate from the time of entering up the judgment ... The statutory rate of interest has been 15 per cent *per annum* since 16 April 1985." That information is taken from *The Supreme Court Practice,* [23] Order 42, Rule 1/12 entered in evidence by the plaintiffs. While the rate seems high in *100 contrast to rates in effect in Canada at this time, there is no contrary evidence.

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[71] In support of their claim for interest, the Indians cite the decision of the Supreme Court of Canada in T.A. Livesley v. E. Clemens Horst Company [24] of which the following quotation is taken:

> The ... rule prevails in actions upon foreign judgments. The principle upon which such judgments are enforced by English courts, as stated by Blackburn, J. delivering the judgments of the Court of Queen's Bench in Godard v. Grey ; and in Schibsey v. Westenholz —following the judgment of Parke B, in Russell v. Smyth , and Williams v. Jones —is that the judgment of court of competent jurisdiction gives rise to a legal obligation to pay the judgment debt; and in an action upon such a judgment in an English court interest, if by the law of the judgment itself it carries interest, is treated as an integral part of the judgment debt, and the rate is accordingly calculated in conformity with the requirements of that law, whatever the rate may be.

[72] Bumper on the other hand cites Holt v. Thomas , the decision of the Alberta Court of Queen's Bench. In that decision the court dealt with the enforcement of an Arizona judgment for arrears of maintenance which apparently did not itself provide for the payment of interest. There is no indication in the judgment of any argument that Arizona law provided for interest on the judgment. In those circumstances the plaintiff claimed interest under Alberta law. The court declined to award interest for reasons which it deemed relevant under Alberta law.

[73] The circumstances are different here. The law of England provides for the payment of interest under the judgment. Under Livesley , this Court has no alternative but to award it to the date of this judgment. From that date the plaintiffs will have interest under the Judgment Interest Act (Alberta) .

[74] Because of the concern expressed above that the English rate of interest is high, Bumper is granted leave to tender, during the 30 days following the date of this judgment, evidence of a lower rate of interest in England.

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Counterclaim

[75] Bumper has counterclaimed for several items of relief and the Union of India applies for a summary judgment dismissing the counterclaim. The test applicable to a summary dismissal of a counterclaim is the determination that the claim has "no reasonable prospect of success" and that it is available "where the material clearly demonstrates that the action is bound to fail" or "has no prospect of success." [25] ***101**

[76] Bumper has counterclaimed for several items of relief. In order, except for the claim for set off, they are dismissed for the following reasons:

[77] Bumper prays in its counterclaim for:

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(a) a declaration that neither the Ruined Temple nor Shiva Lingam (the fifth claimant) are persons or juristic entities with any right to appear before this honourable court to enforce the foreign judgments alleged in the Statement of Claim.

It has been held above that the argument that the Ruined Temple has no status or standing to enforce the judgment is rejected. For the reasons stated in support of that decision, the claim of Bumper for a declaration that the Ruined Temple is not a person or juristic entity with status to appear before this Court is also rejected.

[78] The English trial court also held that the Shiva Lingam was a juristic entity capable of suing under English law. The English Court of Appeal did not find it necessary to decide the question. However the formal judgment of the Court of Appeal dismissed the appeal in its entirety. The English trial judgment therefore stands and is persuasive. No authority was cited to this Court as to why that portion of the judgment is bad or unenforceable. The prayer for a declaration of lack of status is therefore dismissed as it relates to Shiva Lingam. (It should be added that this question is deemed to be academic in view of the determination that the Ruined Temple is a juristic entity with status.)

(b) A declaration that the foreign judgments are "contrary to public policy in Canada and Alberta, are contrary to international public policy as ascribed to by Canada and the Union of India as signatories to the UNESCO Convention , being contrary to the Union of India's express covenant and agreement, with Canada and other States parties to the UNESCO Convention that (i) it will furnish at its expense the documentation and other evidence necessary to establish its claim for the return of the Nataraja and that (ii) it will provide just compensation to innocent purchasers of such property."

The request for a declaration that the judgment is contrary to international public policy and to public policy in Canada and Alberta is also rejected because of the decision set out above that the UNESCO Convention and the Cultural Statute have, because of the Penikett principle, no application in this action. The Penikett principle holds that the Convention has, apart from the Cultural Statute, no domestic internal consequences in Canada. It has been held above that the Statute gives rise to no such right. The declaration sought would ground the claim that the Union of India is in breach of its obligation to pay compensation to Bumper as an innocent purchaser. Given however that the Convention is held under the Penikett principle to ***102** have apart from the Cultural Statute no effect in Canada, the only right which Bumper could have to claim compensation would be under the Cultural Statute. It has been held above that it has no such right. Accordingly Bumper has no right to claim the declaration which it seeks.

(c) A judgment against the Union of India for $3,017,377.63 as compensation to Bumper for the loss of the bronze and for the expenses it incurred respecting the bronze and the proceedings to recover the Nataraja.

This claim appears to be based on a claim that India, being a requesting State within the meaning of the UNESCO Convention, maintained an action for the recovery and return of the bronze and, having recovered the same, is in breach of Article 7 of the Convention for failing to pay as compensation to Bumper. Again, relying on the Penikett principle, the only basis on which a cause of action could be argued by Bumper to exist under Canadian law is the Cultural Statute. No cause of action can be said to exist under that statute for the reasons previously stated. The claim for judgment under this heading is accordingly dismissed.

(d) Judgment for Unjust Enrichment against the Union of India for the abovementioned sum.

This claim is dismissed for the reasons set out above for the rejection of the principle of unjust enrichment as a defence to the action of India for enforcement of the judgment in Alberta.

(e) Judgment for Interest under the Judgment Interest Act

In view of the fact that each part of the counterclaim of Bumper for judgment is dismissed, its claim for interest is also rejected.

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(f) Claim for set off.

The several English judgments are silent with respect to set off of costs awarded to Bumper against the judgment granted against it. Nor has any evidence been tendered to this Court as to the law of England with respect to set off. That being the case, it is assumed to be the same as Alberta law, which permits equitable set off in a case such as this. [26] The right of set off of its claim for the costs awarded to it is accordingly granted to Bumper.

[79] In the result the counterclaim, except for the claim of set off of Bumper's claim for costs, is dismissed in its entirety. ***103**

Judgment

[80] Judgment in this Court will accordingly be awarded to the Ruined Temple, represented by Thiru R. Sadagopan, for the damages awarded by the English Court of Appeal and to the plaintiffs jointly and severally for the aggregate of the costs awarded by the English courts, less the amounts of the costs awarded to Bumper which may, as a matter of law in Alberta, be set off against the award of costs to the plaintiff. Judgment is also awarded to the respective plaintiffs for interest at the rate of 15 per cent *per annum* (or such other rate, if any, as may be held as being the rate(s) in effect in England during the period in question) on the foregoing amounts from the respective dates of entry of the judgments involved to the date of these Reasons. The aggregate of the amounts so awarded will bear interest under the Judgment Interest Act (Alberta) from the date of these Reasons.

[81] In the event that counsel cannot agree on the amount of interest accrued to the date of this judgment, they may speak to me.

[82] The judgment for costs awarded to Bumper in England is, as noted above, under appeal. The status of that appeal is not known to this Court. If the appeal is being actively prosecuted, Bumper may apply within the next 30 days for a stay of a portion of the monies due under this judgment pending the disposition of the appeal.

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Costs

[83] Counsel may, if necessary, apply within the next 30 days for costs on a party and party basis with respect to this judgment. If they do so, a draft Bill of Costs should be submitted by the plaintiffs when the application is made.

Appeal dismissed with costs. ***104**

Footnotes

1 At pp. 5–6 of Part 1 of his main judgment.

2 See leeds et al. v. alberta (C.A.) (1989) 98 A.R. 178 , *per* Harradence, J.A. at para. 22; "The Court should not summarily dispose of matters that raise any real question of fact or loss." See also cerny v. canadian industries ltd. et al.,[1972] 6 W.W.R. 88 ; BK. Toronto v. Stillman, Ont. S.C.A. [1933] D.L.R. 838 ; and View West Construction Ltd v. City of Calgary, S.C.T.D. (1978) 7 Alta. L.R. (2d) 58 ; in which H.J. MacDonald J. said at p. 60: Volume I of the Supreme Court Practice, 1976 (England), deals with procedure for summary judgment, referring to numerous authorities, and states in these words as to its purpose at p. 136: The purpose of O.14 is to enable the plaintiff to obtain a summary judgment without trial, if he can prove his claim clearly and if the

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defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried. Williston and Rolls in *The Law of Civil Procedure,* vol. 1 p. 304, explains R.58 (formerly R.57) of the Ontario rules are as follows: Rule 57 provides a means of obtaining summary judgment where no legal defence exists and was designed to prevent a defendant from defeating or delaying the plaintiff by employing the ordinary exchange of pleadings, and to avoid unnecessary expense by providing a means whereby the claim might be cheaply and expeditiously disposed of unless the possibility of a real defence is shown. The procedure was not intended to provide a summary method of adjudicating upon disputed facts, but rather to provide a simpler method of enforcing admitted rights, or rights concerning which there was no real dispute."

3 (1987) 79 A.R. 131 (Alta. Q.B.), at para. [19].

