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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5498/2011

IN THE MATTER OF

FAROOQ AHMAD (D) THR. LRS. ...APPELLANTS

VERSUS

PARAM HANS RAM CHANDER DAS (D)

BY LRS. & ORS. ...RESPONDENTS

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ADVOCATE ON RECORD: MR. IRSHAD AHMAD

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(DEAD) BY LRS. & ORS. ...RESPONDENTS

SUPPLEMENTARY SUBMISSIONS OF MR. SHEKHAR NAPHADE SR. ADVOCATE ON BEHALF OF APPELLANTS ABOVE NAMED

1. The Hindu party has raised for the first time the contention that the question of *Res Judicata* must be decided with reference to the 1882 CPC and more particularly with reference to Section 13 and 30 of 1882 CPC. Section 30 reads as follows:-

> "**30**. *Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of all parties so interested. But the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all the parties either by personal service or (if from the number of parties or any other case such service is not reasonably practicable) by public advertisement, as the court in each case may direct.*"

2. This contention not having been raised before High Court cannot now be urged in the present Appeals. Without prejudice to this contention, the reliance placed on Section 30 of 1882 CPC is misplaced for the following reasons:-

   i. The principal contention of Mahant Raghubar Dass was that he was competent to file the 1885 Suit.

ii. His interest in the suit property is same as claimed by the Hindus in the present suit namely-this is a site of birth of Lord Ram.

iii. As a Mahant, he was competent to represent the interest of other Hindus.

iv. In view of the order of the then Government prohibiting the Hindus from constructing any temple on account of serious law and order problem, the only possible inference is that Hindus were aware of the 1885 suit and subsequent proceedings arising therefrom and have not challenged the decree of Trial Court or First Appellate Court or Judicial Commissioner and are therefore bound by the same.

3. The factual matrix of the present case is substantially the same as in the case of **Sri Venkataramana Devaruand Ors Vs. State of Mysore, 1958 SCR 895**. In that case, an Appeal was filed by trustees of a temple who were managing the temple on behalf of Gowda Saraswath Brahmin in accordance with a scheme framed in a suit Under Section 92 CPC. That, in the year 1947, the Madras Temple Entry Authorization Act was enacted. The object of the Act was the removal of the prohibition of Harijans from entering into Hindu public temples. Section 3 (1) of the said enactment reads as under -"*Notwithstanding any law, custom or usage to the contrary, persons belonging to the excluded classes shall be entitled to enter any Hindu temple and offer worship therein in the same manner and to the same extent as Hindus in general; and no member of any excluded class shall, by reason only of such entry or worship, whether before or after the commencement of this Act, be deemed to have committed any actionable wrong or offence or be sued or prosecuted therefor.*" That after the passing of the said Act, the trustees made a representation to the Government claiming the temple to be a private one, and therefore, outside, the purview of the Act. The said plea was rejected by the Government. The trustees filed a suit for a declaration that temple was a

denominational one having been founded exclusively for Gowda Saraswath Brahmin and therefore others have no rights. Also the trustees claimed support from Art. 26(b) of the Constitution. The trial court rejected the suit. However in Appeal, the High Court while holding that public is entitled to worship in the Temple, passed a decree in favour of the trustees by reserving their right to exclude general public during certain ceremonies during which the denomination alone was entitled to attend and this granted limited rights to other Hindus. The other Hindus argued that all Hindus are not parties and therefore, the judgment is not binding on them. The same was rejected by this Hon'ble court. This Hon'ble Court while rejecting the same observed as under-

> *"Then, it is said that the members of the public are not parties to the litigation, and that they may not be bound by the result of it, and that, therefore, the matter should be set at large. Even if the members of the public are necessary parties to this litigation, that cannot stand in the way of the rights of the appellants being declared as against the parties to the action. Moreover, the suit was one to challenge the order of the government holding that all classes of Hindus are entitled to worship in the suit temple. While the action was pending, the Constitution came into force, and as against the right claimed by the plaintiffs under Art. 26(b), the Government put forward the rights of the Hindu public under Art. 25(2)(b). There has been a full trial of the issues involved, and a decision has been given, declaring the rights of the appellants and of the public. When the appellants applied for leave to appeal to this Court, that application was resisted by the Government inter alia on the ground that the decree of the High Court was a proper decree recognising the rights of all sections of the public. In view of this, there is no force in the objection that the public are not, as such, parties to the suit. It is their rights that have been agitated by the Government and not any of its rights."*

On page 921 of the Sri Venkataramana Devaruand Ors Vs. State of Mysore (Supra), this Hon'ble Court held that although all the Hindus were not parties to the suit, the judgment is binding on

them as the government was a party to the said proceedings and was protecting the interest of Hindus. It is the presence of the Government which persuaded this Hon'ble Court to hold that all Hindus are bound by the judgment even though formally all Hindus are not parties to the suit.

4. Section 30 old CPC refers to numerous parties having the same interest in one suit. This provision is not attracted as in the 1885 suit, there are no numerous parties; there was only one party namely Hindu party represented by Mahant. Even the High Court has accepted that a suit can be instituted in the name of the Mahant. He represents the Hindus who claim a right of worship/that the site is the birth place of Lord Ram.

5. The other-side has also raised the contention that Explanation V to Section 13 of the 1882 CPC (*Res Judicata*) does not contain the word "*Public Right*" as against Explanation VI to section 11 of the present CPC, which specifically refers to the public right. There is no substance in the plea of the other side that for judging the applicability of the Principle of *Res Judicata*, old code applies. The present suits are filed after the 1908 code i.e., after the coming into force of the present CPC and that the old code stood repealed. There is nothing in the present CPC which remotely suggests that the Old Code survives, for any propose whatsoever. Moreover, the principle of *Res Judicata* contained in Section 11 bars the jurisdiction of Court if the requisite conditions are satisfied. The question of jurisdiction of the court with respect to the present suits must be judged on the basis of the law as it now stands i.e., on the basis of Section 11 of the CPC along with all explanations thereto. It therefore makes no difference whether the word public was used in Explanation V to Section 13 of the old code or not.

6. In any case, in the 1885 suit, the Hindus were represented by the Mahant as stated herein above and therefore dehors Explanation V to Section 13, the Hindus as one single party were the plaintiffs and therefore, bound by the main provision contained in section 13 of 1882 CPC and/or Section 11 of the present code.

