PETITIONER:
NARAYAN BHAGWANTRAO GOSAVIBALAJIWALE

Vs.

RESPONDENT:
GOPAL VINAYAK GOSAVI AND OTHERS

DATE OF JUDGMENT:
22/09/1959

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
DAS, SUDHI RANJAN (CJ)
DAS, S.K.

CITATION:
1960 AIR 100 1960 SCR (1) 773
CITATOR INFO :
R 1964 SC 136 (11)
R 1965 SC 364 (238)
R 1966 SC1457 (17)
R 1970 SC2025 (16)
R 1976 SC 871 (33,34)
R 1981 SC 798 (10)
RF 1992 SC1110 (20,29)

ACT:
Charitable and Religious Trust-Test-Inference drawn from meaning of-Admission, evidentiary value of -Frame of suit-Deity, if a necessary party-Charitable and Religious Trusts Act, 1920 (14 of 1920), s. 5(3).

HEADNOTE:
The question for determination in this appeal, arising out of a suit filed by the appellant under s. 5(3) of the Charitable and Religious Trusts, Act, 1920, was whether the ancient temple of Shri Balaji Venkatesh at Nasik and its Sansthan constituted a charitable and religious trust within the meaning of the Act. The deity was Swayambhu and revealed itself in a dream to one Ganapati Maharaj who, at its behest, brought the deity from the river Tambraparni and installed it in his house. Ganapati's son Timmaya, who removed the deity to Nasik, took the idol to the courts of Rulers and acquired the properties in suit consisting of lands and cash. Timmaya's eldest son obtained an extensive plot of land as a gift from the Peshwa and thereon built a vast temple with a Sabha Mandap which could accommodate no less than 600 persons and installed the deity in the first floor with a staircase leading straight to it. The Hindu public has been worshipping at the temple for more than 200 years and there was no evidence to show that they had ever been excluded from it and any gift had ever been refused. The ceremonies performed in the temple were appropriate to a public deity. It was admitted by the sons of Timmaya in Tahanama, executed by them in 1774, that the Inam villages were granted for the worship of the deity and the temple belonged to the Sansthan, none of them having any share in it. In the Tharav Yadi of 1800, the maintenance allowance provided by the said Tahanama for the different branches of

the family was described as 'Vetan'. The Inam Commissioner, functioning under Act 11 of 1852, recorded the Inam villages as permanently held Debasthan inams at the instance of the then Sthanic and on the basis of original sanads filed by him, reversing the decision of the Assistant Inam Commissioner who had recorded them as personal inams. Those sanads were not filed in the suit. In 1931 the appellant published a history of the Sansthan wherein it was clearly stated that the Sansthan was not a private or family property but was the property of the deity, the members of the family being merely the managers. The deity was not made a party to the suit although representatives of the Hindu public were joined as
98
774
parties under s. 1, r. 8 of the Code of Civil Procedure. The High Court, while it concurred with the trial judge in holding that the deity was a public deity and that its Sansthan constituted a public trust, was, however, inclined to hold that some of the properties might be personal properties of the appellant but refused to grant any such declaration on the ground that no effective decree could be passed against the deity in its absence, It was contended on behalf of the appellant in this court that the courts below had misconstrued the document and were wrong in drawing the inferences they did and that the burden of proof had been wrongly placed on the appellant to prove by positive evidence that the deity was a family deity and the properties his private properties.

Held, that the courts below were right in coming to the conclusion they reached, and the appeal must fail.

A mistaken inference drawn from documents is no less a finding of fact, if there is no misconstruction of the documents and no misconstruction of documents having been proved, the appellant could not succeed.

An admission is the best evidence that an opposing party can rely upon, and, although it is not conclusive, is often decisive of the matter unless it can be successfully withdrawn or proved to be erroneous.

The expression " burden of proof " means one of two things (1) that a party has to prove an allegation before it is entitled to a judgment in its favour, or (2) that the one or the other of the two contending parties has to introduce evidence on a contested issue. The question of onus is material only where the party on which it is placed would eventually lose if it failed to discharge the same. Where issues are, however, joined, evidence is led and such evidence can be weighed in order to determine the issues, the question of burden becomes academic.

In the present case, if the onus lay on any party, it was clearly on the appellant to prove by cogent evidence that the admissions made by his predecessors-in-title and by him were either erroneous or unavailable and this he had failed to do. The earlier sanads, admittedly in his possession, not having been produced and those produced not being in any way inconsistent with the said admissions or the revenue records, no question of any misconstruction of documents could arise.

Babu Bhagwan Din v. Gir Nar Saroon, (1939) L.R. 67 I.A. 1, held inapplicable.

Srinivasa Chariar v. Evalappa Mudaliar, (1922) L.R. 49 I.A. 237, applied.

The entries made in the Inam Register prepared under Act 11 of 1852, were entitled to great weight and although they could not displace actual and authentic evidence in an

individual case, it was well-settled that, in absence of such evidence, they must prevail,
775
Arunachalam Chetty v. Venkatachalapathi Guru Swamigal, (1919) L.R. 46 I.A. 204, referred to.
Held, further, that the vastness of the temple, the mode of its construction, the long user by the public as of right, grant of land and cash by the Rulers, taken along with other relevant factors were consistent only with the public nature of the endowment.
Narayanan v. Hindu Religious Endowments Board, A.I.R. 1938 Mad. 209, relied on.
The absence of a dome or Kalas on the temple was not by itself a decisive factor as to its public character, nor was consecration imperative of a deity that was Swayambhu.
Nor is the temporary movement of the idol from place to place inconsistent with its public character.
Ram Soondur Thakoor v. Taruk Chunder Turkoruttum, (1873) 19 Weekly Reporter 28; Hari Raghunath v. Apantii Bhikajii, (1920) I.L.R. 44 Bom. 466; Prematha Nath Mullick v. Pradyumna Kumar Mullick, (1925) L.R. 52 I.A. 245 and Venkatachala v. Sambasiva, A.I.R. (1927) Mad. 465; 52 M.L.J. 288, considered.
The defect in the frame of such a suit resulting from the omission of the deity as a party to it, cannot be remedied by the subsequent addition of the representatives of the Hindu Public as parties to it, and no effective decree could be passed against the deity in such a suit.

JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeal No. 261 of 1955.
Appeal from the judgment and decree dated April 22, 1949, of the Bombay High Court, in Appeal No. 403 of 1945, from Original Decree arising out of the judgment and decree dated August 14, 1945, of the Civil Judge Senior Division, Nasik, in Special Civil Suit No. 5 of 1943.
Purshottam Tricumdas, Mrs. E. Udayaratnam and S. S. Shukla, for the appellant.
R. Ganapathy Iyer, K. L. Hathi and R. H. Dhebar, for respondent No. 1.
W. S. Barlinge, Shankar- Anand and A. G. Ratnaparkhi, for respondents Nos. 6 and 7.
1959. September 22. The Judgment of the Court .was delivered by
HIDAYATULLAH J.-This appeal with a certificate -Hi, of the High Court of Judicature, Bombay, has been filed against the judgment and decree of that Court
776
dated April 22, 1949, in First Appeal No. 403 of 1945, confirming the judgment and decree of the Civil Judge, Senior Division, Nasik, in Special Suit No. 5 of 1943, decided on August 14, 1945. The High Court made a slight modification in the matter of costs, to which we shall refer later.
The plaintiff, who is the appellant here, is the descendant of one Ganpati Maharaj, who was a devotee of " Shri Venkatesh Balaji ". Ganpati Maharaj died in 1701 at the ripe age of 98. When Ganpati Maharaj was 72 years old, it was vouchsafed to him in a dream that an image of Venkatesh Balaji would be found by him in river Tambraparni in Tirunelveli District. He found the image, brought it to his house in Junnar (Poona District) and installed it. The worship of Shri Venkatesh Balaji was carried on by him, and

when he died, he left behind him three sons and a daughter. His eldest son, Timmayya, at the time of his death was 12 years old. Timmayya succeeded Ganpati Maharaj and lived till 1768, when he died at the ripe age of 79. During his lifetime, Timmayya obtained several properties as presents and gifts. The present suit concerns those properties which are described in the schedules attached to the plaint. The, appellant is the direct descendant of Ganpati in the eldest male line, and respondents 1 to 4 are the descendants from Ganpati's daughter, Nagubai.

On April 23, 1942, the first four respondents made an application to the District Court tinder s. 3 of the Charitable and Religious Trusts Act, 1920 (No. 14 of 1920), hereinafter called the Act, against the appellant and two others asking that the appellant be directed to furnish full particulars of the properties and their application and for accounts of the income as also of the properties during the three preceding years. The appellant in reply denied that there was a trust, much less a public trust, and claimed the idol and the properties as private. He understook to bring a suit under s. 5(3) of the Act, and the suit out of which the present appeal arises, was filed on March 21, 1943. He claimed in the suit three declarations, which were as follows :

777

(1) It may be declared that 'Shri Vyankatesh Balaji Deity' and 'Shri Vyankatesh Balaji Sansthan' are not legal trust as alleged by the Defendants and their nature also is not such as alleged by the Defendants.

(2) If the court holds that a trust in the matter of Shri Vyankatesh Balaji Deity' and 'Shri Vyankatesh Balaji Sansthan' exists, then it may be declared that the said trust is not a public one, that the same has not come into existence for the religious and charitable purposes and that the Religious and Charitable Trusts Act (sic.)(No. 14 of 1920) is not applicable to the same.

(3)It may be declared that the Defendants for themselves or as the representatives of the entire Hindu Community have no right and authority whatever over 'Sri Vyankatesh Balaji Devta' and Shri Vyankatesh Balaji Sansthan' and that they or the entire Hindu Community has no right and authority whatever in any capacity whatever to interfere in the matter of Devta' (deity) and ' Sansthan ' or to ask for the Yadi ' (list) of the properties or accounts in respect of the income thereof and to ask for reliefs mentioned in prayer clauses of the Miscellaneous Application No. 19 of 1942."

The trial Judge framed eight issues. The first two involved the declarations sought. Three others concerned the position of defendants 1 to 4, 6 and 7 in respect of maintenance, share in the right of customary worship and management. One issue raised the question whether the suit was had because the deity was not joined and the remaining two were consequential.

The trial Judge decided all the issues against the appellant. He held that the suit properties were not the personal or private properties of the appellant, that the plaintiff was estopped from making such a claim, that the deity itself was not a family or private deity, and that the deity Shri Venkatesh Balaji was the owner of the properties, and that there was a public, religious and charitable trust in respect of them. It was, however, held that the appellant was entitled as the hereditary shebait to manage them.

778

The trial Judge also gave a finding that the first four

defendants were entitled to customary worship and emoluments as might be fixed by the Pujadhikaris descended from the eldest branch of Bapaji Buva and could be removed for failure to perform the duties assigned to them. The application under s. 3 of the Act was held to be competent, and the suit was also held to be bad in the absence of the deity. In the result, the trial Judge dismissed the suit, awarding two sets of costs to the defendants. It may be pointed out that after the suit was filed, a public notice under s. 1, R. 8 of the Code of Civil Procedure was issued and other defendants were joined, representing the Hindu Community. During the early stages of the suit, the first four defendants raised the question whether the deity was not a necessary party to such a suit, and desired that the deity should be joined, represented by an independent guardian-ad-litem. This application was opposed by the appellant, who stated that inasmuch as his case was that the deity and the properties were his personal properties, there was no need to join the deity because of an averment by the defendants that the temple was a public one and the properties were public religious endowments. The trial Judge after expressing some surprise that the plaintiff should have taken this stand, acceded to his contention and did not join the deity as a party. He, however, warned the appellant by his order that in case the deity was found to be a necessary party, the suit might have to be dismissed for that reason alone.

Against the decree dismissing the suit, an appeal was taken to, the High Court of Bombay. The learned Judges of the High Court (Rajadhyaksha and Chainani, JJ.), dismissed the appeal but modified the order about costs, directing that only one set of costs be paid to the defendants in the suit. The learned Judges traced the history of the various properties and how they were acquired, and concluded that in respect of some of the properties there was no doubt that they formed religious endowments of a public nature, but in respect of others, though they were inclined to hold that they were personal properties,

779

they held that no declaration could be given, since the deity was not a party to the proceedings. They, however, granted a certificate of fitness under Art. 133 of the Constitution, read with ss. 109 and 110 of the Code of Civil Procedure, and the present appeal has been filed as a result.