4 Reported at [1991] All E.R. 638, at p. 643 .

5 (1882) 10 Q.B.D. 295 , at p. 296.

6 Above, *per* Lord Coleridge at pp. 299–300.

7 (1890) 25 Q.B.D. 310 at pp. 316–317.

8 [1992] 2 All E.R. 193, [1993] I.L. Pr. 24 : at p. 201 (All E.R.).

9 See Dicey and Morris. *The Conflict of Laws* (11th edn., 1987), p. 469, n. 66.

10 At p. 203.

11 (1984) 65 B.C.L.R. 393, at p. 396 .

12 (1987) 18 B.C.L.R. (2d) 354 (C.A.) .

13 15 May 1990, not yet reported (Alta. Master in Chambers).

14 Stevenson and Cote: Jurileber, at p. 478.

15 [1993] 4 All E.R. 9 at p. 13 .

16 (1991) 21 N.S.W.L.R. 444 .

17 [1982] S.C.R. 834 at 848.

18 (1987) 43 D.L.R. (4th) 324 at 365.

19 [1981] 2 S.C.R. 392 .

20 Discussed at pp. 409–410.

21 (1992) 88 D.L.R. (4 th) 612 at p. 622.

22 (3rd. edn., 1944).

23 Vol. 1 (Sweet & Maxwell, 1993).

24 [1924] S.C.R. 605 at p. 610 .

25 See Allied-Signal Inc. v. Dome Petroleum Ltd et al. (1991) 122 A.R. 321 [Q.B.] at 329.

26 See also the English appeal judgment which contains at p. 644 the following statement: "It is trite law that foreign law in our courts is treated as a question of fact which must be proved in evidence. In the absence of any evidence to the contrary, it is to be assumed to be the same as English law." The law of England in this respect is held to be similar to Alberta law.

[1996] I.L.Pr. 78

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INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE TEMPLE OF PREAH VIHEAR

(CAMBODIA *v.* THAILAND)
MERITS

JUDGMENT OF 15 JUNE 1962

1962

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COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU TEMPLE DE PRÉAH VIHÉAR

(CAMBODGE c. THAÏLANDE)
FOND

ARRÊT DU 15 JUIN 1962

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This Judgment should be cited as follows:

"Case concerning the Temple of Preah Vihear (Cambodia v. *Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962, p. 6."*

Le présent arrêt doit être cité comme suit:

« *Affaire du temple de Préah Vihéar (Cambodge c. Thaïlande), Fond, Arrêt du 15 juin 1962: C. I. J. Recueil 1962, p. 6.* »

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INTERNATIONAL COURT OF JUSTICE

1962
15 June
General List:
No. 45

YEAR 1962

15 June 1962

CASE CONCERNING THE TEMPLE OF PREAH VIHEAR

(CAMBODIA *v.* THAILAND)

MERITS

Territorial sovereignty.—Title deriving from treaty.—Treaty clauses establishing frontier along watershed line as delimited by Mixed Commission of Parties.—Uncertain character of resulting delimitation in disputed area.—Eventual production by experts of one Party, at the request of the other, of a map.—Non-binding character of map at moment of its production.—Subsequent acceptance by conduct of map and frontier line by other Party.—Legal effet of silence as implying consent.—Alleged non-correspondence of map line with true watershed line.—Acceptance of risk of errors.—Subsequent conduct confirming original acceptance and precluding a denial of it.—Effect of subsequent treaties confirming existing frontiers and as evidence of Parties' desire for frontier stability and finality.—Interpretation of treaty settlement considered as a whole, including map.

JUDGMENT

Present: *President* WINIARSKI; *Vice-President* ALFARO; *Judges* BASDEVANT, BADAWI, MORENO QUINTANA, WELLINGTON KOO, Sir Percy SPENDER, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, MORELLI; *Registrar* GARNIER-COIGNET.

4

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In the case concerning the Temple of Preah Vihear,

between

the Kingdom of Cambodia,

represented by

H.E. Truong Cang, Member of the *Haut Conseil du Trône*,
as Agent,

and by

H.E. Ouk Chhoum, Minister Counsellor at the Cambodian Embassy in France,

assisted by

Hon. Dean Acheson, Member of the Bar of the Supreme Court of the United States of America,
M. Roger Pinto, Professor at the Paris Law Faculty,
M. Paul Reuter, Professor at the Paris Law Faculty,
as Counsel,

and by

Mr. Brice M. Clagett, Member of the Bar of the United States Court of Appeals for the District of Columbia,
as Legal Adviser,

Colonel Ngin Karet, Director of the Survey Department of the Royal Khmer Armed Forces,
as Expert Adviser,

M. Chan Youran,
as General Secretary of the Delegation,

M. Chem Snguon,
as Deputy General Secretary of the Delegation,

and

the Kingdom of Thailand,

represented by

H.S.H. Prince Vongsamahip Jayankura, Ambassador of Thailand to the Netherlands,
as Agent,
assisted by

Mr. Seni Pramoj, Member of the Thai Bar,
M. Henri Rolin, Honorary Professor of the Free University of Brussels, Advocate at the Court of Appeal of Brussels,
The Rt. Hon. Sir Frank Soskice, Q.C., M.P., former Attorney-General of England,
Mr. James Nevins Hyde, Member of the Bar of the State of New York and Member of the Bar of the Supreme Court of the United States of America,
M. Marcel Slusny, Advocate at the Court of Appeal of Brussels, Lecturer at the Free University of Brussels,

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Mr. J. G. Le Quesne, Member of the English Bar,
as Advocates and Counsel,

and by

Lieutenant-General Busrindre Bhakdikul, Director-General, Royal Thai Survey Department, Ministry of Defence,
Mr. Suk Perunavin, Deputy Under-Secretary in the Office of the Prime Minister,
Mr. Chinda Na Songkhla, Deputy Secretary-General of the Civil Service Commission,
Lieutenant-Colonel Phoon Phon Asanachinta, Lecturer, School of Surveying, Royal Thai Survey Department, Ministry of Defence,
as Expert Advisers,

and by

Mr. Chapikorn Sreshthaputra, Chief of the Legal Division, Treaty and Legal Department, Ministry of Foreign Affairs,

Mr. David S. Downs, Solicitor, Supreme Court of Judicature, England,
as Juridical Advisers,

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THE COURT,

composed as above,

delivers the following Judgment:

By its Judgment of 26 May 1961, the Court rejected the first preliminary objection of the Government of Thailand and found that it had jurisdiction to adjudicate upon the dispute submitted to it on 6 October 1959 by the Application of the Government of Cambodia.

By Order of the same date, the Court fixed the time-limits for the further pleadings. The case became ready for hearing on the filing of the last pleading on 2 February 1962.

Public hearings were held on the following dates: 1-3 March, 5 March, 7-10 March, 12-13 March, 15-17 March, 19-24 March and 26-31 March 1962. At these hearings the Court heard oral arguments and replies by M. Truong Cang, Mr. Dean Acheson, M. Roger Pinto and M. Paul Reuter on behalf of the Government of Cambodia, and by Prince Vongsamahip Jayankura, Mr. Seni Pramoj, M. Henri Rolin, Sir Frank Soskice and Mr. James Nevins Hyde on behalf of the Government of Thailand.

At the hearings from 15 to 20 March 1962, the Court heard the evidence of the witnesses and experts, called by each of the Parties, in reply to questions put to them in examination and cross-exami-

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nation on behalf of the Parties and by Members of the Court. The following persons gave evidence:

called by the Government of Cambodia:

M. Suon Bonn, former Governor of Kompong Thom, Inspector of Political and Administrative Affairs in the Ministry of the Interior of Cambodia, as witness;

called by the Government of Thailand:

Professor Willem Schermerhorn, Dean of the International Training Center for Aerial Survey, Delft, and Director of the Consulting Department of the Center, as expert;

Mr. Friedrich E. Ackermann, Dipl. Ing., Lecturer at the International Training Center for Aerial Survey, Delft, and member of the Consulting Department of the Center, as witness and expert;

Mr. Herman Theodoor Verstappen, geomorphologist, Head of the Geological Section of the International Training Center for Aerial Survey, Delft, as expert.

At the hearing held on 19 March 1962, the Court withdrew and reassembled in private to attend, in the presence of the representatives of the Parties, the showing of a film of the place in dispute filed by Cambodia. During the projection of the film and with the authorization of the President, M. Suon Bonn gave brief indications relating to points of fact.

In the course of the written proceedings, the following Submissions were presented by the Parties:

On behalf of the Government of Cambodia,

in the Application and in the Memorial:

"May it please the Court to adjudge and declare, whether the Kingdom of Thailand appears or not:

(1) that the Kingdom of Thailand is under an obligation to withdraw the detachments of armed forces it has stationed since 1954 in the ruins of the Temple of Preah Vihear;

(2) that the territorial sovereignty over the Temple of Preah Vihear belongs to the Kingdom of Cambodia";

in the Reply:

"May it please the Court:

I.—To reject the submissions presented by the Kingdom of Thailand in its Counter-Memorial, subject, in particular, to the presentation, if necessary, of any other grounds for the rejection of any further submissions that may be presented by the Kingdom of Thailand;

II.—To find in favour of the submissions contained in its Application instituting proceedings and in its Memorial.