7. The reliance placed by the other side on the judgment of this **Hon'ble Court titled as V. Rajeshwari Vs. T.C. Saravanabava reported (2004) 1 SCC 551** is misplaced. The observation relied upon is actually not the ratio; it is also not an obiter. It is a passing observation. In that case, the plea of *Res Judicata* was not raised in the Trial Court. It is settled law that the Plea of *Res Judicata* must be specifically pleaded and proved by leading evidence which must include the pleadings in the former suit, the judgment in the earlier suit and the title claimed in the earlier suit. These are factual aspects and in the absence of such material, the plea of *Res Judicata* cannot be sustained. This is evident from para 15 of the said judgment.

   Moreover, this Court held that it is not necessarily *Res Judicata.* This implies that the applicability of *Res Judicata* depends upon the aforesaid factors.

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SRI VENKATARAMANA DEVARU AND OTHERS

v.

THE STATE OF MYSORE AND OTHERS

(with connected petition)

(S. R. DAS C.J., VENKATARAMA AIYAR, JAFER IMAM, A. K. SARKAR and VIVIAN BOSE JJ.)

Temple Entry, Authorisation of—Validity of enactment—Denominational right, if subject to general right of the Hindu public—'Matters of religion', Meaning of—Madras Temple Entry Authorisation Act (V of 1947), ss. 2(2), 3—Constitution of India, Arts. 25(2)(b), 26(b).

This was an appeal by the trustees of the ancient and renowned temple of Sri Venkataramana of Moolky Petta, who were managing the temple on behalf of the Gowda Saraswath Brahmins in accordance with a Scheme framed in a suit under s. 92 of the Code of Civil Procedure. After the passing of the Madras Temple Entry Authorisation Act (Madras V of 1947), which had for its object the removal of the disability of Harijans from entering into Hindu public temples, the trustees made a representation to the Government that the temple was a private one, and, therefore, outside the operation of the Act. But the Government did not accept that position and held that the Act applied to the temple. Thereupon the trustees brought the suit, out of which the appeal arises, for a declaration that the temple was not one as defined by s. 2(2) of the Act but was a denominational one having been founded exclusively for the Gowda Saraswath Brahmins. It was contended that s. 3 of the Act was void as being repugnant to Art. 26(b) of the Constitution which vouchsafed to a religious denomination the right to manage its own affairs in matters of religion. The trial court found against the appellants. It held that matters of religion did not include rituals and ceremonies. But on appeal the High Court while holding that the public were entitled to worship in the temple, passed a limited decree in favour of the appellants by reserving to the latter the right to exclude the general public during certain ceremonies in which the members of the denomination alone were entitled to participate. The question for decision was whether the rights of a religious denomination to manage its own affairs in matters of religion under Art. 26(b) can be subjected to, and controlled by, a law protected by Art. 25(2)(b) of the Constitution.

Held, that the expression "religious institutions of a public character" occurring in Art. 25(2) (b) of the Constitution contemplates not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof and includes

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denominational temples as well. While Art. 25(1) deals with the rights of individuals and Art. 26(b) with those of religious denominations, Art. 25(2) covers a much wider ground and controls both. Article 26(b) must, therefore, be read subject to Art. 25(2) (b) of the Constitution.

Although the right to enter a temple for purposes of worship protected by Art. 25(2) (b) must be construed liberally in favour of the public, that does not mean that that right is absolute and unlimited in character. It must necessarily be subject to such limitation or regulation as arises in the process of harmonising it with the right protected by Art. 26(b). Where the denominational rights claimed are not such as can nullify or substantially reduce the right conferred by Art. 25(2) (b), that Article should be so construed as to give effect to them, leaving the rights of the public in other respects unaffected.

The expression 'matters of religion' occurring in Art. 26(b) of the Constitution includes practices which are regarded by the community as part of its religion and under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand for worship and how the worship is to be conducted are all matters of religion.

The Commissioner, Hindu Religious Endowments, Madras v. *Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt*, (1954) S.C.R. 1005; *Gopala Muppanar* v. *Subramania Aiyar*, (1914) 27 M.L.J. 253 and *Sankaralinga Nadan* v. *Raja Rajeswara Dorai*, (1908) L.R. 35 I.A. 176, referred to.

Held further, that it is well settled that where the original dedication is proved to have been for the benefit of a particular community the fact that members of other communities were allowed to worship cannot lead to the inference that the dedication was also for their benefit.

Babu Bhagwan Din v. *Gir Har Saroop*, (1939) L.R. 67 I.A. 1, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 403 of 1956.

Appeal from the judgment and order dated April 11, 1956, of the Madras High Court in Appeal No. 145 of 1952, arising out of the judgment and decree dated March 31, 1951 of the Court of the Subordinate Judge, South Kanara in Original Suit No. 24 of 1949.

M. K. Nambiyar, M. L. Naik, J. B. Dadachanji, S. N. Andley, Rameshwar Nath and *P. L. Vohra*, for the appellant in C.A. No. 403 of 1956 and respondents in special leave Petition No. 327 of 57.

C. K. Daphtary, Solicitor-General of India, B. R. L. Iyengar and *T. M. Sen*, for the respondents in C.A. No. 403 of 56 and petitioner in special leave petition No. 327 of 1957.

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1957. November 8. The following Judgment of the Court was delivered by

Venkatarama Aiyar J.

VENKATARAMA AIYAR J.—The substantial question of law, which arises for decision in this appeal, is whether the right of a religious denomination to manage its own affairs in matters of religion guaranteed under Art. 26(b), is subject to, and can be controlled by, a law protected by Art. 25(2)(b), throwing open a Hindu public temple to all classes and sections of Hindus.

In the District of South Kanara which formed until recently part of the State of Madras and is now comprised in the State of Mysore, there is a group of three villages, Mannampady, Bappanad and Karnad collectively known as *Moolky Petah*; and in the village of Mannampady, there is an ancient temple dedicated to Sri Venkataramana, renowned for its sanctity. It is this institution and its trustees, who are the appellants before us. The trustees are all of them members of a sect known as Gowda Saraswath Brahmins. It is said that the home of this community in the distant past was Kashmir, that the members thereof migrated thence to Mithila and Bihar, and finally moved southwards and settled in the region around Goa in sixty villages. They continued to retain their individuality in their new surroundings, spoke a language of their own called *Konkani*, married only amongst themselves, and worshipped idols which they had brought with them. Subsequently, owing to persecution by the Portuguese, they migrated further south, some of them settling at Bhatkal and others in Cochin. Later on, a chieftain who was ruling over the Moolky area brought five of these families from Bhatkal, settled them at Mannampady, erected a temple for their benefit and installed their idol therein, which came to be known as Tirumalaivaru or Venkataramana, and endowed lands therefor. In course of time, other families of Gowda

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Saraswath Brahmins would appear to have settled in the three villages constituting Moolky, and the temple came to be managed by members of this community residing in those villages.