Before dealing with the appeal proper, it is necessary to refer to certain landmarks in the history of Shri Venkatesh Balaji and this family. As we have stated earlier, the deity was placed in his house by Ganpati Maharaj at Junnar in Poona District. Ganpati Maharaj did not acquire any property, but in the lifetime of his son, the deity was moved from Junnar to Nasik. A tradition in the family says that this was the result of a dream by Timmayya, who was warned that Junnar would be burnt to ashes and the deity must be removed. Timmayya soon acquainted the people of the locality with the miraculous powers of the deity, and not content with this alone, he took the deity to the Courts of the various Rulers and also from place to place acquiring the properties in dispute, cash allowances and gifts. After Timmayya died his eldest son, Bapaji Buva, obtained a plot of land in gift from the Peshwa near the bank of the Godavari river at Nasik and built a temple on it. The deity was installed in that temple, and has continued in that abode ever since. Bapaji Buva had raised a loan for the construction of the temple, and a substantial portion of it

was paid off by the Peshwa and other Rulers like Holkar and Scindia. In Bapaji's Buva's time, a large Sabha Mandap was built in the premises of the temple to accomodate about 600 persons at the time of darshan and worship of the deity.

In 1774 family disputes arose and a Tahanama (Ex. 121) was executed, whereby the right of management was vested in the eldest male member of the senior branch of the family, and provision was made for the maintenance of that branch as well as the junior branches. Again in 1800, further disputes took place in the family and a Tharav Yadi (Ex. 122) was drawn up. By that agreement, instead of the cash allowances for the maintenance of the branches certain

780

villages were assigned to them. Next came the Inam Commission under the Bombay Rent-free Estates Act, 1852 (Bom. 11 of 1852), by which in accordance with the policy laid down by Lord Bentick, all jagirdars and inamdars were required to prove the sources of their title and the conditions on which the jagirs or inams were held. The Assistant Inam Commissioner recorded the grant of the villages under R. 3 of Sch. B to that Act as personal inams. Damodar Maharaj who was then the Pujadhikari or Sansthanik appealed to the Inam Commissioner, and contended that the villages were not held as personal inams but were Devasthan inams and could only be recorded under R. 7 of Sch. B. The difference between the two Rules was that whereas personal inams could be held only so long as the family survived, Devasthan inams were held permanently and were to be recorded as such. The Inam Commissioner accepted this contention, and caused the entries to be changed from personal inams to Devasthan inams in respect of the villages. Damodar Maharaj died in 1885, and was succeeded by Krishnarao Maharaj, who died in 1893, whose eldest son, Bhagwantrao Maharaj died in 1900 and was succeeded by the appellant, during whose minority the property was managed by a guardian appointed by Court. The appellant became major in 1921, and took over the management of these properties. In 1929, the appellant caused a history of the deity to be written and it was published by him. A reference to all these documents will be necessary hereafter to consider the argument whether there was a religious endowment of a public nature, or whether the properties in dispute were privately owned.

As pointed out already, the two Courts below have concurred in holding that the deity was not a mere family deity in which the public had no interest, and that the properties given to the deity constituted a religious and charitable endowment of a public nature. Ordinarily, such a finding is a finding of fact, not open to further scrutiny by this Court, but the appellant contended that the legal inference drawn from the proved facts in the case was erroneous and a point of law

781

therefore arose. A mistaken inference from documents is no less a finding of fact, if there is no misconstruction of the documents, and this principle should be applied to the discussion of the documentary evidence in this case, because if there was no misconstruction of the documents,-the concurrent findings would be not of law but of fact and the error, if any, equally of fact.

Both the Courts below have analysed at length the documents which number several hundreds, and have pointed out that there was nothing inconsistent in them with the contention of the respondents that there was a religious and charitable endowment of a public character in favour of the deity.

Before us, the attempt of the appellant was to show that this conclusion was not correct and that the documents pointed to grants in favour of individuals for the time being managing the affairs of a family deity. In addition to the examination of the documents, the two Courts below relied strongly against the appellant on the admissions made by his predecessors-in-title from 1774 onwards. Learned counsel for the appellant contended that the documents were misconstrued and thus, the inference from them in which these so-called admissions were contained, was exactly the opposite of what the Courts have deduced. In this appeal, therefore, all that is necessary is to see whether the inferences are vitiated by a misconstruction of the documents as such.

The appellant contended that this was a special suit under s. 5(3) of -the Charitable and Religious Trusts Act, 1920, and that the burden lay upon the respondents to prove that there was a religious and charitable trust of a public character in favour of the deity. He contended that the two Courts below had placed the burden of proof upon him to show by positive evidence that the deity was a family deity, and that the properties were his private properties. According to him the defendants ought to have proved their case, and if they failed to prove affirmatively that case, then the suit ought to have been decreed in his favour. The expression "burden of proof" really means two different things. It means sometimes that a party is

99

782

required to prove an allegation before judgment can be given in its favour; it also means that on a contested issue one of the two contending parties has to introduce evidence. Whichever way one looks, the question is really academic in the present case,, because both parties have introduced their evidence on the question of the nature of the deity and the properties and have sought to establish their own part of the case. The two Courts below have not decided the case on the abstract question of burden of proof ; nor could the suit be decided in such a way. The burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must eventually fail. Where, however, parties have joined issue and have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic.

In the present case, the burden of proof need not detain us for another reason. It has been proved that the appellant and, his predecessors in the title which he claims, had admitted on numerous occasions that the public had a right to worship the deity, and that the properties were held as Devasthan inams. To the same effect are the records of the revenue authorities, where these grants have been described as Devasthan, except in a few cases, to which reference will be made subsequently. In view of all these admissions and the revenue records, it was necessary for the appellant to prove that the admissions were erroneous, and did not bind him. An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive ’of the matter, unless successfully withdrawn or proved erroneous. We shall now examine these admissions in brief and the extent to which they went and the number of times they were repeated.

The earliest admission that the property belonged to the Devasthan and that there was no private ownership is to be found in the Tahanama (Ex. 121) of the year 1774. This