To adjudge and declare

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1.—That the Kingdom of Thailand is under an obligation to withdraw the detachments of armed forces it has stationed since 1954 in the ruins of the Temple of Preah Vihear;

2.—That the territorial sovereignty over the Temple of Preah Vihear belongs to the Kingdom of Cambodia."

On behalf of the Government of Thailand,

in the Counter-Memorial:

"The Government of Thailand submits:

(1) that the claims of the Kingdom of Cambodia formulated in the Application and the Memorial are not sustainable and should be rejected;

(2) that Phra Viharn is in Thai territory: and the Court is respectfully asked so to adjudge and declare."

During the oral proceedings, Counsel for Thailand asked, at the close of the hearing of 13 March 1962, to be allowed to defer formulating the Final Submissions on behalf of Thailand until after the evidence of witnesses and experts. The Agent for Cambodia was requested to express his views on the matter and declared that he relied entirely on the justice and wisdom of the Court. The Court, after having deliberated, granted the authorization requested, it being understood that, after the evidence of witnesses and experts and before the filing of the Final Submissions of Thailand, the Agent for Cambodia might file such modifications to his own Submissions as he wished to make after having heard the evidence.

The Submissions presented by the Parties during the oral proceedings and in particular after the foregoing decision were as follows:

On behalf of the Government of Cambodia:

A. Submissions read at the hearing of 5 March 1962

"May it please the Court:

1. To adjudge and declare that the frontier line between Cambodia and Thailand, in the Dangrek sector, is that which is marked on the map of the Commission of Delimitation between Indo-China and Siam (Annex I to the Memorial of Cambodia);

2. To adjudge and declare that the Temple of Preah Vihear is situated in territory under the sovereignty of the Kingdom of Cambodia;

3. To adjudge and declare that the Kingdom of Thailand is under an obligation to withdraw the detachments of armed forces it has stationed since 1954, in Cambodian territory, in the ruins of the Temple of Preah Vihear;

4. To adjudge and declare that the sculptures, stelae, fragments of monuments, sandstone model and ancient pottery which have been removed from the Temple by the Thai authorities since 1954 are to be returned to the Government of the Kingdom of Cambodia by the Government of Thailand."

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B. Submissions, entitled Final Submissions, read at the hearing of 20 March 1962

"May it please the Court:

1. To adjudge and declare that the map of the Dangrek sector (Annex I to the Memorial of Cambodia) was drawn up and published in the name and on behalf of the Mixed Delimitation Commission set up by the Treaty of 13 February 1904, that it sets forth the decisions taken by the said Commission and that, by reason of that fact and also of the subsequent agreements and conduct of the Parties, it presents a treaty character;

2. To adjudge and declare that the frontier line between Cambodia and Thailand, in the disputed region in the neighborhood of the Temple of Preah Vihear, is that which is marked on the map of the Commission of Delimitation between Indo-China and Siam (Annex I to the Memorial of Cambodia);

3. To adjudge and declare that the Temple of Preah Vihear is situated in territory under the sovereignty of the Kingdom of Cambodia;

4. To adjudge and declare that the Kingdom of Thailand is under an obligation to withdraw the detachments of armed forces it has stationed, since 1954, in Cambodian territory, in the ruins of the Temple of Preah Vihear;

5. To adjudge and declare that the sculptures, stelae, fragments of monuments, sandstone model and ancient pottery which have been removed from the Temple by the Thai authorities since 1954 are to be returned to the Government of the Kingdom of Cambodia by the Government of Thailand."

On behalf of the Government of Thailand:

A. Submissions read at the hearing of 20 March 1962

"With respect to the Submissions presented by the Government of Cambodia on the 5th March, 1962, the Government of Thailand respectfully presents the following as its Submissions to the Court:

1. The Court is asked not to entertain the claims put forward by Cambodia in paragraphs 1 and 4 of the Submissions presented on Monday, 5th March, by the Agent for the Government of Cambodia, on the ground that both those claims are put forward too late and were not included as claims which the Government of Cambodia wished to present to the Court in the Application instituting these proceedings or in the course of the written pleadings and were for the first time put forward by the Agent for Cambodia when he formulated Cambodia's conclusions.

It is therefore submitted that these claims should not now be entertained by the Court.

2. Alternatively,

In regard to the first of the said claims Thailand submits the following conclusions:

(i) The map Annex I has not been proved to be a document binding on the Parties whether by virtue of the Treaty of 1904 or otherwise.

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(ii) Thailand and Cambodia have not in fact treated the frontier marked out on Annex I as the frontier between Thailand and Cambodia in the Dang Rek region.

(iii) For the above reasons, the frontier line marked on Annex I ought not to be substituted for the existing boundary line in fact observed and accepted by the two Parties in the Dang Rek range.

(iv) Even, therefore, if the Court, contrary to the submission of Thailand, thinks it proper to entertain the said claim (1) now put forward by Cambodia, Thailand submits that on the merits this claim is not well founded and ought to be rejected.

3. Thailand submits the following further conclusions in answer to Submissions 2 and 3 put forward by Cambodia:

(i) Abundant evidence has been given that at all material times Thailand has exercised full sovereignty in the area of the Temple to the exclusion of Cambodia. Alternatively, if, which is denied, Cambodia in any sense carried out any administrative functions in the said area, such acts were sporadic and inconclusive, and in no sense such as to negative or qualify the full exercise of sovereignty in the said area by Thailand.

(ii) The watershed in the said area substantially corresponds with the cliff edge running round Phra Viharn and constitutes the treaty boundary in the said area as laid down by the Treaty of 1904.

(iii) To the extent that the cliff edge does not precisely correspond with the watershed as shown by the configuration of the ground in the area, the divergencies are minimal and should be disregarded.

(iv) The general nature of the area allows access from Thailand to the Temple, whereas access from Cambodia involves the scaling of the high cliff from the Cambodian plain.

(v) There is no room in the circumstances of the present case for the application in favour of Cambodia of any of the doctrines prayed in aid by Counsel for Cambodia, whether acquiescence, estoppel or prescription.

(vi) Cambodia ought not in any event now to be allowed by the Court to put forward a claim based on prescription not having anywhere in her pleadings or until the very end of her oral argument put forward any such claim.

(vii) The evidence in favour of Cambodia is in any event wholly inadequate to support any prescriptive title in Cambodia.

Cambodia's second and third Submissions ought therefore to be rejected.

4. Further and in the alternative with regard to Cambodia's fourth Submission, it is submitted that this Submission, even if entertained by the Court, is wholly unsupported by evidence, and the claim put forward by Cambodia in its fourth Submission is accordingly unsustainable."

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B. Revised Submissions presented on 20 March 1962 after the hearing

"With respect to the revised Submissions presented by the Government of Cambodia on the 20th March 1962, the Government of Thailand respectfully submits the following Submissions to the Court:

I. *With regard to the first claim of the revised Submissions:*

1. The whole of the evidence before the Court shows that the map of the sector of the Dang Rek which is Annex I to the Memorial of Cambodia was not prepared or published either in the name or on behalf of the Mixed Commission of Delimitation set up under the Treaty of the 13th February, 1904; but, whereas the said Mixed Commission consisted of a French Commission and a Siamese Commission, the said Annex I was prepared by members of the French Commission alone and published only in the name of the French Commission.

2. The French officers who prepared the said Annex I had no authority to give any official or final interpretation of the decisions of the said Mixed Commission, still less of the intentions of the said Mixed Commission at points at which no decision had been recorded.

3. No decision of the said Mixed Commission was recorded about the boundary at Phra Viharn. If the said Mixed Commission did reach such a decision, that decision is not correctly represented on the said Annex I, but was a decision that in the Phra Viharn area the boundary should coincide with the cliff edge.

4. There was no subsequent agreement of the parties attributing a bilateral or conventional character to the said Annex I.

5. The conduct of the parties, so far from attributing any conventional character to the said Annex I, shows that the Parties have not treated the line marked on the said Annex I as the boundary in the Dang Rek; Thailand has remained in undisputed possession of all the territory at the top of the Dang Rek. Wherever there is a cliff edge in the Dang Rek the edge of the cliff is, and has been, accepted as constituting the watershed boundary established in this region by Article I of the said Treaty of 1904.

6. Even if the said Annex I were to be regarded as possessing a conventional character, the boundary line marked on it would not be binding on the parties when proved—as it has been in the disputed area—to be based on an inaccurate survey of the terrain.

II. *With regard to the second claim of the revised Submissions:*

1. The Court is asked not to entertain the claim, because:

(i) the claim to a region 'in the neighbourhood of the temple of Phra Viharn' constitutes an enlargement of the claim presented by the Government of Cambodia in the Application instituting these proceedings and throughout the written pleadings;

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(ii) the terms of the claim are too vague to allow either the Court or the Government of Thailand to appreciate what are the limits of the territory claimed.

2. Alternatively, the Government of Thailand repeats paragraph 3 of its submissions presented at the sitting of the Court on the 20th March, 1962.

III. *With regard to the third and fourth claims of the revised Submissions:*

The Government of Thailand repeats paragraph 3 of its submissions presented at the sitting of the Court on the 20th March, 1962.

IV. *With regard to the fifth claim of the revised Submissions:*

1. The Court is asked not to entertain this claim, because it constitutes an enlargement of the claim presented by the Government of Cambodia in the Application instituting these proceedings and throughout the written pleadings.