In 1915, a suit, O. S. No. 26 of 1915, was instituted in the Court of the Subordinate Judge of South Kanara under s. 92 of the Code of Civil Procedure for framing a scheme for this temple. Exhibit A-6 is the decree passed in that suit. It begins by declaring that "Shri Venkataramana temple of Moolky situated in the village of Mannampadi, Nadisal Mangane, Mangalore taluk is an ancient institution belonging to the Gowda Saraswath Brahmin community, *i.e.*, the commuunity to which the parties to the suit belong residing in the Moolky Petah, *i.e.*, the villages of Bappanad, Karnad and Mannampadi according to the existing survey demarcation". Clause 2 of the decree vests the general control and management of the affairs of the temple, both secular and religious, in the members of that community. Clause 3 provides for the actual management being carried on by a Board of Trustees to be elected by the members of the community aforesaid from among themselves. Then follow elaborate provisions relating to preparation of register of electors, convening of meetings of the general body and holding of elections of trustees. This decree was passed on March 9, 1921, and it is common ground that the temple has ever since been managed in accordance with the provisions of the scheme contained therein.

This was the position when the Madras Temple Entry Authorisation Act (Madras V of 1947), hereinafter referred to as the Act, was passed by the Legislature of the Province of Madras. It will be useful at this stage to set out the relevant provisions of the Act, as it is the validity of s. 3 thereof that is the main point for determination in this appeal. The preamble to the Act recites that the policy of the Provincial Government was "to remove the disabilities imposed by custom or usage on certain classes of Hindus against entry into Hindu temples in the Province which are open to the general Hindu public".

Section 2(2) defines 'temple' as "a place by whatever name known, which is dedicated to or for the benefit of or used as of right by the Hindu community in general as a place of public religious worship". Section 3 (1) enacts that,

"Notwithstanding any law, custom or usage to the contrary, persons belonging to the excluded classes shall be entitled to enter any Hindu temple and offer worship therein in the same manner and to the same extent as Hindus in general; and no member of any excluded class shall, by reason only of such entry or worship, whether before or after the commencement of this Act, be deemed to have committed any actionable wrong or offence or be sued or prosecuted therefor."

Section 6 of the Act provides that,

"If any question arises as to whether a place is or is not a temple as defined in this Act, the question should be referred to the Provincial Government and their decision shall be final, subject however to any decree passed by a competent civil court in a suit filed before it within six months from the date of the decision of the Provincial Government". It is the contention of the appellants—and that, in our opinion, is well-founded—that the true intent of this enactment as manifest in the above provisions was to remove the disability imposed on Harijans from entering into temples, which were dedicated to the Hindu public generally.

Apprehending that action might be taken to put the provisions of this Act in operation with reference to the suit temple, the trustees thereof sent a memorial to the Government of Madras claiming that it was a private temple belonging exclusively to the Gowda Saraswath Brahmins, and that it therefore did not fall within the purview of the Act. On this, the Government passed an order on June 25, 1948, Exhibit B-13, that the temple was one which was open to all Hindus generally, and that the Act would be applicable to it. Thereupon, the trustees filed the suit, out of which the present appeal arises, for a declaration that the Sri Venkataramana temple at Moolky was not a

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temple as defined in s. 2(2) of the Act. It was alleged in the plaint that the temple was founded for the benefit of the Gowda Saraswath Brahmins in Moolky Petah, that it had been at all times under their management, that they were the followers of the Kashi Mutt, and that it was the head of the Mutt that performed various religious ceremonies in the temple, and that the other communities had no rights to worship therein. The plaint was filed on February 8, 1949. On July 25, 1949, the Province of Madras filed a written statement contesting the claim. Between these two dates, the Madras Legislature had enacted the Madras Temple Entry Authorisation (Amendment) Act (Madras XIII of 1949), amending the definition of 'temple' in s. 2(2) of Act V of 1947, and making consequential amendments in the preamble and in the other provisions of the Act. According to the amended definition, a temple is "a place which is dedicated to or for the benefit of the Hindu community or any section thereof as a place of public religious worship". This Amendment Act came into force on June 28, 1949. In the written statement filed on July 25, 1949, the Government denied that the temple was founded exclusively for the benefit of the Gowda Saraswath Brahmins, and contended that the Hindu public generally had a right to worship therein, and that, therefore, it fell within the definition of temple as originally enacted. It further pleaded that, at any rate, it was a temple within the definition as amended by Act XIII of 1949, even if it was dedicated for the benefit of the Gowda Saraswath Brahmins, inasmuch as they were a section of Hindu community, and that, in consequence, the suit was liable to be dismissed.

On January 26, 1950, the Constitution came into force, and thereafter, on February 11, 1950, the plaintiffs raised the further contention by way of amendment of the plaint that, in any event, as the temple was a denominational one, they were entitled to the protection of Art. 26, that it was a matter of religion as to who were entitled to take part in worship in a temple, and that s. 3 of the Act, in so far as it provided for

the institution being thrown open to communities other than Gowda Saraswath Brahmins, was repugnant to Art. 26(b) of the Constitution and was, in consequence, void.

On these pleadings, the parties went to trial. The Subordinate Judge of South Kanara, who tried the suit, held that though the temple had been originally founded for the benefit of certain immigrant families of Gowda Saraswath Brahmins, in course of time it came to be resorted to by all classes of Hindus for worship, and that accordingly it must be held to be a temple even according to the definition of 'temple' in s. 2(2) of the Act, as it originally stood. Dealing with the contention that the plaintiffs had the right under Art. 26(b) to exclude all persons other than Gowda Saraswath Brahmins from worshipping in the temple, he held that "matters of religion" in that Article had reference to religious beliefs and doctrines, and did not include rituals and ceremonies, and that, in any event, Arts. 17 and 25(2) which had been enacted on grounds of high policy must prevail. He accordingly dismissed the suit with costs. Against this decision, the plaintiffs preferred an appeal to the High Court of Madras, A. S. No. 145 of 1952.