Tahanama was entered into by the sons of Timmayya Maharaj in the presence of
783
Panchas long before the present dispute arose. -It is stated there that " Shrimant Pant Pradhan and other Sardars of (both) Nizam and Deccan (States) have granted in Inam villages for the purposes of Seva (worship) of Shri (deity)." It *as again stated that the Shri's temple which was newly built on the banks of the river Ganga (Godavari) belonged to Shri's Sansthan and nobody had a share therein. By the Tahanama, the three brothers set apart a certain sum for the Seva (worship) of the deity in accordance with their practice which sum was not to be diminished under any circumstance. They, however, took a small portion of the income as their own Nemnuk (maintenance), which Nemnuk was to be reduced if the income was not sufficient to meet the expenses of Shri (deity).
Learned counsel for the appellant stated that the Tahanama was misconstrued by the two Courts below. He contended that this was a private temple, and if anything could be spelt out from this document, it was that the three brothers constituted a private trust in favour of the deity. According to him, the brothers were dividing the income which was theirs into two parts, namely, (1) for the Seva of the deity and (2) for their maintenance. This, in, our opinion, is a strained reading of the document as a whole. This deity was " Swayambhu " and not a consecrated idol. If none of the members of the family had any interest in the Shri's temple or any shares in the properties thereof, obviously the properties were not private properties, nor the idol a family idol. The document clearly shows that the deity was regarded as the owner and the family were its servants. This is made clear by the subsequent document, which is the Tharav Yadi of 1800; the Nemnuk allowance which the members of the family had taken out of the income was described as Vetan (remuneration) for doing service to the deity and Sansar Begmi " for themselves. The use of the word Vetan " does not indicate ownership, but on the contrary, paid service. Even as far back as 1774 to 1800, the predecessors of the appellant considered themselves as the servants of the deity, and all that they did was to make a stable arrangement for the
784
application of the funds, so that the deity could enjoy its own property and the servants were regularly paid.
When the Inam Commission was established to enquire into the jagirs and inams which had passed into the territory of the East India Company, Act No. 1 of 1852 was passed. The Inam Commission purported to be established under that Act and for purposes of enquiry as laid down under that Act. The Assistant Inam Commissioner at that time held that the inam was a personal one, and ordered that it be recorded as such. This was in the years 1857 to 1859. Damodar at that time went up in appeal to the Inam Commissioner, complaining against the record of the inams as personal, and claimed that they should be recorded as Devasthan inams. His appeal is Ex. D-643 dated March 5, 1858. He stated therein that the mokass Amal and the jagir and Sardeshmukhi in the villages were granted " for the expenditure on account of the Shri ". He relied on the Sanads, in which it was stated that the Amals (revenue shares) were for the purpose of worship and Naivedya (food offering) to the Devasthan of Shri Venkatesh. He referred to the earlier documents to which we have referred, and claimed that the order of the Assistant Inam Commisioner was erroneous, because the inams

must be recorded in the name of the deity under R. 7 of Sch. B to the Act of 1852 and not under R. 3, as was ordered by the Assistant Inam Commissioner. We have already pointed out the different effect of the two Rules, and proviso (6) to R. 7 stated that no personal inam could be recorded permanently under R. 7. The effect of this appeal was to claim on behalf of the deity a permanent recognition of its rights to the inam properties without any share on behalf of the family, apart from remuneration such as the Pujadhikaris might from time to time settle, in accordance With the Tahanama and the Tharav Yadi of the earlier times. The Inam Commissioner acceded to this contention; and after examining all the Sanads that had been produced in the case, ordered that,

" the order issued by Meherban, Assistant Inam Commissioner be annulled and under Section 7 (sic.)

785

Supplement No. 2 of Act 11 of 1852 the remaining portion of this village . ... to remain as perpetual Inam with the Devasthan of Shri Vyankatesh ... and the management do remain continued from generation to generation of the lineal descendants with the male descendants of Timaya Gosavi bin (i.e. son of) Ganesh Gosavi and Apatia bin (i.e. son of) Konher Gosavi."

The effect of all these documents therefore was to get recognition in invitum of the right of the deity as the owner. It also indicated that in the family of Bapaji Buva there were the hereditary Pujadhikaris or Shebaits of the deity who were not entitled to anything more than reasonable remuneration for their services of the deity.

In the year 1907 when the plaintiff was still a minor, his mother made a deposition as a witness. She stated that there were Annachatra and Sadavarat Kulkarni Inams and other Inams, but that they all belonged to the Sansthan, and that there was " no private (or personal) property at all". Even the gardens were described by her as belonging to the deity and not to any individual. The guardian also took the same stand throughout the minority of the plaintiff. Even earlier, in 1899 the father and uncle of the present appellant stated that the village, Savergaon, one of the items of the properties of the Devasthan, was not in the private ownership of any person. It was stated on this occasion as follows:

"Except this Shri Vyankatesh deity no one else has anyright, interest or ownership with regard to the village and the Sansthan. We both are the managers of the aforesaid Sansthan and we have been looking after all the affairs of the Sansthan and in that connection we are carrying on the management of the aforesaid village."

The statement was made in Suit No. 515 of 1898. Again, in Ex. 700, the written statement by the guardian of the plaintiff, in Civil Suit No. 295 of 1920, it was stated as late as November 5, 1920, as follows:

"It is denied that Damodar Timmayya or any other "

particular individual owned the Balaji

786

Sansthan at any time in his individual capacity. The temple of balaji belongs to the Sansthan and several villages are granted to Balaji Sansthan purely for temple purposes by Sanads granted by the British Government and the Defendant’s family is appointed only the vahiwatdar."

The said Damodar Timaya had no separate property of his own."

To the same effect is the application made by Ramabai, the mother of the present appellant, in Ex. 702.

These later documents may not bind the appellant, who was a minor at the time, but as late as December 1, 1927, the appellant himself stated that village in question (Savergaon) was a Devasthan inam, and was alienated to the deity, Shri Venkatesh, who was the owner. He also referred to the family settlement of 1801, and stated that the other villages were also similarly given to the deity. He observed that in the case of Devasthan inam the idol was the grantee and the real owner, and since the property Had to be managed by a human beinG, the so-called manager therefor managed the villages on behalf of the deity. He claimed only to be-the manager of the village for and on behalf of the deity, Shri Balaji, and did not claim any private ownership. At that time, he referred to the Land Alienation Register and produced a certified copy of the Register to show that Shri Venkatesh was shown as the alienee.

Ex. 634 is the genealogy filed by the plaintiff wherein Bhagwant Annaji, uncle of Damodar Timmayya, wrote against the name of Timmayya that he had acquired nine villages, and was the founder of Puja Naivedya, Utsav, Annachhatra and Sadavarat dedicated to Shri Venkatesh. It was stated there that the villages were grants to the deity. Similar are the admissions in the Yadi, Ex. 626 dated December 15, 1886, by the Mamlatdar addressed to Krishnarao Damodar and in a letter, Ex. 199, by the plaintiff himself addressed to Mankarnikabai, wife of Krishnarao Damodar in 1922. In several suits which others filed, the defendant there was described as " Shri

787

Venkatesh Balaji Sansthan, Nasik, through manager" that is the appellant. He represented as manager the owner, namely, the deity.