2. Alternatively, the rejection of the first, second and third claims of the revised Submissions must involve the rejection of this claim.

3. Alternatively, this claim should be restricted to any objects of the kinds specified in the claim proved by the evidence before the Court to have been removed from the temple since 1954 by the Thai authorities."

* * *

In its Judgment of 26 May 1961, by which it upheld its jurisdiction to adjudicate upon the dispute submitted to it by the Application filed by the Government of Cambodia on 6 October 1959, the Court described in the following terms the subject of the dispute:

> "In the present case, Cambodia alleges a violation on the part of Thailand of Cambodia's territorial sovereignty over the region of the Temple of Preah Vihear and its precincts. Thailand replies by affirming that the area in question lies on the Thai side of the common frontier between the two countries, and is under the sovereignty of Thailand. This is a dispute about territorial sovereignty."

Accordingly, the subject of the dispute submitted to the Court is confined to a difference of view about sovereignty over the region of the Temple of Preah Vihear. To decide this question of territorial sovereignty, the Court must have regard to the frontier line between the two States in this sector. Maps haven been submitted to it and various considerations have been advanced in this connection. The Court will have regard to each of these only to such extent as it may find in them reasons for the decision it has to give in order to settle the sole dispute submitted to it, the subject of which has just been stated.

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The Temple of Preah Vihear is an ancient sanctuary and shrine situated on the borders of Thailand and Cambodia. Although now partially in ruins, this Temple has considerable artistic and archaeological interest, and is still used as a place of pilgrimage. It stands on a promontory of the same name, belonging to the eastern sector of the Dangrek range of mountains which, in a general way, constitutes the boundary between the two countries in this region—Cambodia to the south and Thailand to the north. Considerable portions of this range consist of a high cliff-like escarpment rising abruptly above the Cambodian plain. This is the situation at Preah Vihear itself, where the main Temple buildings stand in the apex of a triangular piece of high ground jutting out into the plain. From the edge of the escarpment, the general inclination of the ground in the northerly direction is downwards to the Nam Moun river, which is in Thailand.

It will be apparent from the description just given that a frontier line which ran along the edge of the escarpment, or which at any rate ran to the south and east of the Temple area, would leave this area in Thailand; whereas a line running to the north, or to the north and west, would place it in Cambodia.

Thailand has urged that the edge of this escarpment constitutes the natural and obvious line for a frontier in this region. In support of this view Thailand has referred to the documentary evidence indicative of the desire of the Parties to establish frontiers which would not only be "natural", but visible and unmistakable—such as rivers, mountain ranges, and hence escarpments, where they exist.

The desire of the Parties for a natural and visible frontier could have been met by almost any line which followed a recognizable course along the main chain of the Dangrek range. It could have been a crest line, a watershed line or an escarpment line (where an escarpment existed, which was far from always being the case). As will be seen presently, the Parties provided for a watershed line. In so doing, they must be presumed to have realized that such a line would not necessarily, in any particular locality, be the same line as the line of the crest or escarpment. They cannot therefore be presumed to have intended that, wherever an escarpment existed, the frontier must lie along it, irrespective of all other considerations.

The Parties have also relied on other arguments of a physical, historical, religious and archaeological character, but the Court is unable to regard them as legally decisive.

* * *

As concerns the burden of proof, it must be pointed out that though, from the formal standpoint, Cambodia is the plaintiff,

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having instituted the proceedings, Thailand also is a claimant because of the claim which was presented by her in the second Submission of the Counter-Memorial and which relates to the sovereignty over the same piece of territory. Both Cambodia and Thailand base their respective claims on a series of facts and contentions which are asserted or put forward by one Party or the other. The burden of proof in respect of these will of course lie on the Party asserting or putting them forward.

* * *

Until Cambodia attained her independence in 1953 she was part of French Indo-China, and her foreign relations—like those of the rest of French Indo-China—were conducted by France as the protecting Power. It is common ground between the Parties that the present dispute has its *fons et origo* in the boundary settlements made in the period 1904-1908, between France and Siam (as Thailand was then called) and, in particular, that the sovereignty over Preah Vihear depends upon a boundary treaty dated 13 February 1904, and upon events subsequent to that date. The Court is therefore not called upon to go into the situation that existed between the Parties prior to the Treaty of 1904.

The relevant provisions of the Treaty of 13 February 1904, which regulated *inter alia* the frontier in the eastern Dangrek region, were as follows:

[Translation by the Registry]

"*Article 1*

> The frontier between Siam and Cambodia starts, on the left shore of the Great Lake, from the mouth of the river Stung Roluos, it follows the parallel from that point in an easterly direction until it meets the river Prek Kompong Tiam, then, turning northwards, it merges with the meridian from that meeting-point as far as the Pnom Dang Rek mountain chain. From there it follows the watershed between the basins of the Nam Sen and the Mekong, on the one hand, and the Nam Moun, on the other hand, and joins the Pnom Padang chain the crest of which it follows eastwards as far as the Mekong. Upstream from that point, the Mekong remains the frontier of the Kingdom of Siam, in accordance with Article 1 of the Treaty of 3 October 1893."

"*Article 3*

> There shall be a delimitation of the frontiers between the Kingdom of Siam and the territories making up French Indo-China. This delimitation will be carried out by Mixed Commissions composed of officers appointed by the two contracting countries. The work will relate to the frontier determined by Articles 1 and 2, and the region lying between the Great Lake and the sea."

It will be seen, in the first place, that these articles make no mention of Preah Vihear as such. It is for this reason that the Court

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can only give a decision as to the sovereignty over the Temple area after having examined what the frontier line is. Secondly, whereas the general character of the frontier established by Article 1 was, along the Dangrek range, to be a watershed line, the exact course of this frontier was, by virtue of Article 3, to be delimited by a Franco-Siamese Mixed Commission. It is to be observed, moreover, that what had to be delimited was "the frontiers" between Siam and French Indo-China; and although this delimitation had, *prima facie*, to be carried out by reference to the criterion indicated in Article 1, the purpose of it was to establish the actual line of the frontier. In consequence, the line of the frontier would, to all intents and purposes, be the line resulting from the work of delimitation, unless the delimitation were shown to be invalid.

* * *

In due course, a Mixed Commission composed of French and Siamese members was set up, charged with the task of delimiting the frontier in various districts, including the eastern sector of the Dangrek range in which Preah Vihear is situated. This Mixed Commission was composed of two sections, one French and one Siamese, sitting together—one consisting of French topographical and administrative officers under a French president, and the other of Siamese members under a Siamese president. So far as the frontier in the Dangrek range was concerned, the task of this Mixed Commission was confined to the eastern sector (roughly east of the Pass of Kel) in which Preah Vihear is situated. At this time the western sector of the Dangrek lay wholly in Thailand. It was only when a further boundary settlement, under a treaty dated 23 March 1907, brought within Cambodia various districts abutting on the western Dangrek sector, that the latter became a frontier region. The task of delimiting the frontier in this latter region was given to a second Mixed Commission set up under the 1907 Treaty.

The Mixed Commission set up under the Treaty of 1904 held its first meeting in January 1905, but did not reach that part of its operations that concerned the frontier along the eastern sector of the Dangrek range until December 1906, although it appears from the minutes of the Commission's meeting of 2 December 1906 that one of the French members of the Commission, Captain Tixier, had passed along the Dangrek in February 1905. At the meeting of 2 December 1906, held at Angkor-Wat, it was agreed that the Commission should ascend the Dangrek from the Cambodian plain by the Pass of Kel, which lies westwards of Preah Vihear, and travel eastwards along the range by the same route (or along the same line) as had been reconnoitred by Captain Tixier in 1905 (*"le tracé qu'a reconnu ... le capitaine Tixier"*). It was stated that all the

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necessary reconnaissance between this route and the crest line (to which it ran roughly parallel) could be carried out by this method, since the route was, at the most, only ten to fifteen kilometres from the crest, on the Siamese side. It has not been contested that the Presidents of the French and Siamese sections of the Commission, as representing it, duly made this journey, and that in the course of it they visited the Temple of Preah Vihear. But there is no record of any decision that they may have taken.

At this same meeting of 2 December 1906, it was also agreed that another of the members of the French section of the Commission, Captain Oum, should, starting at the eastern end, survey the whole of the eastern part of the Dangrek range, in which Preah Vihear is situated, and that he would leave for this purpose the next day.

It is thus clear that the Mixed Commission fully intended to delimit the frontier in this sector of the Dangrek and that it took all the necessary steps to put the work of delimitation in hand. The work must have been accomplished, for at the end of January 1907 the French Minister at Bangkok reported to the Minister of Foreign Affairs in Paris that he had been formally notified by the President of the French section of the Mixed Commission that the whole work of delimitation had been finished without incident, and that the frontier line had been definitely established, except in the region of Siem Reap. Furthermore, in a report on the whole work of delimitation, dated 20 February 1907, destined for his own Government, the President said that: "All along the Dangrek and as far as the Mekong, the fixing of the frontier could not have involved any difficulty." Mention may also be made of a map produced by Thailand, recently prepared by the Royal Thai Survey Department, Bangkok, tracing in the Dangrek the "Route followed by the Mixed Commission of 1904".