It is now necessary to refer to another litigation *inter partes*, the result of which has a material bearing on the issues which arise for determination before us. In 1951, the Madras Legislature enacted the Madras Hindu Religious and Charitable Endowments Act, (Madras XIX of 1951) vesting in the State the power of superintendence and control of temples and Mutts. The Act created a hierarchy of officials to be appointed by the State, and conferred on them enormous powers of control and even management of institutions. Consequent on this legislation, a number of writ applications were filed in the High Court of Madras challenging the validity of the provisions therein as repugnant to Arts. 19, 25 and 26 of the Constitution, and one of them was Writ Petition No. 668 of 1951 by the trustees of Sri Venkataramana Temple at Moolky. They claimed that the institution being a denominational one, it had a right under

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Art. 26(b) to manage its own affairs in matters of religion, without interference from any outside authority, and that the provisions of the Act were bad as violative of that right. By its judgment dated December 13, 1951, the High Court held that the Gowda Saraswath Brahmin community was a section of the Hindu public, that the Venkataramana Temple at Moolky was a denominational temple founded for its benefit, and that many of the provisions of the Act infringed the right granted by Art. 26(b) and were void. Vide *Devaraja Shenoy* v. *State of Madras* (1). Against this judgment, the State of Madras preferred an appeal to this Court, Civil Appeal No. 15 of 1953, but ultimately, it was withdrawn and dismissed on September 30, 1954. It is the contention of the appellants that by reason of the decision given in the above proceedings, which were *inter partes*, the issue as to whether the temple is a denominational one must be held to have been concluded in their favour.

To resume the history of the present litigation: Subsequent to the dismissal of Civil Appeal No. 15 of 1953 by this Court, the appeal of the plaintiffs, A.S. No. 145 of 1952, was taken up for hearing, and on the application of the appellants, the proceedings in the writ petition were admitted as additional evidence. On a review of the entire materials on record, including those relating to the proceedings in Writ Petition No. 668 of 1951, the learned Judges held it established that the Sri Venkataramana Temple was founded for the benefit of the Gowda Saraswath Brahmin community, and that it was therefore a denominational one. Then, dealing with the contention that s. 3 of the Act was in contravention of Art. 26(b), they held that as a denominational institution would also be a public institution, Art. 25(2)(b) applied, and that, thereunder, all classes of Hindus were entitled to enter into the temple for worship. But they also held that the evidence established that there were certain religious ceremonies and occasions during which the Gowda Saraswath Brahmins alone were entitled to participate, and that that right was protected by Art. 26(b).

(1) (1952) 2 M.L.J. 481.

They accordingly reserved the rights of the appellants to exclude all members of the public during those ceremonies and on those occasions, and these were specified in the decree. Subject to this modification, they dismissed the appeal. Against this judgment the plaintiffs have preferred Civil Appeal No. 403 of 1956 on a certificate granted by the High Court.

There is also before us Petition No. 327 of 1957 for leave to appeal under Art. 136. That has reference to the modifications introduced by the decree of the High Court in favour of the appellants. It must be mentioned that while the appeal was pending, there was a reorganisation of the States, and the District of South Kanara in which the temple is situated, was included in the State of Mysore. The State of Mysore has accordingly come on record in the place of the State of Madras, and is contesting this appeal, and it is that State that has now applied for leave to appeal against the modifications. The application is very much out of time, and Mr. M. K. Nambiar for the appellants vehemently opposes its being entertained at this stage. It is pointed out that not merely had the State of Madras not filed any application for leave to appeal to this Court against the decision of the Madras High Court but that it accepted it as correct and actually opposed the grant of leave to the appellants on the ground that the points involved were pure questions of fact, that no substantial question of law was involved, and that the judgment of the High Court had recognised the rights of all sections of the Hindu public. It is argued that when a party acquiesces in a judgment and deliberately allows the time for filing an appeal to lapse, it would not be a sufficient ground to condone the delay that he has subsequently changed his mind and desires to prefer an appeal. The contention is clearly sound, and we should have given effect to it, were it not that the result of this litigation would affect the rights of members of the public, and we consider it just that the matter should be decided on the merits, so that the controversies involved might be finally settled. We have accordingly condoned the delay, and have heard counsel on this application.

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In view of this, it is unnecessary to consider the questions discussed at the Bar as to the scope of Art. 132, who are entitled to appeal on the strength of a certificate granted under that Article, and the forum in which the appeal should be lodged. It is sufficient to say that in this case no appeal, was, in fact, filed by the respondent.

On the arguments addressed before us, the following questions fall to be decided:

(1) Is the Sri Venkataramana Temple at Moolky, a temple as defined in s. 2 (2) of Madras Act V of 1947?

(2) If it is, is it a denominational temple?

(3) If it is a denominational temple, are the plaintiffs entitled to exclude all Hindus other than Gowda Saraswath Brahmins from entering into it for worship, on the ground that it is a matter of religion within the protection of Art. 26(b) of the Constitution?

(4) If so, is s. 3 of the Act valid on the ground that it is a law protected by Art. 25 (2) (b), and that such a law prevails against the right conferred by Art. 26 (b); and

(5) If s. 3 of the Act is valid, are the modifications in favour of the appellants made by the High Court legal and proper?

On the first question, the contention of Mr. M. K. Nambiar for the appellants is that the temple in question is a private one, and therefore falls outside the purview of the Act. This plea, however, was not taken anywhere in the pleadings. The plaint merely alleges that the temple was founded for the benefit of the Gowda Saraswath Brahmins residing in Moolky Petah. There is no averment that it is a private temple. It is true that at the time when the suit was instituted, the definition of 'temple' as it then stood, took in only institutions which were dedicated to or for the benefit of the Hindu public in general, and it was therefore sufficient for the plaintiffs to aver that the suit temple was not one of that character, and that it would have made no difference in the legal position whether the temple was a private one, or whether it was intended for the benefit of a section of the public. But then, the Legislature amended the definition of 'temple'

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by Act XIII of 1949, and brought within it even institutions dedicated to or for the benefit of a section of the public; and that would have comprehended a temple founded for the benefit of the Gowda Saraswath Brahmins but not a private temple. In the written statement which was filed by the Government, the amended definition of 'temple' was in terms relied on in answer to the claim of the plaintiffs. In that situation, it was necessary for the plaintiffs to have raised the plea that the temple was a private one, if they intended to rely on it. Far from putting forward such a plea, they accepted the stand taken by the Government in their written statement, and simply contended that as the temple was a denominational one, they were entitled to the protection of Art. 26 (b). Indeed, the Subordinate Judge states in para. 19 of the judgment that it was admitted by the plaintiffs that the temple came within the purview of the definition as amended by Act XIII of 1949.