Lastly, there is the history of this Sansthan published by the appellant himself and written from original documents supplied by him. This was in 1931. The appellant in his deposition admitted that he was intimately connected with this writing and its publication. This history is Ex. 642. It gives an account of the idol and the temples, and describes how from time to time Peshwas and various Sardars granted villages to the " Shri " and dedicated them to the deity. The conclusion alone need be stated, because the document is a long one ’and the admissions are contained in numerous places in it. This is what was stated;

"The reader of the present history will have observed that the sansthan belongs to the deity and (the members of the house of) Timaya Maharaj are merely the managers and administrators of the same.....

The management of it shall not be like that of a private property."

As a result of the Faisalnamas of the Inam Commission which are to be found in Exs. 135 to 144, 634 and 644, the record of rights showed the deity as the owner and the jagirs and inams as Devasthan. Learned counsel for the appellant contends that these admissions do no prove anything more than this that the entire establishment of Balaji Mandir was described as ’a Sansthan and the ownership thereof was in the members of the family. We cannot accept this contention, which runs counter to the plain tenor of those documents. In these documents, the ownership of the family over the temple, the deity and the properties of the deity is not only not admitted but is denied. On the other hand, the assertion always has been that the members of the family were merely the servants of the deity getting remuneration for their services and that the ownership vested in the deity and none other.

In view of these admissions, the question of burden of proof, as we have already pointed out, is really
788
academic, and if any burden lay upon any party, it was upon the appellant to displace by cogent and convincing evidence that these admissions were erroneous and need not be accepted-in proof. These admissions are two-fold; they concern the nature of the properties in dispute and the nature of the idol. Added to these are the decisions of the Inam Commissioner in respect of the villages, which were recorded as Devasthan inams at the instance of Damodar, who appealed against the order to record them as personal inams. The value to be attached to the decisions of the Inam Commissioner had come up for consideration before the Judicial Committee in a series of cases. It is sufficient to refer to only one of them. In Arunachellam Chetty v. Venkatachellapathi Guru Swamigal (1), the Judicial Committee while dealing with the Inam Register for the year 1864 which had been produced for their inspection, attached the utmost importance to it. It observed :
" It is true that the making of this Register was for the ultimate purpose of determining whether or not the lands were tax-free. But it must not be forgotten that the preparation of this Register was a great act of State, and its preparation and contents were the subject of much consideration under elaborately detailed reports and minutes. It is to be remembered that the Inam Commissioners through their officials made enquiry oil the spot, heard evidence and examined documents, and with regard to each individual property, the Government was put in possession not only ?of the conclusion come to as to whether the land was tax-free, but of a statement of the history, and tenure of the property itself. While their Lordships do not doubt that such a report would not displace actual and authentic evidence in individual cases; yet the Board, when such is not available, cannot fail to attach the utmost importance, as part of the history of the property, to the information set forth in the Inam Register."
The nature and quantum of the right and interest in the land was thus gathered from the Inam Registers and enquiries, which preceded them,
(1) (1919) L.R. 46 I.A. 204.
789
Thus, it was doubly necessary for the appellant to bring before the Court all the documents in which his title was created, recognised or confirmed. He has, however, filed only a selection, and has refrained from bringing into evidence all the material in his possession which as late as 1931 was available to him. We have pointed out above that in 1931 he caused a history of the Sansthan to be published, and it refers to numerous documents, which have not found their way into Court. The learned Judges of the High Court also mentioned this fact, and stated that in view of the failure of the appellant to prove conclusively that a higher title than the one made out before the Inam Commission was available to him, no reliance could be placed upon such documents as had been exhibited. We have to see whether this statement is correct in 'all the circumstances of this case.
The property in the case consists of eleven villages, cash allowances and other urban properties to which separate reference will be made. All the eleven villages were the subject of an enquiry by the Inam Commission, and the decisions were uniform, except in one case where a technical ground came in the way. We were taken through documents

relating to two such villages as indication of the kind of title enjoyed by the appellant. It may be pointed out here that the appel. lant himself made no distinction between one property and another, and stated that all the properties were held by him under an identical title. At the hearing of the appeal, he attempted to show that these properties were granted to him, impressed with service of the deity. But that was not the case he had made out either before the District Court under the Charitable and Religious Trusts Act or in the plaint filed in this case. It is not open to him now to change his plea with regard to his ownership, and the case must be decided only on the contention that the properties were private.

The first batch of documents to which our attention was drawn, concerns mostly Vihitgaon. It consists of Exs. 200 to 206. The first four are letters written to Mukadams, Kamavisdars and Mamlatdars to continue

100

790

the Mokasa, Sahotra or Inam to Timayya, to whom the village was given as Madade-Mnash. The earliest of them is of 1714 and the last is of 1755. Exs. 204 and 206, however, mention even earlier sanads and the latter particularly mentions the original grant of the ruler, Mahomed Shah, under his own seal. Those sanads, however, have not been produced, as also some of the sanads of the Peshwas, which were mentioned by the Inam Commission in Ex. 135. None of these documents shows the terms on which the original grant was made, and in view of the meagreness of this evidence and its inconclusive nature, the High Court was justified in accepting the finding of the Inam Commission that the grant was to the Devasthan and constituted a Devasthan Inam.

The next village of which the documents were shown to us is Belatgaon. Here too, the documents are of later dates, the original grant not being produced. In connection with this village also, the Inam Commission held that the village was a Devasthan inam, and the documents produced in this case do not show anything to the contrary. These documents are merely letters and so-called sanads and direct the Mukadams, etc., to pay a share of the revenue to Timayya. Learned counsel for the appellant stated that the documents in respect of the other villages were also of similar character. On an examination, we have found them to be so. In all the order,-, made by the Inam Commission in respect of each and every village, there is a reference to other sanads of earlier dates, which have not been produced before us. The respondents bad, in the Court of First Instance, served a notice upon the appellant to produce all the sanads admittedly in his possession and mentioned in Ex. 642, but the appellant avoided doing so by pretending that the demand was vague. In this view of the matter, it cannot be said that-there has been a misconstruction of any documents. On the other band, the judgments in the two Courts below have proceeded on the ground that the appellant having an opportunity to prove his case against the findings of the Inam Commission and the admissions made from time to time, had suppressed

791

the original documents conferring villages upon him as he alleged, and had produced letters and so-called sanads of later dates, which were no more than mere pay-orders to continue the privilege which had been granted by the rulers in the earlier documents. We do not therefore find any misconstruction of the documents such as have been produced, and we hold that the admissions-and the revenue records

remain uncontradicted.