It seems clear therefore that a frontier was surveyed and fixed; but the question is what was that frontier (in particular in the region of Preah Vihear), by whom was it fixed, in what way, and upon whose instructions? The difficultly in answering these questions lies in the fact that, after the minutes of the meeting of the First Commission on 2 December 1906, there is no further reference whatever, in any minutes of later meetings, to the question of the frontier in the Dangrek region.

It appears that at about this time the Commission had in substance finished its work on the ground and was awaiting the reports and provisional maps of the survey officers (Captain Oum and others). These reports and maps would not be available until February-March 1907 when, in normal circumstances, another meeting of the Commission would have been held to consider them. It appears that a meeting had been provisionally fixed for 8 March.

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That it was certainly the intention to call one, can be seen from a despatch from the French Minister in Bangkok to the Minister of Foreign Affairs in Paris, dated 23 February 1907, covering the report from Colonel Bernard, President of the French section of the Commission. The Minister, in his despatch, said: "The maps indicating the frontier can be brought up to date in a fairly short time and the plenary meeting of the French and Siamese Commissioners will probably be held before 15 March." No meeting apparently ever took place. In the meantime the two Governments had entered into negotiations for a further boundary treaty. This treaty was signed on 23 March 1907, and provided for exchanges of territory and a comprehensive regulation of all those frontiers not covered by the previous treaty settlement of 1904.

A second Mixed Commission of Delimitation was then set up under the Treaty of 1907. As already mentioned, part of its task was to delimit that sector of the Dangrek region not having come within the ambit of the First Commission, namely from the Pass of Kel westwards, and therefore not including Preah Vihear which lay to the east. There was in fact some overlapping of the work of the two Commissions in the Kel region, but this overlapping did not extend to Preah Vihear. There is, however, evidence in the records of the Second Commission that, at or near the Pass of Kel, the line drawn by this Commission joined up with an already existing line proceeding eastwards to the Temple area and beyond. There is no definite indication as to what this line was, or how it had come to be established; but the presumption that it was in some manner or other the outcome of the survey work which the First Commission had put in hand, and which the President of its French section, in his report of 20 February 1907, stated to have been accomplished without difficulty is, in the circumstances, overwhelmingly strong. The Court has noted that although, under Article IV of the Treaty of 1907, the task of the Second Mixed Commission was to delimit the "new frontiers" established by that Treaty, the Commission also had the task, under Clause III of the Protocol attached to the Treaty, of delimiting all that part of the frontier defined in Clause I of the Protocol. This latter provision related to the entire Dangrek range from a point in its western half to the eastern continuation of the Dangrek, the Pnom Padang range, as far as the River Mekong. Therefore, had the eastern Dangrek and Pnom Padang sectors not already been delimited by the first (1904) Mixed Commission, it would have been the duty of the second (1907) Commission to do this work. This Commission did not do it, apart from the overlap (not extending to Preah Vihear) already mentioned, and therefore the presumption must be that it had already been done.

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The First Mixed Commission apparently did not hold any formal meeting after 19 January 1907. It must not be forgotten that, at the time when such a meeting might have been held for the purpose of winding up the work of the Commission, attention in both countries, on the part of those who were specially qualified to act and speak on their behalf in these matters, was directed towards the conclusion of the Treaty of 23 March 1907. Their chief concern, particularly in the case of Colonel Bernard, could hardly have been the formal completion of the results of the delimitation they had carried out.

The final stage of the operation of delimitation was the preparation and publication of maps. For the execution of this technical work, the Siamese Government, which at that time did not dispose of adequate means, had officially requested that French topographical officers should map the frontier region. It is clear from the opening paragraph of the minutes of the meeting of the first Mixed Commission on 29 November 1905 that this request had the approval of the Siamese section of the Commission, which may indeed have inspired it, for in the letter of 20 August 1908 in which the Siamese Minister in Paris communicated to his Government the eventual results of this work of mapping, he referred to "the Mixed Commission of Delimitation of the frontiers and the Siamese Commissioners' request that the French Commissioners prepare maps of various frontiers". That this was the deliberate policy of the Siamese authorities is also shown by the fact that in the second (1907) Mixed Commission, the French members of the Commission were equally requested by their Siamese colleagues to carry out cartographical work, as can be seen from the minutes of the meeting of 6 June 1908.

The French Government duly arranged for the work to be done by a team of four French officers, three of whom, Captains Tixier, Kerler and de Batz, had been members of the first Mixed Commission. This team worked under the general direction of Colonel Bernard, and in the late autumn of 1907 it completed a series of eleven maps covering a large part of the frontiers between Siam and French Indo-China, including those portions that are material in the present case. The maps were printed and published by a well-known French cartographical firm, H. Barrère.

The eleven maps were in due course communicated to the Siamese Government, as being the maps requested by the latter, and the Court will consider later the circumstances of that communication and the deductions to be drawn from it. Three of the maps had been overtaken by events, inasmuch as the former frontier areas they showed had, by virtue of the Treaty of March 1907, now become situated wholly in Cambodia. Siam was not therefore called upon either to accept or reject them. Her interest in the other maps remained. Amongst these was one of that part of the Dangrek

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range in which the Temple is situated, and on it was traced a frontier line purporting to be the outcome of the work of delimitation and showing the whole Preah Vihear promontory, with the Temple area, as being on the Cambodian side. If therefore the delimitation carried out in respect of the Eastern Dangrek sector established or was intended to establish a watershed line, this map purported to show such a line. This map was filed by Cambodia as Annex I to its Memorial, and has become known in the case (and will be referred to herein) as the Annex I map.

It is on this map that Cambodia principally relies in support of her claim to sovereignty over the Temple. Thailand, on the other hand, contests any claim based on this map, on the following grounds: first, that the map was not the work of the Mixed Commission, and had therefore no binding character; secondly, that at Preah Vihear the map embodied a material error, not explicable on the basis of any exercise of discretionary powers of adaptation which the Commission may have possessed. This error, according to Thailand's contention, was that the frontier line indicated on the map was not the true watershed line in this vicinity, and that a line drawn in accordance with the true watershed line would have placed, and would now place, the Temple area in Thailand. It is further contended by Thailand that she never accepted this map or the frontier line indicated on it, at any rate so far as Preah Vihear is concerned, in such a way as to become bound thereby; or, alternatively that, if she did accept the map, she did so only under, and because of, a mistaken belief (upon which she relied) that the map line was correctly drawn to correspond with the watershed line.

The Court will, for the moment, confine itself to the first of these contentions, based on an argument which the Court considers to be correct, namely that the map was never formally approved by the first Mixed Commission as such, since that Commission had ceased to function some months before the production of the map. The record does not show whether the map and the line were based on any decisions or instructions given by the Commission to the surveying officers while it was still functioning. What is certain is that the map must have had a basis of some sort, and the Court thinks there can be no reasonable doubt that it was based on the work of the surveying officers in the Dangrek sector. Being one of the series of maps of the frontier areas produced by French Government topographical experts in response to a request made by the Siamese authorities, printed and published by a Paris firm of repute, all of which was clear from the map itself, it was thus invested with an official standing; it had its own inherent technical authority; and its provenance was open and obvious. The Court must nevertheless conclude that, in its inception, and at the moment of its production, it had no binding character.

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Thailand has argued that in the absence of any delimitation approved and adopted by the Mixed Commission, or based on its instructions, the line of the frontier must necessarily—by virtue of Article 1 of the Treaty of 1904—follow strictly the line of the true watershed, and that this line, at Preah Vihear, would place the Temple in Thailand. While admitting that the Mixed Commission had a certain discretion to depart from the watershed line in order to avoid anomalies, and to take account of certain purely local considerations, Thailand contends that any departure such as to place Preah Vihear in Cambodia would have far exceeded the scope of any discretionary powers the Mixed Commission could have had authority to exercise without specific reference to the Governments.

Whatever substance these contentions may have, taken by themselves, the Court considers that they do not meet the real issues here involved. Even if there was no delimitation of the frontier in the eastern sector of the Dangrek approved and adopted by the Mixed Commission, it was obviously open to the Governments themselves to adopt a delimitation for that region, making use of the work of the technical members of the Mixed Commission. As regards any departures from the watershed line which any such delimitation embodied—since, according to Thailand's own contention, the delimitation indicated on the Annex I map was not the Mixed Commission's—there is no point in discussing whether such departures as may have occurred at Preah Vihear fell within the Commission's discretionary powers or not. The point is that it was certainly within the power of the Governments to adopt such departures.

The real question, therefore, which is the essential one in this case, is whether the Parties did adopt the Annex I map, and the line indicated on it, as representing the outcome of the work of delimitation of the frontier in the region of Preah Vihear, thereby conferring on it a binding character.

Thailand denies this so far as she is concerned, representing herself as having adopted a merely passive attitude in what ensued. She maintains also that a course of conduct, involving at most a failure to object, cannot suffice to render her a consenting party to a departure at Preah Vihear from the watershed line specified by Article 1 of the Treaty of 1904, so great as to affect the sovereignty over the Temple area.