Mr. M. K. Nambiar invited our attention to Exhibit A-2, which is a copy of an award dated November 28, 1847, wherein it is recited that the temple was originally founded for the benefit of five families of Gowda Saraswath Brahmins. He also referred us to Exhibit A-6, the decree in the scheme suit, O. S. No. 26 of 1915, wherein it was declared that the institution belonged to that community. He contended on the basis of these documents and of other evidence in the case that whether the temple was a private or public institution was purely a matter of legal inference to be drawn from the above materials, and that, notwithstanding that the point was not taken in the pleadings, it could be allowed to be raised as a pure question of law. We are unable to agree with this submission. The object of requiring a party to put forward his pleas in the pleadings is to enable the opposite party to controvert them and to adduce evidence in support of his case. And it would be neither legal nor just to refer to evidence adduced with reference to a matter which was actually in issue and on the basis of that evidence, to come to a finding on a matter which was not in issue, and decide the rights of parties on the

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basis of that finding. We have accordingly declined to entertain this contention. We hold, agreeing with the Courts below, that the Sri Venkataramana Temple at Mookly is a public temple, and that it is within the operation of Act V of 1947.

(2) The next question is whether the suit temple is a denominational institution. Both the Courts below have concurrently held that at the inception the temple was founded for the benefit of Gowda Saraswath Brahmins; but the Subordinate Judge held that as in course of time public endowments came to be made to the temple and all classes of Hindus were taking part freely in worship therein, it might be presumed that they did so as a matter of right, and that, therefore, the temple must be held to have become dedicated to the Hindu public generally. The learned Judges of the High Court, however, came to a different conclusion. They followed the decision in *Devaraja Shenoy* v. *State of Madras* (*supra*), and held that the temple was a denominational one. The learned Solicitor-General attacks the correctness of this finding on two grounds. He firstly contends that even though the temple might have been dedicated to the Gowda Saraswath Brahmins, that would make it only a communal and not a denominational institution, unless it was established that there were religious tenets and practices special to the community, and that that had not been done. Now, the facts found are that the members of this community migrated from *Gowda Desa* first to the Goa region and then to the south, that they carried with them their idols, and that when they were first settled in Moolky, a temple was founded and these idols were installed therein. We are therefore concerned with the Gowda Saraswath Brahmins not as a section of a community but as a sect associated with the foundation and maintenance of the Sri Venkataramana Temple, in other words, not as a mere denomination, but as a religious denomination. From the evidence of P. W. 1, it appears that the Gowda Saraswath Brahmins have three *Gurus*, that those in Moolky Petah are followers of the head of the Kashi Mutt, and that it is he that performs some of the

important ceremonies in the temple. Exhibit A is a document of the year 1826-27. That shows that the head of the Kashi Mutt settled the disputes among the Archakas, and that they agreed to do the puja under his orders. The uncontradicted evidence of P. W. 1 also shows that during certain religious ceremonies, persons other than Gowda Saraswath Brahmins have been wholly excluded. This evidence leads irresistibly to the conclusion that the temple is a denominational one, as contended for by the appellants.

The second ground urged on behalf of the respondent is that the evidence discloses that all communities had been freely admitted into the temple, and that though P. W. 1 stated that persons other than Gowda Saraswath Brahmins could enter only with the permission of the trustees, there was no instance in which such permission was refused. It was contended that the inference to be drawn from this was that the Hindu public generally had a right to worship in the temple. The law on the subject is well settled. When there is a question as to the nature and extent of a dedication of a temple, that has to be determined on the terms of the deed of endowment if that is available, and where it is not, on other materials legally admissible; and proof of long and uninterrupted user would be cogent evidence of the terms thereof. Where, therefore, the original deed of endowment is not available and it is found that all persons are freely worshipping in the temple without let or hindrance, it would be a proper inference to make that they do so as a matter of right, and that the original foundation was for their benefit as well. But where it is proved by production of the deed of endowment or otherwise that the original dedication was for the benefit of a particular community, the fact that members of other communities were allowed freely to worship cannot lead to the inference that the dedication was for their benefit as well. For, as observed in *Babu Bhagwan Din* v. *Gir Har Saroop* (1), "it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away". On the findings of the Court

(1) (1939) L. R. 67 I. A. 1.

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below that the foundation was originally for the benefit of the Gowda Saraswath Brahmin community, the fact that other classes of Hindus were admitted freely into the temple would not have the effect of enlarging the scope of the dedication into one for the public generally. On a consideration of the evidence, we see no grounds for differing from the finding given by the learned Judges in the court below that the suit temple is a denominational temple founded for the benefit of the Gowda Saraswath Brahmins, supported as it is by the conclusion reached by another Bench of learned Judges in *Devaraja Shenoy* v. *State of Madras* (supra). In this view, there is no need to discuss whether this issue is *res judicata* by reason of the decision in Writ Petition No. 668 of 1951.

(3) On the finding that the Sri Venkataramana Temple at Moolky is a denominational institution founded for the benefit of the Gowda Saraswath Brahmins, the question arises whether the appellants are entitled to exclude other communities from entering into it for worship on the ground that it is a matter of religion within the protection of Art. 26 (b). It is argued by the learned Solicitor-General that exclusion of persons from entering into a temple cannot *ipso facto* be regarded as a matter of religion, that whether it is so must depend on the tenets of the particular religion which the institution in question represents, and that there was no such proof in the present case. Now, the precise connotation of the expression "matters of religion" came up for consideration by this Court in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1), and it was held therein that it embraced not merely matters of doctrine and belief pertaining to the religion but also the practice of it, or to put it in terms of Hindu theology, not merely its *Gnana* but also its *Bakti* and *Karma Kandas*. The following observations of Mukherjea J., (as he then was) are particularly apposite to the present discussion:

"In the first place, what constitutes the essential

(1) [1954] S.C.R. 1005.

part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of article 26 (b)."

It being thus settled that matters of religion in Art. 26 (b) include even practices which are regarded by the community as part of its religion, we have now to consider whether exclusion of a person from entering into a temple for worship is a matter of religion according to Hindu Ceremonial Law. There has been difference of opinion among the writers as to whether image worship had a place in the religion of the Hindus, as revealed in the Vedas. On the one hand, we have hymns in praise of Gods, and on the other, we have highly philosophical passages in the *Upanishads* describing the Supreme Being as omnipotent, omnicient and omnipresent and transcending all names and forms. When we come to the *Puranas*, we find a marked change. The conception had become established of Trinity of Gods, Brahma, Vishnu and Siva as manifestations of the three aspects of creation, preservation and destruction attributed to the Supreme Being in the Upanishads, as, for example, in the following passage in the *Taittiriya Upanishad, Brigu Valli*, First *Anuvaka*:

"That from which all beings are born, by which they live and into which they enter and merge."