This brings us to the cash allowances, which were granted from the villages to the predecessors-in-title of the appellant. These documents number a few hundreds. They too are merely letters written from time to time to the Mukadams, Kamavisdars and Mamlatdars to pay the arrears of annuities, Varshashan, Aivaj to Haribakthi Parayana Rajeshri Timayya Gosavi. In almost all the documents, there is a reference that the original sanads had been filed, but the original sanads have not been produced. The respondents, on the other hand, produced some of these documents to show that the original grant was to the Devasthan and that in some of them, there is specific mention that it was for the expenses of " Shri ". These are Exs. 228, 229, 639, 230, 231 and 233. The respondents connect these documents with the history of Shri Venkatesh Balaji Sansthan (Ex. 642) to show that similar documents exist with regard to the grant of all the villages and the cash allowances but have not been produced. The appellant also admitted in Ex. 151 that his ancestors had received these grants in order to do Puja Archa, Sadavarat, etc., of the deity. The two Courts below have from these circumstances ,drawn the conclusion that the grant cannot be considered as personal but must be regarded as one made in favour of the deity or the Sansthan. It is for this reason also that the appellant stated that all the properties including the temple and the idol go in the name of ' Sansthan', and that this word was used compendiously to describe the properties and the Vahiwatdar. In our opinion, the appellant was conscious of the weakness of his case, because the grants to Sansthan or to the "Shri" could not be regarded as grants to an

792

individual, and he therefore included himself and the deity in the expression 'Sansthan', so as to be able to show that the grants to the Sansthan were grants to him as much as to the deity.

The appellant, however, contended that this case was covered by the decision of the Privy Council in Babu Bhagwan Din v. Gir Har Saroop (1). That case was entirely different. There, the grant which was a single one, was made to an individual and his heirs in perpetuity from generation to generation, and there was no evidence otherwise. The Judicial Committee interpreted the grant in favour of the individual, and stated that it was made to one Daryao Gir and his heirs in perpetuity. It observed:

" Had it been intended as an endowment for an idol it would have been very differently expressed; the reference to the grantee's heirs, and the Arabic terminology 'naslan ba'da naslin wa batnam ba'da batnin' (descendant after descendant and generation after generation) are not reconcilable with the view that the grantor was in effect making a wakf for a Hindu religious purpose, even if it be assumed that this is not otherwise an untenable hypothesis."

Though, in that case, the origin of the idol was not completely traced, the grant itself disclosed the existence of a sanyasi, with an idol in a mud hut, to whom and not to the little temple the grant, in effect, was made. The history of this deity is well-known, and it shows the manner in which the grants were made from time to time. To apply that case to the facts here is impossible. In our opinion, the principle to apply to this case is the one stated by the Privy Council in Srinivasa Chariar v. Evalappa Mudaliar(2). It was there observed:

" Their Lordships must dissent entirely from the view that where the discoverable origins of property show it to be

trust property the onus of establishing that it must have illegitimately come into the trustee's own right rests upon the beneficiaries. Upon the contrary, the onus is heavily upon the trustee to show by the clearest end most unimpeachable evidence the the legitimacy of his personal acquisition."

(1) (1939) L.R. 67 I.A. 1.
(2) (1922) L.R. 49 I.A. 237.

793

The appellant next argued that those properties in respect of which the High Court felt disposed to giving a finding that they were private, should at least be declared as private properties, He also made an application in this Court for joining the deity as a party to the appeal, and requested that this Court should send down an issue for a finding by the Court of First Instance in the presence of the deity, whether these properties were private. We shall deal with these matters a little later, because it is necessary at this stage to decide whether the public have any right of worship in the temple. Both the Courts below have agreed that the deity and the temple were public. The High Court correctly pointed out that the matter has to be judged in accordance with the dictum of Varadachariar, J., in Narayanan v. Hindu Religious Endowments Board (1). In that case which arose under s. 9 of the Hindu Religious Endowments Act, the definition of a temple' meant a place 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 religous worship. The learned Judge observed as follows:

" The question of intention to dedicate the place for the use of the public or of the user by the public being as of right is necessarily a matter for inference from the nature of the institution and the nature of the user and the way the institution has been administered ... once a long course of user by the public for the purpose of worship is established, and the fact of a separate endowment in trust for the deity is also proved, it is fair to infer that the institution must have been dedicated for user by the public (unless the contrary is established)-particularly when the character of the temple, its construction, the arrangement of the various parts of the temple and the nature of the deities installed there are similar to what obtains in admittedly public temples. Similarly, when user by the public generally to the extent to which there is a worshipping public in the locality is established, it is not unreasonable to

(1) A.I.R. 1938 Mad. 209.

794

presume that the user by the public was as of right,' unless there are circumstances clearly suggesting that the user must have been permissive or that the authorities in charge of the temple have exercised such arbitrary power of exclusion that it can only be ascribed to the private character of the institution."

The two Courts below reached the conclusion that the public had a right in the temple and the idol from a number of considerations. Shortly, they are as follows: The building of the temple is public in character inasmuch as the staircase leads straight to the idol, and the public are admitted throughout the day between 7 a.m. and 10 p.m. There-is no evidence to show that the public or any member of it were ever excluded from the worship. There is only one instance when a member of the family was excluded, but that was because he had used abusive language towards the

mother of the present appellant. Indeed, the public are invited to worship the deity, and no gift is ever refused. The merchants of the locality keep a separate khata in the name of the deity, in which they set a-part a portion of their earnings as kangi, which is paid regularly to the temple. The extent of the ceremonies performed at the temple also indicates the existence of a deity in which the public are interested rather than a family deity. There are celebrations, Utsavs etc., and daily a large number of Brahmans and others are fed and at the time of the festivals all the visitors are also fed. The deity also goes out on such occasions in processions through a marked route, and there are ten carriages in which it rides for- ten days. These festivals are celebrated with great e'clat, and the public not only of Nasik but of other parts of the country freely join in them. Even the daily routine of the deity is of a form uncommon in the case of family deities. The appellant himself admitted that the idol was being worshipped with Rajopchar. It may be mentioned that for playing music or performing the services, the deity has conferred hereditary inams upon those who attend to them. There is also a collection box placed at the temple where the public, who are so minded, are invited to place their offerings.

795

No doubt, the Privy Council in Babu Bhagwan Din v. Gir Har Saroop (1) stated that the mere fact that offerings were accepted from the public might not be a safe foundation on which to build an inference that the deity was public. Still, the extent to which the offerings and the gifts go, may be a fair indication not merely of the popularity of the deity but of the extent of the public right in it. As has been pointed out above, the Judicial Committee was dealing with a single grant which was made to the Mahant in per-petuity, and the temple itself was a mud hut. Here, the temple covers several acres of land, and has a vast structure. There is a Sabha Mandap, which accommodates 600 persons. It is inconceivable that such a big temple was built only for the use of the family. It indicates that there was an invitation to the public to use it as of right, and user and continuous user for 200 years, without let or hindrance, by the public has been proved in the case beyond doubt. It is also unusual for Rulers to make grants to a family idol. The fact that many Rulers have made grants of land and cash allowances to the deity for seva,puja etc., is itself indicative of the public nature of the trust.