The Court sees the matter differently. It is clear from the record that the publication and communication of the eleven maps referred

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to earlier, including the Annex I map, was something of an occasion. This was no mere interchange between the French and Siamese Governments, though, even if it had been, it could have sufficed in law. On the contrary, the maps were given wide publicity in all technically interested quarters by being also communicated to the leading geographical societies in important countries, and to other circles regionally interested; to the Siamese legations accredited to the British, German, Russian and United States Governments; and to all the members of the Mixed Commission, French and Siamese. The full original distribution consisted of about one hundred and sixty sets of eleven maps each. Fifty sets of this distribution were allocated to the Siamese Government. That the Annex I map was communicated as purporting to represent the outcome of the work of delimitation is clear from the letter from the Siamese Minister in Paris to the Minister of Foreign Affairs in Bangkok, dated 20 August 1908, in which he said that "regarding the Mixed Commission of Delimitation of the frontiers and the Siamese Commissioners' request that the French Commissioners prepare maps of various frontiers, the French Commissioners have now finished their work". He added that a series of maps had been brought to him in order that he might forward them to the Siamese Minister of Foreign Affairs. He went on to give a list of the eleven maps, including the map of the Dangrek region—fifty sheets of each. He ended by saying that he was keeping two sheets of each map for his Legation and was sending one sheet of each to the Legations in London, Berlin, Russia and the United States of America.

It has been contended on behalf of Thailand that this communication of the maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgment of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*

So far as the Annex I map is concerned, it was not merely the circumstances of the communication of this and the other maps that called for some reaction from the Siamese side, if reaction there was to be; there were also indications on the face of the map sheet which required a reaction if the Siamese authorities had any reason to contend that the map did not represent the outcome of

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the work of delimitation. The map—together with the other maps—was, as already stated, communicated to the Siamese members of the Mixed Commission. These must necessarily have known (and through them the Siamese Government must have known) that this map could not have represented anything formally adopted by the Mixed Commission, and therefore they could not possibly have been deceived by the title of the map, namely, "Dangrek—Commission of Delimitation between Indo-China and Siam" into supposing that it was purporting to be a production of the Mixed Commission as such. Alternatively, if the Siamese members of the Commission did suppose otherwise, this could only have been because, though without recording them, the Mixed Commission had in fact taken some decisions on which the map was based; and of any such decisions the Siamese members of the Commission would of course have been aware.

The Siamese members of the Commission must also have seen the notice appearing in the top left-hand corner of the map sheet to the effect that the work on the ground had been carried out by Captains Kerler and Oum. They would have known, since they were present at the meeting of the Commission held on 2 December 1906, that Captain Oum had then been instructed to carry out the survey of the eastern sector of the Dangrek range, covering Preah Vihear, and that he was to leave the next day to take up this assignment. They said nothing—either then or later—to suggest that the map did not represent the outcome of the work of delimitation or that it was in any way inaccurate.

That the Siamese authorities by their conduct acknowledged the receipt, and recognized the character, of these maps, and what they purported to represent, is shown by the action of the Minister of the Interior, Prince Damrong, in thanking the French Minister in Bangkok for the maps, and in asking him for another fifteen copies of each of them for transmission to the Siamese provincial Governors.

Further evidence is afforded by the proceedings of the subsequent Commission of Transcription which met in Bangkok in March of the following year, 1909, and for some months thereafter. This was a mixed Franco-Siamese Commission set up by the Parties with the object of getting an official Siamese geographical service started, through a consolidation of all the work of the two Mixed Commissions of 1904 and 1907. A primary aim was to convert the existing maps into handy atlas form, and to give the French and Siamese terms used in them their proper equivalents in the other languages. No suggestion that the Annex I map or line was unacceptable was made in the course of the work of this Commission.

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It was claimed on behalf of Thailand that the maps received from Paris were only seen by minor officials who had no expertise in cartography, and would know nothing about the Temple of Preah Vihear. Indeed it was suggested during the oral proceedings that no one in Siam at that time knew anything about the Temple or would be troubling about it.

The Court cannot accept these contentions either on the facts or the law. If the Siamese authorities did show these maps only to minor officials, they clearly acted at their own risk, and the claim of Thailand could not, on the international plane, derive any assistance from that fact. But the history of the matter, as set out above, shows clearly that the maps were seen by such persons as Prince Devawongse, the Foreign Minister, Prince Damrong, the Minister of the Interior, the Siamese members of the First Mixed Commission, the Siamese members of the Commission of Transcription; and it must also be assumed that the Annex I map was seen by the Governor of Khukhan province, the Siamese province adjoining the Preah Vihear region on the northern side, who must have been amongst those for whom extra copies were requested by Prince Damrong. None of these persons was a minor official. All or most had local knowledge. Some must have had knowledge of the Dangrek region. It is clear from the documentation in the case that Prince Damrong took a keen personal interest in the work of delimitation, and had a profound knowledge of archaeological monuments. It is not conceivable that the Governor of Khukhan province, of which Preah Vihear formed part up to the 1904 settlement, was ignorant of its existence.

In any case this particular contention of Thailand's is decisively disproved by a document deposited by Thailand herself, according to which the Temple was in 1899 "re-discovered" by the Siamese Prince Sanphasit, accompanied by some fifteen to twenty officials and local dignitaries, including, it seems, the then Governor and Deputy-Governor of Khukhan. It thus appears that only nine years previous to the receipt of the Annex I map by the Siamese authorities, a considerable number of persons having high official standing in Siam knew of Preah Vihear.

The Court moreover considers that there is no legal foundation for the consequence it is attempted to deduce from the fact that no one in Thailand at that time may have known of the importance of the Temple or have been troubling about it. Frontier rectifications cannot in law be claimed on the ground that a frontier area has turned out to have an importance not known or suspected when the frontier was established.

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It follows from the preceding findings that the Siamese authorities in due course received the Annex I map and that they accepted it. Now, however, it is contended on behalf of Thailand, so far as the disputed area of Preah Vihear is concerned, that an error was committed, an error of which the Siamese authorities were unaware at the time when they accepted the map.

It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error. The Court considers that the character and qualifications of the persons who saw the Annex I map on the Siamese side would alone make it difficult for Thailand to plead error in law. These persons included the members of the very Commission of Delimitation within whose competence this sector of the frontier had lain. But even apart from this, the Court thinks that there were other circumstances relating to the Annex I map which make the plea of error difficult to receive.

An inspection indicates that the map itself drew such pointed attention to the Preah Vihear region that no interested person, nor anyone charged with the duty of scrutinizing it, could have failed to see what the map was purporting to do in respect of that region. If, as Thailand has argued, the geographical configuration of the place is such as to make it obvious to anyone who has been there that the watershed must lie along the line of the escarpment (a fact which, if true, must have been no less evident in 1908), then the map made it quite plain that the Annex I line did not follow the escarpment in this region since it was plainly drawn appreciably to the north of the whole Preah Vihear promontory. Nobody looking at the map could be under any misapprehension about that.

Next, the map marked Preah Vihear itself quite clearly as lying on the Cambodian side of the line, using for the Temple a symbol which seems to indicate a rough plan of the building and its stairways.

It would thus seem that, to anyone who considered that the line of the watershed at Preah Vihear ought to follow the line of the escarpment, or whose duty it was to scrutinize the map, there was everything in the Annex I map to put him upon enquiry. Furthermore, as has already been pointed out, the Siamese Government knew or must be presumed to have known, through the Siamese members of the Mixed Commission, that the Annex I map had never been formally adopted by the Commission. The Siamese authorities knew it was the work of French topographical officers to whom they had themselves entrusted the work of producing the

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maps. They accepted it without any independent investigation, and cannot therefore now plead any error vitiating the reality of their consent. The Court concludes therefore that the plea of error has not been made out.

* * *

The Court will now consider the events subsequent to the period 1904-1909.

The Siamese authorities did not raise any query about the Annex I map as between themselves and France or Cambodia, or expressly repudiate it as such, until the 1958 negotiations in Bangkok, when, *inter alia*, the question of Preah Vihear came under discussion between Thailand and Cambodia. Nor was any question raised even after 1934-1935, when Thailand carried out a survey of her own in this region, and this survey had, in Thailand's view, established a divergence between the map line and the true line of the watershed—a divergence having the effect of placing the Temple in Cambodia. Although, after this date, Thailand eventually produced some maps of her own showing Preah Vihear as being in Thailand, she continued, even for public and official purposes, to use the Annex I map, or other maps showing Preah Vihear as lying in Cambodia, without raising any query about the matter (her explanations as to this will be considered presently). Moreover, the Court finds it difficult to overlook such a fact as, for instance, that in 1937, even after Thailand's own survey in 1934-1935, and in the same year as the conclusion of a treaty with France in which, as will be seen, the established common frontiers were reaffirmed, the Siamese Royal Survey Department produced a map showing Preah Vihear as lying in Cambodia.

Thailand had several opportunities of raising with the French authorities the question of the Annex I map. There were first of all the negotiations for the 1925 and 1937 Treaties of Friendship, Commerce and Navigation between France, on behalf of Indo-China, and Siam. These Treaties, although they provided for a general process of revision or replacement of previous Agreements, excluded from this process the existing frontiers as they had been established under the Boundary Settlements of 1893, 1904 and 1907. Thereby, and in certain more positive provisions, the Parties confirmed the existing frontiers, whatever they were. These were occasions (particularly in regard to the negotiations for the 1937 Treaty, which occurred only two years after Thailand's own survey of the frontier regions had disclosed, in her belief, a serious divergence between the map line and the watershed line at Preah Vihear) on which it would have been natural for Thailand to raise the matter, if she considered the map indicating the frontier at Preah Vihear to be

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incorrect—occasions on which she could and should have done so if that was her belief. She did not do so and she even, as has been seen, produced a map of her own in 1937 showing Preah Vihear as being in Cambodia. That this map may have been intended for internal military use does not seem to the Court to make it any less evidence of Thailand's state of mind. The inference must be—particularly in regard to the 1937 occasion—that she accepted or still accepted the Annex I map, and the line it indicated, even if she believed it incorrect, even if, after her own survey of 1934-1935, she thought she knew it was incorrect.