The Gods have distinct forms ascribed to them and their worship at home and in temples is ordained as certain means of attaining salvation. These injunctions have had such a powerful hold over the minds of the

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people that daily worship of the deity in temple came to be regarded as one of the obligatory duties of a Hindu. It was during this period that temples were constructed all over the country dedicated to Vishnu, Rudra, Devi, Skanda, Ganesha and so forth, and worship in the temple can be said to have become the practical religion of all sections of the Hindus ever since. With the growth in importance of temples and of worship therein, more and more attention came to be devoted to the ceremonial law relating to the construction of temples, installation of idols therein and conduct of worship of the deity, and numerous are the treatises that came to be written for its exposition. These are known as *Agamas*, and there are as many as 28 of them relating to the *Saiva* temples, the most important of them being the *Kamikagama*, the *Karanagama* and the *Suprubedagama*, while the *Vikhanasa* and the *Pancharatra* are the chief *Agamas* of the *Vaishnavas*. These *Agamas*, contain elaborate rules as to how the temple is to be constructed, where the principal deity is to be consecrated, and where the other *Devatas* are to be installed and where the several classes of worshippers are to stand and worship. The following passage from the judgment of Sadasiva Aiyar J. in *Gopala Muppanar* v. *Subramania Aiyar* (1), gives a summary of the prescription contained in one of the *Agamas* :

"In the Nirvachanapaddhathi it is said that Sivadwijas should worship in the Garbagriham, Brahmins from the ante chamber or Sabah Mantabam, Kshatriyas, Vysias and Sudras from the Mahamantabham, the dancer and the musician from the Nrithamantabham east of the Mahamantabham and that castes yet lower in scale should content themselves with the sight of the Gopuram."

The other *Agamas* also contain similar rules.

According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship, and purificatory ceremonies (known as *Samprokshana*) have to be performed for restoring the sanctity of the shrine. Vide judgment of

(1) (1914) 27 M.L.J. 253.

Sadasiva Aiyar J. in *Gopala Muppanar* v. *Subramania Aiyar* (*supra*). In *Sankaralinga Nadan* v. *Raja Rajeswara Dorai* (1), it was held by the Privy Council affirming the judgment of the Madras High Court that a trustee who agreed to admit into the temple persons who were not entitled to worship therein, according to the Agamas and the custom of the temple was guilty of breach of trust. Thus, under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion. The conclusion is also implicit in Art. 25 which after declaring that all persons are entitled freely to profess, practice and propagate religion, enacts that this should not affect the operation of any law throwing open Hindu religious institutions of a public character to all classes and sections of Hindus. We have dealt with this question at some length in view of the argument of the learned Solicitor-General that exclusion of persons from temple has not been shown to be a matter of religion with reference to the tenets of Hinduism. We must accordingly hold that if the rights of the appellants have to be determined solely with reference to Art. 26 (b), then s. 3. of Act V of 1947, should be held to be bad as infringing it.

(4) That brings us on to the main question for determination in this appeal, whether the right guaranteed under Art. 26 (b) is subject to a law protected by Art. 25 (2) (b) throwing the suit temple open to all classes and sections of Hindus. We must now examine closely the terms of the two articles. Art. 25, omitting what is not material, is as follows:

"(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

.....

(1) (1908) L.R. 35 I.A. 176.

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(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". Article 26 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."

We have held that matters of religion in Art. 26(b) include the right to exclude persons who are not entitled to participate in the worship according to the tenets of the institution. Under this Article, therefore, the appellants would be entitled to exclude all persons other than Gowda Saraswath Brahmins from entering into the temple for worship. Article 25(2)(b) enacts that a law throwing open public temples to all classes of Hindus is valid. The word 'public' includes, in its ordinary acceptation, any section of the public, and the suit temple would be a public institution within Art. 25(2)(b), and s. 3 of the Act would therefore be within its protection. Thus, the two Articles appear to be apparently in conflict. Mr. M. K. Nambiar contends that this conflict could be avoided if the expression "religious institutions of a public character" is understood as meaning institutions dedicated to the Hindu community in general, though some sections thereof might be excluded by custom from entering into them, and that, in that view, denominational institutions founded for the benefit of a section of Hindus would fall outside the purview of Art. 25(2)(b) as not being dedicated for the Hindu community in general. He sought support for this contention in the law relating to the entry of excluded classes into Hindu temples and in the history of legislation with reference thereto, in Madras.

According to the Agamas, a public temple enures,

where it is not proved to have been founded for the benefit of any particular community, for the benefit of all Hindus including the excluded classes. But the extent to which a person might participate in the worship therein would vary with the community in which he was born. In *Venkatachalapathi* v. *Subbarayadu* (1), the following statement of the law was quoted by the learned Judges with apparent approval:

"Temple, of course, is intended for all castes, but there are restrictions of entry. Pariahs cannot go into the court of the temple even. Sudras and Baniyas can go into the hall of the temple. Brahmins can go into the holy of the holies."

In *Gopala Muppanar* v. *Subramania Aiyar* (*supra*), Sadasiva Aiyar J. observed as follows at p. 258:

"It is clear from the above that temples were intended for the worship of people belonging to all the four castes without exception. Even outcastes were not wholly left out of the benefits of temple worship, their mode of worship being however made subject to severe restrictions as they could not pass beyond the Dwajastambam (and some times not beyond the temple outer gate) and they could not have a sight of the images other than the procession images brought out at the times of festivals."

The true position, therefore, is that the excluded classes were all entitled to the benefit of the dedication, though their actual participation in the worship was insignificant. It was to remove this anomaly that legislation in Madras was directed for near a decade. First came the Malabar Temple Entry Act (Madras XX of 1938). Its object was stated to be "to remove the disabilities imposed by custom and usage on certain classes of Hindus in respect of their entry into, and offering worship in, Hindu temples". Section 2(4) defined 'temple' as "a place which is used as a place of public worship by the Hindu community generally except excluded classes.....". Sections 4 and 5 of the Act authorised the trustees to throw such temples open to persons belonging to the excluded classes under

(1) (1890) I.L.R. 13 Mad. 293.

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certain conditions. This Act extended only to the District of Malabar. Next came the Madras Temple Entry Authorisation and Indemnity Act (Madras Act XXII of 1939). The preamble to the Act states that "there has been a growing volume of public opinion demanding the removal of disabilities imposed by custom and usage on certain classes of Hindus in respect of their entry into and offering worship in Hindu temples", and that "it is just and desirable to authorize the trustees in charge of such temples to throw them open to.....the said classes". Section 3 of the Act authorised the trustees to throw open the temples to them. This Act extended to the whole of the Province of Madras. Then we come to the Act, which has given rise to this litigation, Act V of 1947. It has been already mentioned that, as originally passed, its object was to lift the ban on the entry into temples of communities which are excluded by custom from entering into them, and 'temple' was also defined as a place dedicated to the Hindus generally.