We think that the extensiveness of the temple and of grants to it are pertinent circumstances to be taken into account in judging the nature and extent of the public right. It may be remembered that in the documents to which we have referred in an earlier portion of this judgment, there is reference to special endowments for festivals. These endowments would not be made if the deity was a family deity. In the Gazetteer dealing with Nasik District there is a full description of the temple and the deity. Extracts from it have been quoted by the two Courts below, and they show that the temple is a public one. Indeed, the history of the deity written at the instance of the appellant himself (Ex. 642) indicates the public right in the deity.

As against these, the appellant contended that there were other circumstances which indicated that the deity was a family diety. He examined Dr. Kurtkote,

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

796

who gave some reasons for an opinion that the temple was not

a public one but a mere Deva-ghar. He stated that the idol of 'Balaji did not appear to have been firmly installed, that it was installed on an upper floor, that householders resided in the temple and that daily worship was suspended when there was a birth or death in the family, and last of all, he stated that the deity being movable, must be regarded as a family deity. It may be pointed out here that the deity is sometimes invited to private residences at the time of festivals, for dinner. This circumstance was also pleaded as indicating that the temple is private and the deity a family deity. We shall now briefly examine these reasons to see whether they outweigh the evidence of the public character of the deity, which we have analysed above. We begin with a very small point which was made that the temple of Balaji at Nasik has no dome or Kalas. This is an admitted fact, but vasudev (P.W. 12) admitted that there was no dome or Kalas at Balaji temple at Devalgaon Raja, which is a public temple. So also other temples mentioned in the case. It seems that nothing really turns upon the existence of a dome or Kalas, and no authority has been cited before us to show that it is a conclusive circumstance in deciding that the temple is public.

It must be remembered that this idol was found in a river and did not need consecration ceremonies, which are necessary for a new idol, which is set up in a new temple. It was first placed inside the house of Bapaji Buva at Juniar, and was removed from that place as a result of instructions vouchsafed by the deity itself to Bapaji Buva's successor. It was then installed at Nasik ' Where a big temple has grown. No doubt, in some portions of this building the family of the Pujadhikhris reside without any objection from any person The extensiveness of the building makes it impossible to think that they are residing within the temple, or that the Thakurbari is within their private residence. Indeed, the description of the temple as given in the Gazetteer clearly shows that the temple in quite distinct

797

from the residential quarters, and that also is the evidence of the appellant himself. With regard to the installation of the idol on the first floor, we have already mentioned that the staircase from the ground leads direct to the sanctum. It was, however, admitted by Dr. Kurtkote that the deity at Bindu Madhav temple at Benares in also installed on the upper storey, though he explained that beneath the idol there is a solid stone pedestal, which runs right from the ground to the first floor. No question was put to him as to whether the deities there, were firmly installed or moveable, He, however, admitted that the text of Prathista Mayukha did not mention that the idol should not be installed on an upper storey. In our opinion, in the absence of any text prohibiting the installation of the deity on an upper floor, we cannot draw any inference that the temple is private.

The real ground on which the claim has been made that the deity is a family deity is that it is capable of being moved from one place to another, and, in fact, is so moved. Evidence was led to show that in the early history of this temple the Pujadhikaris took the deity on visits to the various ruling chiefs. Documents have been filed to show how arrangements were made for the journey of the deity and instructions issued to all concerned to give all facilities for it. It is also in evidence-and is indeed admitted-that when the deity is invited on festive occasions to private residences, a substitute idol is also left at the main

temple for the public to worship. Further, all these removals are temporary, and the deity is brought back and installed in its abode afterwards. The deity at the Jaganath temple at Puri is also shifted for periodic processions, and is brought back to its place. Dr. Kurtkote stated that the installation of an idol can be either in a movable form (chala) or -stationary form (sthira), and that it is so mentioned in the Prathista Mayukha. He also admitted that it could not be said that the idol was not installed because it could be moved from one place to another. No other authority was cited before us at the hearing as to whether s a idol cannot at all be
101
798
moved from the place where it is installed, even though it may be installed in a movable form (chala).
There are, however, cases in which this matter has come up for consideration before the Courts. In Ram Soondur Thakoor v. Taruck Chunder Turkoruttun (1), there was a destruction of the temple by the erosion of the river on the banks of which the idol was installed. The suit was filed by the plaintiffs for a declaration of their right to remove the idol to their own house and to keep it there for the period of their turn of worship. This claim was decreed. On appeal, Dwarknath Mitter and Ainslie, JJ., interfered only to the extent that the lower Court ought to have defined the precise period for which the plaintiffs were entitled to worship the idol before it could make the declaratory decree, which it had passed in their favour. They also directed that if it was found by the lower appellate Court that the plaintiffs and the defendants were jointly entitled to worship the idol during any part of the period mentioned by the plaintiffs, the,lower appellate Court should not allow the plaintiffs to remove the idol to their own house at Khatra for that portion of time. It appears from the judgment that though the plaintiffs were allowed to remove the idol to their own house, they were to re-convey it at their own expense to the place where it was at the time of the institution of the suit. The learned Judges, however, qualified their judgment by saying that it was not contended in the case before then that the idol was not removable according to the Hindu Shastras.
In Hari Raghunath v. Anantji Bhikaji (2), the temple was a public one. It was held by the High Court that under Hindu law, the manager of a public temple has no right to remove the image from the old temple and instal it in another new building, especially when the removal is objected to by a majority of the worshippers. It is interesting to note that in this case Dr. P. V. Kane appeared, and in the course of his argument, he stated as follows:
"According to the Pratishtha-Mayukha of Nilkantha and other ancient works an image is to
(1) (1873) 19 Weekly Reporter 28.
(2) (1920) I.L.R. 44 Bom. 466.
799
be removed permanently only in case of unavoidable necessity, such as where the current of a river carries away the image. Here the image is intact. It is only the temple that is dilapidated. For repairing it, the image need not necessarily be removed. Even if it may be necessary to remove the image, that will be only temporarily. The manager has under Hindu law no power to effect permanent removal of an image in the teeth of opposition from a large number of the worshippers. In the instances cited by the appellant, worshippers had consented to the removal.