Thailand having temporarily come into possession of certain parts of Cambodia, including Preah Vihear, in 1941, the Ministry of Information of Thailand published a work entitled "Thailand during national reconstruction" in which it was stated in relation to Preah Vihear that it had now been "retaken" for Thailand. This has been represented by Thailand as being an error on the part of a minor official. Nevertheless, similar language, suggesting that Thailand had been in possession of Preah Vihear only since about 1940, was used by representatives of Thailand in the territorial negotiations that took place between Thailand and Cambodia at Bangkok in 1958.

After the war, by a Settlement Agreement of November 1946 with France, Thailand accepted a reversion to the *status quo ante* 1941. It is Thailand's contention that this reversion to the *status quo* did not affect Preah Vihear because Thailand already had sovereignty over it before the war. The Court need not discuss this contention, for whether Thailand did have such sovereignty is precisely what is in issue in these proceedings. The important point is that, in consequence of the war events, France agreed to set up a Franco-Siamese Conciliation Commission consisting of the two representatives of the Parties and three neutral Commissioners, whose terms of reference were specifically to go into, and make recommendations on an equitable basis in regard to, any complaints or proposals for revision which Thailand might wish to make as to, *inter alia*, the frontier settlements of 1904 and 1907. The Commission met in 1947 in Washington, and here therefore was an outstanding opportunity for Thailand to claim a rectification of the frontier at Preah Vihear on the ground that the delimitation embodied a serious error which would have caused Thailand to reject it had she known of the error in 1908-1909. In fact, although Thailand made complaints about the frontier line in a considerable number of regions, she made none about Preah Vihear. She even (12 May 1947) filed with the Commission a map showing Preah Vihear as lying in Cambodia. Thailand contends that this involved no adverse implications as regards her claim to the Temple, because

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the Temple area was not in issue before the Commission, that it was other regions that were under discussion, and that it was in relation to these that the map was used. But it is precisely the fact that Thailand had raised these other questions, but not that of Preah Vihear, which requires explanation; for, everything else apart, Thailand was by this time well aware, from certain local happenings in relation to the Temple, to be mentioned presently, that France regarded Preah Vihear as being in Cambodian territory—even if this had not already and long since been obvious from the frontier line itself, as mapped by the French authorities and communicated to the Siamese Government in 1908. The natural inference from Thailand's failure to mention Preah Vihear on this occasion is, again, that she did not do so because she accepted the frontier at this point as it was drawn on the map, irrespective of its correspondence with the watershed line.

As regards the use of a map showing Preah Vihear as lying in Cambodia, Thailand maintains that this was for purely cartographical reasons, that there were no other maps, or none that were so convenient, or none of the right scale for the occasion. The Court does not find this explanation convincing. Thailand could have used the map but could also have entered some kind of reservation with France as to its correctness. This she did not do.

As regards her failure even to raise the question of the map as such until 1958, Thailand states that this was because she was, at all material times, in possession of Preah Vihear; therefore she had no need to raise the matter. She indeed instances her acts on the ground as evidence that she never accepted the Annex I line at Preah Vihear at all, and contends that if she never accepted it she clearly had no need to repudiate it, and that no adverse conclusions can be drawn from her failure to do so. The acceptability of this explanation must obviously depend on whether in fact it is the case that Thailand's conduct on the ground affords *ex post facto* evidence sufficient to show that she never accepted the Annex I line in 1908 in respect of Preah Vihear, and considered herself at all material times to have the sovereignty over the Temple area.

* * *

The Court has considered the evidence furnished by Thailand of acts of an administrative character performed by her officials at or relative to Preah Vihear. France, and subsequently Cambodia,

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in view of her title founded on the Treaty of 1904, performed only a very few routine acts of administration in this small, deserted area. It was specifically admitted by Thailand in the course of the oral hearing that if Cambodia acquired sovereignty over the Temple area by virtue of the frontier settlement of 1904, she did not subsequently abandon it, nor did Thailand subsequently obtain it by any process of acquisitive prescription. Thailand's acts on the ground were therefore put forward as evidence of conduct as sovereign, sufficient to negative any suggestion that, under the 1904 Treaty settlement, Thailand accepted a delimitation having the effect of attributing the sovereignty over Preah Vihear to Cambodia. It is therefore from this standpoint that the Court must consider and evaluate these acts. The real question is whether they sufficed to efface or cancel out the clear impression of acceptance of the frontier line at Preah Vihear to be derived from the various considerations already discussed.

With one or two important exceptions to be mentioned presently, the acts concerned were exclusively the acts of local, provincial, authorities. To the extent that these activities took place, it is not clear that they had reference to the summit of Mount Preah Vihear and the Temple area itself, rather than to places somewhere in the vicinity. But however that may be, the Court finds it difficult to regard such local acts as overriding and negativing the consistent and undeviating attitude of the central Siamese authorities to the frontier line as mapped.

In this connection, much the most significant episode consisted of the visit paid to the Temple in 1930 by Prince Damrong, formerly Minister of the Interior, and at this time President of the Royal Institute of Siam, charged with duties in connection with the National Library and with archaeological monuments. The visit was part of an archaeological tour made by the Prince with the permission of the King of Siam, and it clearly had a quasi-official character. When the Prince arrived at Preah Vihear, he was officially received there by the French Resident for the adjoining Cambodian province, on behalf of the Resident Superior, with the French flag flying. The Prince could not possibly have failed to see the implications of a reception of this character. A clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined. It demanded a reaction. Thailand did nothing. Furthermore, when Prince Damrong on his return to Bangkok sent the French Resident some photographs of the occasion, he used language which seems to admit that France, through her Resident, had acted as the host country.

The explanations regarding Prince Damrong's visit given on behalf of Thailand have not been found convincing by the Court. Looking at the incident as a whole, it appears to have amounted

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to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim. What seems clear is that either Siam did not in fact believe she had any title—and this would be wholly consistent with her attitude all along, and thereafter, to the Annex I map and line—or else she decided not to assert it, which again means that she accepted the French claim, or accepted the frontier at Preah Vihear as it was drawn on the map.

* * *

The remaining relevant facts must now be stated. In February 1949, not long after the conclusion of the proceedings of the Franco-Siamese Conciliation Commission, in the course of which, as has been seen, Thailand did not raise the question of Preah Vihear, France addressed a Note to the Government of Thailand stating that a report had been received of the stationing of four Siamese keepers at the Temple, and asking for information. There was no reply to this Note, nor to a follow-up Note of March 1949. In May 1949, France sent a further Note, setting out briefly, but quite explicitly, the grounds on which she considered Preah Vihear to be in Cambodia, and pointing out that a map produced by Thailand herself had recognized this fact. The withdrawal of the keepers was requested. Although there was an error in this Note, the significance of the latter was that it contained an unequivocal assertion of sovereignty. This French Note also received no reply. In July 1950, a further Note was sent. This too remained unanswered.

In these circumstances Cambodia, on attaining her independence in 1953, proposed, for her part, to send keepers or guards to the Temple, in the assertion or maintenance of her position. However, finding that Thai keepers were already there, the Cambodian keepers withdrew, and Cambodia sent a Note dated January 1954 to the Government of Thailand asking for information. This received a mere acknowledgment, but no explanation. Nor was there, even then, any formal affirmation of Thailand's claim. At the end of March 1954, the Government of Cambodia, drawing attention to the fact that no substantive reply to its previous Note had been received, notified the Government of Thailand that it now proposed to replace the previously withdrawn Cambodian keepers or guards by some Cambodian troops. In this Note Cambodia specifically referred to the justification of the Cambodian claim contained in the French Note of May 1949. This Cambodian Note also was not

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answered. However, the Cambodian troops were not in fact sent; and in June 1954, Cambodia addressed to Thailand a further Note stating that, as information had been received to the effect that Thai troops were already in occupation, the despatch of the Cambodian troops had been suspended in order not to aggravate the situation. The Note went on to ask that Thailand should either withdraw her troops or furnish Cambodia with her views on the matter. This Note equally received no reply. But the Thai "troops" (the Court understands that they are in fact a police force) remained. Again, therefore, it would seem that Thailand, while taking certain local action, was not prepared to deny the French and Cambodian claim at the diplomatic level.

No further diplomatic correspondence was produced to the Court; but eventually, in 1958, a conference was held at Bangkok between Thailand and Cambodia, to discuss various territorial matters in dispute between the Parties, including that of Preah Vihear. The representative of Thailand having declined to discuss the legal aspects of the matter, the negotiations broke down and Cambodia instituted the present proceedings.

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The Court will now state the conclusions it draws from the facts as above set out.

Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a belief that the map was correct. It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.