Now, the contention of Mr. Nambiar is that Art. 25(2)(b) must be interpreted in the background of the law as laid down in *Gopala Muppanar* v. *Subramania Aiyar* (supra) and the definition of 'temple' given in the statutes mentioned above, and that the expression "religious institutions of a public character" must be interpreted as meaning institutions which are dedicated for worship to the Hindu community in general, though certain sections thereof were prohibited by custom from entering into them, and that, in that view, denominational temples will fall outside Art. 25(2)(b). There is considerable force in this argument. One of the problems which had been exercising the minds of the Hindu social reformers during the period preceding the Constitution was the existence in their midst of communities which were classed as untouchables. A custom which denied to large sections of Hindus the right to use public roads and institutions to which all the other Hindus had a right of access, purely on grounds of birth could not be considered reasonable and defended on any sound democratic

principle, and efforts were being made to secure its abolition by legislation. This culminated in the enactment of Art. 17, which is as follows:

"'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."

Construing Art. 25(2)(b) in the light of Art. 17, it is arguable that its object was only to permit entry of the excluded classes into temples which were open to all other classes of Hindus, and that that would exclude its application to denominational temples. Now, denominational temples are founded, *ex hypothesi*, for the benefit of particular sections of Hindus, and so long as the law recognises them as valid—and Art. 26 clearly does that—what reason can there be for permitting entry into them of persons other than those for whose benefit they were founded? If a trustee diverts trust funds for the benefit of persons who are not beneficiaries under the endowment, he would be committing a breach of trust, and though a provision of the Constitution is not open to attack on the ground that it authorises such an act, is it to be lightly inferred that Art. 25(2)(b) validates what would, but for it, be a breach of trust and for no obvious reasons of policy, as in the case of Art. 17? There is, it should be noted, a fundamental distinction between excluding persons from temples open for purposes of worship to the Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not objects within the benefit of the foundation. The former will be hit by Art. 17 and the latter protected by Art. 26, and it is the contention of the appellants that Art. 25(2)(b) should not be interpreted as applicable to both these categories and that it should be limited to the former. The argument was also advanced as further supporting this view, that while Art. 26 protects denominational institutions of not merely Hindus but of all communities such as Muslims and Christians, Art. 25(2)(b) is limited in its operation to Hindu temples, and that it could

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not have been intended that there should be imported into Art. 26(b) a limitation which would apply to institutions of one community and not of others. Article 26, it was contended, should therefore be construed as falling wholly outside Art. 25(2)(b), which should be limited to institutions other than denominational ones.

The answer to this contention is that it is impossible to read any such limitation into the language of Art. 25 (2)(b). It applies in terms to all religious institutions of a public character without qualification or reserve. As already stated, public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprised therein. The language of the Article being plain and unambiguous, it is not open to us to read into it limitations which are not there, based on *a priori* reasoning as to the probable intention of the Legislature. Such intention can be gathered only from the words actually used in the statute; and in a Court of law, what is unexpressed has the same value as what is unintended. We must therefore hold that denominational institutions are within Art. 25 (2) (b).

It is then said that if the expression "religious institutions of a public character" in Art. 25 (2) (b) is to be interpreted as including denominational institutions, it would clearly be in conflict with Art. 26 (b), and it is argued that in that situation, Art. 26 (b) must, on its true construction, be held to override Art. 25 (2) (b). Three grounds were urged in support of this contention, and they must now be examined. It was firstly argued that while Art. 25 was stated to be "subject to the other provisions of this Part" (Part III), there was no such limitation on the operation of Art. 26, and that, therefore, Art. 26(b) must be held to prevail over Art. 25 (2) (b). But it has to be noticed that the limitation "subject to the other provisions of this Part" occurs only in cl. (1) of Art. 25 and not in cl. (2). Clause (1) declares the rights of all persons to freedom of conscience and the right freely to profess, practise and propagate religion. It is this right that

is subject to the other provisions in the Fundamental Rights Chapter. One of the provisions to which the right declared in Art. 25 (1) is subject is Art. 25 (2). A law, therefore, which falls within Art. 25 (2) (b) will control the right conferred by Art. 25 (1), and the limitation in Art. 25 (1) does not apply to that law.

It is next contended that while the right conferred under Art. 26(d) is subject to any law which may be passed with reference thereto, there is no such restriction on the right conferred by Art. 26(b). It is accordingly argued that any law which infringes the right under Art. 26 (b) is invalid, and that s. 3 of Act V of 1947 must accordingly be held to have become void. Reliance is placed on the observations of this Court in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (supra) at page 1023, in support of this position. It is undoubtedly true that the right conferred under Art. 26(b) cannot be abridged by any legislation, but the validity of s. 3 of Act V of 1947 does not depend on its own force but on Art. 25(2)(b) of the Constitution. The very Constitution which is claimed to have rendered s. 3 of the Madras Act void as being repugnant to Art. 26(b) has, in Art. 25(2)(b), invested it with validity, and, therefore, the appellants can succeed only by establishing that Art. 25(2)(b) itself is inoperative as against Art. 26(b).

And lastly, it is argued that whereas Art. 25 deals with the rights of individuals, Art. 26 protects the rights of denominations, and that as what the appellants claim is the right of the Gowda Saraswath Brahmins to exclude those who do not belong to that denomination, that would remain unaffected by Art. 25(2)(b). This contention ignores the true nature of the right conferred by Art. 25(2)(b). That is a right conferred on "all classes and sections of Hindus" to enter into a public temple, and on the unqualified terms of that Article, that right must be available, whether it is sought to be exercised against an individual under Art. 25(1) or against a denomination under Art. 26(b). The fact is that though Art. 25(1) deals with rights of individuals, Art. 25(2) is much wider in

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its contents and has reference to the rights of communities, and controls both Art. 25(1) and Art. 26(b).

The result then is that there are two provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted, then Art. 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Art. 26(b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Art. 25(2)(b) will prevail. While, in the former case, Art. 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Art. 26(b). We must accordingly hold that Art. 26(b) must be read subject to Art. 25(2)(b).