The Court however considers that Thailand in 1908-1909 did accept the Annex I map as representing the outcome of the work of delimitation, and hence recognized the line on that map as being the frontier line, the effect of which is to situate Preah Vihear in Cambodian territory. The Court considers further that, looked at

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as a whole, Thailand's subsequent conduct confirms and bears out her original acceptance, and that Thailand's acts on the ground do not suffice to negative this. Both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line.

* * *

The Court must now consider two further matters. Thailand contends that since 1908, and at any rate up to her own 1934-1935 survey, she believed that the map line and watershed line coincided, and therefore that if she accepted the map line, she did so only in that belief. It is evident that such a contention would be quite inconsistent with Thailand's equally strongly advanced contention that these acts in the concrete exercise of sovereignty evidenced her belief that she had sovereignty over the Temple area: for if Thailand was truly under a misapprehension about the Annex I line—if she really believed it indicated the correct watershed line—then she must have believed that, on the basis of the map and her acceptance of it, the Temple area lay rightfully in Cambodia. If she had such a belief—and such a belief is implicit in any plea that she had accepted the Annex I map only because she thought it was correct—then her acts on the ground would have to be regarded as deliberate violations of the sovereignty which (on the basis of the assumptions above stated) she must be presumed to have thought Cambodia to possess. The conclusion is that Thailand cannot allege that she was under any misapprehension in accepting the Annex I line, for this is wholly inconsistent with the reason she gives for her acts on the ground, namely that she believedher self to possess sovereignty in this area.

It may be added that even if Thailand's plea of misapprehension could, in principle, be accepted, it should have been advanced shortly after Thailand's own survey of the disputed region was carried out in 1934-1935. Since then Thailand could not have been under any misapprehension.

* * *

There is finally one further aspect of the case with which the Court feels it necessary to deal. The Court considers that the acceptance of the Annex I map by the Parties caused the map to enter the treaty settlement and to become an integral part of it. It cannot be said that this process involved a departure from, and

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even a violation of, the terms of the Treaty of 1904, wherever the map line diverged from the line of the watershed, for, as the Court sees the matter, the map (whether in all respects accurate by reference to the true watershed line or not) was accepted by the Parties in 1908 and thereafter as constituting the result of the interpretation given by the two Governments to the delimitation which the Treaty itself required. In other words, the Parties at that time adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty. Even if, however, the Court were called upon to deal with the matter now as one solely of ordinary treaty interpretation, it considers that the interpretation to be given would be the same, for the following reasons.

In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious. It must be asked why the Parties in this case provided for a delimitation, instead of relying on the Treaty clause indicating that the frontier line in this region would be the watershed. There are boundary treaties which do no more than refer to a watershed line, or to a crest line, and which make no provision for any delimitation in addition. The Parties in the present case must have had a reason for taking this further step. This could only have been because they regarded a watershed indication as insufficient by itself to achieve certainty and finality. It is precisely to achieve this that delimitations and map lines are resorted to.

Various factors support the view that the primary object of the Parties in the frontier settlements of 1904-1908 was to achieve certainty and finality. From the evidence furnished to the Court, and from the statements of the Parties themselves, it is clear that the whole question of Siam's very long frontiers with French Indo-China had, in the period prior to 1904, been a cause of uncertainty, trouble and friction, engendering what was described in one contemporary document placed before the Court as a state of "growing tension" in the relations between Siam and France. The Court thinks it legitimate to conclude that an important, not to say a

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paramount object of the settlements of the 1904-1908 period (which brought about a comprehensive regulation of all outstanding frontier questions between the two countries), was to put an end to this state of tension and to achieve frontier stability on a basis of certainty and finality.

In the Franco-Siamese Boundary Treaty of 23 March 1907, the Parties recited in the preamble that they were desirous "of ensuring the final regulation of all questions relating to the common frontiers of Indo-China and Siam". A further token of the same object is to be found in the desire, of which the documentation contains ample evidence, and which was evinced by both Parties, for natural and visible frontiers. Even if, as the Court stated earlier, this is not in itself a reason for holding that the frontier must follow a natural and visible line, it does support the view that the Parties wanted certainty and finality by means of natural and visible lines.

The same view is strongly supported by the Parties' attitude over frontiers in the 1925 and 1937 Treaties. By specifically excluding frontiers from the process of revision of previous treaties, which the 1925 and 1937 Treaties otherwise effected, the Parties bore witness to the paramount importance they attached to finality in this field. Their attitude in 1925 and 1937 can properly be taken as evidence that they equally desired finality in the 1904-1908 period.

The indication of the line of the watershed in Article 1 of the 1904 Treaty was itself no more than an obvious and convenient way of describing a frontier line objectively, though in general terms. There is, however, no reason to think that the Parties attached any special importance to the line of the watershed as such, as compared with the overriding importance, in the interests of finality, of adhering to the map line as eventually delimited and as accepted by them. The Court, therefore, feels bound, as a matter of treaty interpretation, to pronounce in favour of the line as mapped in the disputed area.

* * *

Given the grounds on which the Court bases its decision, it becomes unnecessary to consider whether, at Preah Vihear, the line as mapped does in fact correspond to the true watershed line in this vicinity, or did so correspond in 1904-1908, or, if not, how the watershed line in fact runs.

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Referring finally to the Submissions presented at the end of the oral proceedings, the Court, for the reasons indicated at the beginning of the present Judgment, finds that Cambodia's first and second Submissions, calling for pronouncements on the legal status of the Annex I map and on the frontier line in the disputed region, can be entertained only to the extent that they give expression to grounds, and not as claims to be dealt with in the operative provisions of the Judgment. It finds on the other hand that Thailand, after having stated her own claim concerning sovereignty over Preah Vihear, confined herself in her Submissions at the end of the oral proceedings to arguments and denials opposing the contentions of the other Party, leaving it to the Court to word as it sees fit the reasons on which its Judgment is based.

In the presence of the claims submitted to the Court by Cambodia and Thailand, respectively, concerning the sovereignty over Preah Vihear thus in dispute between these two States, the Court finds in favour of Cambodia in accordance with her third Submission. It also finds in favour of Cambodia as regards the fourth Submission concerning the withdrawal of the detachments of armed forces.

As regards the fifth Submission of Cambodia concerning restitution, the Court considers that the request made in it does not represent any extension of Cambodia's original claim (in which case it would have been irreceivable at the stage at which it was first advanced). Rather is it, like the fourth Submission, implicit in, and consequential on, the claim of sovereignty itself. On the other hand, no concrete evidence has been placed before the Court showing in any positive way that objects of the kind mentioned in this Submission have in fact been removed by Thailand from the Temple or Temple area since Thailand's occupation of it in 1954. It is true that Thailand has not so much denied the allegation as contended that it is irreceivable. In the circumstances, however, the question of restitution is one on which the Court can only give a finding of principle in favour of Cambodia, without relating it to any particular objects.

For these reasons,

THE COURT,

by nine votes to three,

finds that the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia;

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finds in consequence,

by nine votes to three,

that Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory;

by seven votes to five,

that Thailand is under an obligation to restore to Cambodia any objects of the kind specified in Cambodia's fifth Submission which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fifteenth day of June, one thousand nine hundred and sixty-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Kingdom of Cambodia and to the Government of the Kingdom of Thailand, respectively.

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(Signed) B. WINIARSKI,
President.

(Signed) GARNIER-COIGNET,
Registrar.

Judge TANAKA and Judge MORELLI make the following Joint Declaration:

We wish to make clear the reason why, to our great regret, we were unable to concur in the majority opinion on the clause of the operative provisions of the Judgment concerning the restoration by Thailand to Cambodia of any objects which may have been removed from the Temple.

The fact that we voted against this clause of the operative provisions is in no way connected with the foundation of Cambodia's claim for the restoration of the objects in question. We did so because we think that the Court should have refrained from pronouncing on that claim since, having been made for the first time in the Submissions filed by Cambodia on 5 March 1962, it must be considered to be out of time.

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The claim as it is formulated in Cambodia's Application is directed not to the return of the Temple as such, but rather to sovereignty over the portion of territory in which the Temple is situated. It is directed, further, to one of the consequences flowing from Cambodian sovereignty over the said portion of territory, that is to say, Thailand's obligation to withdraw the detachments of armed forces it had stationed there, this consequence being explicitly indicated by Cambodia in its Application.

The other possible consequence of Cambodian sovereignty over the portion of territory in which the Temple is situated, namely, Thailand's obligation to restore to Cambodia any objects that may have been removed from the Temple, is a consequence that is not indicated in the Application. A claim for the return of the said objects cannot be considered to be implicitly contained in the claim presented by Cambodia in its Application, that claim having, as has been stated above, a completely different subject.

It is only if the claim by Cambodia had had directly as its subject the return of the Temple that it would have been possible, but then only through a liberal construction of such a claim, to consider that that claim was concerned also with objects which, having formed part of the Temple prior to the Application, had, also prior to the Application, been removed from the Temple.

Vice-President ALFARO and Judge Sir Gerald FITZMAURICE append to the Judgment of the Court statements of their Separate Opinions.

Judges MORENO QUINTANA, WELLINGTON KOO and Sir Percy SPENDER append to the Judgment of the Court statements of their Dissenting Opinions.

(Initialled) B. W.

(Initialled) G.-C.

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