(5) It remains to deal with the question whether the modifications made in the decree of the High Court in favour of the appellants are valid. Those modifications refer to various ceremonies relating to the worship of the deity at specified times each day and on specified occasions. The evidence of P. W. I establishes that on those occasions, all persons other than Gowda Saraswath Brahmins were excluded from participation thereof. That evidence remains uncontradicted, and has been accepted by the learned Judges, and the correctness of their finding on this point has not been challenged before us. It is not in dispute that the modifications aforesaid relate, according to the view taken by this Court in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*

(supra), to matters of religion, being intimately connected with the worship of the deity. On the finding that the suit temple is a denominational one, the modifications made in the High Court decree would be within the protection of Art. 26(b).

The learned Solicitor-General for the respondents assails this portion of the decree on two grounds. He firstly contends that the right to enter into a temple which is protected by Art. 25(2)(b) is a right to enter into it for purposes of worship, that that right should be liberally construed, and that the modifications in question constitute a serious invasion of that right, and should be set aside as unconstitutional. We agree that the right protected by Art. 25(2)(b) is a right to enter into a temple for purposes of worship, and that further it should be construed liberally in favour of the public. But it does not follow from this that that right is absolute and unlimited in character. No member of the Hindu public could, for example, claim as part of the rights protected by Art. 25(2)(b) that a temple must be kept open for worship at all hours of the day and night, or that he should personally perform those services, which the Archakas alone could perform. It is again a well-known practice of religious institutions of all denominations to limit some of its services to persons who have been specially initiated, though at other times, the public in general are free to participate in the worship. Thus, the right recognised by Art. 25(2)(b) must necessarily be subject to some limitations or regulations, and one such limitation or regulation must arise in the process of harmonising the right conferred by Art. 25(2)(b) with that protected by Art. 26(b).

We have held that the right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Art. 26(b), must yield to the overriding right declared by Art. 25(2)(b) in favour of the public to enter into a temple for worship. But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from certain religious services, they being limited by the rules of

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the foundation to the members of the denomination, then the question is not whether Art. 25(2)(b) overrides that right so as to extinguish it, but whether it is possible—so to regulate the rights of the persons protected by Art. 25(2)(b) as to give effect to both the rights. If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Art. 25(2)(b), then of course, on our conclusion that Art. 25(2)(b) prevails as against Art. 26(b), the denominational rights must vanish. But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Art. 25(2)(b) as to give effect to Art. 26(b) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected.

The question then is one of fact as to whether the rights claimed by the appellants are strictly denominational in character, and whether after giving effect to them, what is left to the public of the right of worship is substantial. That the rights allowed by the High Court in favour of the appellants are purely denominational clearly appears from the evidence on record. P.W. 1 put forward two distinct rights on behalf of the Gowda Saraswath Brahmins. He firstly claimed that no one except members of his community had at any time the right to worship in the temple except with their permission; but he admitted that the members of the public were, in fact, worshipping and that permission had never been refused. This right will be hit by Art. 25 (2) (b), and cannot be recognised. P.W. 1 put forward another and distinct right, namely, that during certain ceremonies and on special occasions, it was only members of the Gowda Saraswath Brahmin community that had the right to take part therein, and that on those occasions, all other persons would be excluded. This would clearly be a denominational right. Then, the question is whether if this right is recognised, what is left to the public of their

right under Art. 25(2)(b) is substantial. The learned Solicitor-General himself conceded that even apart from the special occasions reserved for the Gowda Saraswath Brahmins, the other occasions of worship were sufficiently numerous and substantial, and we are in agreement with him. On the facts, therefore, it is possible to protect the rights of the appellants on those special occasions, without affecting the substance of the right declared by Art. 25(2)(b); and, in our judgment, the decree passed by the High Court strikes a just balance between the rights of the Hindu public under Art. 25(2)(b) and those of the denomination of the appellants under Art. 26(b) and is not open to objection.

Then, it is said that the members of the public are not parties to the litigation, and that they may not be bound by the result of it, and that, therefore, the matter should be set at large. Even if the members of the public are necessary parties to this litigation, that cannot stand in the way of the rights of the appellants being declared as against the parties to the action. Moreover, the suit was one to challenge the order of the Government holding that all classes of Hindus are entitled to worship in the suit temple. While the action was pending, the Constitution came into force, and as against the right claimed by the plaintiffs under Art. 26(b), the Government put forward the rights of the Hindu public under Art. 25 (2)(b). There has been a full trial of the issues involved, and a decision has been given, declaring the rights of the appellants and of the public. When the appellants applied for leave to appeal to this Court, that application was resisted by the Government *inter alia* on the ground that the decree of the High Court was a proper decree recognising the rights of all sections of the public. In view of this, there is no force in the objection that the public are not, as such, parties to the suit. It is their rights that have been agitated by the Government and not any of its rights.

In the result, both the appeal and the application for special leave to appeal must be dismissed.

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The parties will bear their own costs throughout. The appellants will take their costs out of the temple funds.

Appeals Dismissed.

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November 8.

NOHIRIA RAM

v.

THE UNION OF INDIA AND OTHERS

(with connected appeal)

(S. R. DAS C. J., VENKATARAMA AIYAR, S. K. DAS, A. K. SARKAR and VIVIAN BOSE JJ.)

Civil Servant—Cadre—Additional post to regular establishment—Whether an integral part of regular Cadre—Creation of post outside Cadre—Competence—Transfer of incumbent of such post on foreign service—Effect—Fundamental Rules, Rr. 9(4), 111, 113, 127—Civil Services (Classification, Control and Appeal) Rules, rr. 24, 44.

The appellant was originally employed as a civilian clerk in the Royal Air Force, Quetta, but subsequently on application made by him to the Director General of Indian Medical Service, he was appointed as an additional clerk in the office of the Director General to deal with the work of the Indian Research Fund Association on the understanding that the average cost of the appointment together with leave and pensionary contributions thereon was to be recovered from the Association. The Public Service Commission approved of the appointment subject to the condition that this would not give him any claim to appointment in the Central Secretariat or its attached offices. On June 12, 1930, the appellant was confirmed in the additional post with effect from April 1, 1930, and on April 10, 1931, he was transferred on "foreign service" under the Indian Research Fund Association, where he continued to serve till September 17, 1944. As a result of certain representations made by him in which he submitted that the post which he held was a permanent post in the regular establishment of the Director General, Indian Medical Service, Government decided that while continuing to hold the extra-cadre post which was originally sanctioned for the work of the Indian Research Fund Association, he would in future be employed on ordinary work in the office of the Director General, but would continue to be subject to the existing disqualifications, namely, that he would have no claim to appointment in the regular cadre of the ministerial establishment of the office.