Permanent removal of an image without unavoidable necessity is against Hindu sentiment." (italics supplied)

Shah, J. (Crump, J. concurring) observed as follows:

" It is not disputed that the existing building is in a ruinous condition and that it may be that for the purpose of effecting the necessary repairs the image may have to be temporarily removed. Still the question is whether the defendant as manager is entitled to remove the image with a view to its installation in another, building which is near the existing building. Taking the most liberal view of the powers of the manager, I do not think that as the manager of a public temple he can do what he claims the power to do, viz., to remove the image from its present position and to instal it in the new building. The image is consecrated in its present position for a number of years and there is the existing temple. To remove the image from that temple and to instal it in another building would be practically putting a new temple in place of the existing temple. Whatever may be the occasions on which the installation of a new image as a substitute for the old may be allowable according to the Hindu law, it is not shown on behalf of the defendant that the ruinous condition of the existing building is a ground for practically removing the image from its present place to a new place permanently. We are not concerned in this suit with the question of the temporary removal which may be necessary when the existing building is repaired."

800

The case is an authority for the proposition that the idol cannot be removed permanently to another place, because that would be tantamount to establishing a new temple. However, if the public agreed to a temporary removal, it could be done for a valid reason.

In Pramatha Nath Mullick v. Pradyumna Kumar Mullick (1), the deed of trust created an injunction against the removal of the deity. The following quotation from that deed of trust shows the powers of the manager :

" Shall be for ever held by the said Jadulal Mullick, his heirs, executors, administrators and representatives to and for the use of the said Thakur Radha Shamsunderji to the intent that the said Thakur may be located and worshipped in the said premises and to and for no other use or intent whatsoever provided always that if at any time hereafter it shall appear expedient to the said Jadulal Mullick, his heirs, executors, administrators or representatives so to do it shall be lawful for him or them upon his or their providing and dedicating for the location and worship of the said Thakur another suitable Thakur Bari of the same or greater value than the premises hereby dedicated to revoke the trusts hereinbefore contained and it is hereby declared that unless and until another Thakur Bari is provided and dedicated as aforesaid the said Thakur shall not on any account be removed from the said premises and in the event of another Thakur Bari being provided and dedicated as aforesaid the said Thakur shall be located therein, but shall not similarly be removed therefrom on any account whatsoever."

The Privy Council analysed this provision, and stated that the last condition made the idol immovable, except upon providing for the dedicatee another Thakur Bari of the same or larger value. It observed:

" The true view of this is that the will of the idol in regard to location must be respected. if, in the course of a proper and unassailable administration

(1) (1925) L.R. 52 I.A. 245.

801
of the worship of the idol by the Shebait, it be thought that a family idol should change its location the will of the idol itself, expressed through his guardian, must be given effect to."
Their Lordships ordered the appointment of a disinterested next friend, who was to commune with the deity and decide what course should be adopted, and later the instructions of the deity vouchsafed to that representative were carried out. In this case, there was a family deity and there was a provision for removing the idol to another better and more suitable Thakur Bari, if it appeared necessary. The wishes of the deity were considered and consulted. The case, however, is not quite clear as to whether in all circum-stances the idol can be removed from one place to another.
The last case on the subject is Venkatachala v. Sambasiva (1). The headnote quite clearly gives the decision, and may be quoted here:
" Where all the worshippers of a temple, who are in management of it, decide to build a new temple, the old one being in ruins and the site on which it stood becoming insanitary and inconvenient for worshippers, then, unless there is clear prohibition against their demolishing the old temple and building a new temple, the Court is not entitled to prevent the whole body from removing the temple with its image to a new site in the circumstances."
Devadoss, J., quoted passages from Kamika Agama, and referred to Prathista Mayukha by Nilakanta, Purva Karana Agamam and Nirnaya Sindhu. He, however, relied upon certain passages from Purva Thanthiram by Brighu, Kamika Agama, Siddhanta Sekhara and Hayasirsha Pancharatra, and came to the above conclusion. The effect of the decision is that the whole body of worshippers, if they are of one mind, can even permanently remove an idol to another habitation.
In the present case, the idol was not permanently removed except once when it was taken away from Junnar and installed at Nasik. As we have already
(1) A I.R. 1927 Mad. 465; 52 M.L.J. 288.
802
pointed out, that was at the behest of the deity itself. Afterwards, the deity which is installed in a removable form (chala) has been temporarily removed for purposes of -processions, invitations to dinner and visits to other parts of India, so that worshippers may have a chance of making their devotion. This has continued for over 250 years, and has not been objected to at any time. Indeed, a huge concourse of worshippers always followed and follows the deity every time it is taken out temporarily for the purpose of affording the votaries chances of worship at close quarters. This appears to be a custom which has received recognition by antiquity and by the consent of the worshipping public it may be noted that the deity is brought back to the old site after its temporary sojourn at other places, and that further during the absence of the deity, a substitute idol is placed, so that the dedicatee is never out of possession of the temple.
In view of these circumstances and the cases to which we have referred, and in view, further, of the fact that no text or authority was cited against such course of conduct with the consent of the worshipping public, we do not see any reason for holding that the temple was private and the deity, a family idol.
The appellant raised a special argument in respect of certain properties, which, he stated, were private. He relied upon the observations of the learned Judges of the

High Court that they were inclined to hold that these properties were private but refrained, from giving a declaration in view of the fact that the deity had not been joined. These properties are jat inams, recently built properties, namely, the Balaji temple and the 'Shree Theatre', and an allowance which goes in the name of Kulkarni commutation amounting to Rs. 24 per year. The difficulty in the way of the appellant is real. He refrained from joining the deity, if not as a necessary, at least as a proper party to the suit. If he had joined the deity and the deity was represented by a disinterested guardian, necessary pleas against his contention could have been raised by the guardian, and it is likely that some evidence would also have been given. The appellant seeks to
803
cover up his default by saying that the suit was one under s. 1, r. 8 of the Code of Civil Procedure, and that the Hindu public was joined and the deity was adequately represented. In a suit of this character, it is incumbent to have all necessary parties, so that the declaration may be effective and binding. It is obvious enough that a declaration given against the interests of the deity will not bind the deity, even though the Hindu Community as such may be bound. The appellant would have avoided circuity of action, if he had acceded to the very proper request of the respondents to bring on record the deity as a party. He stoutly opposed such a move, but at a very late stage in this Court he has made an application that the deity be joined. It is too late now to follow the course adopted by the Privy Council in Pramatha Nath Mullick v. Pradyumna Kumar Mullick (1) and Kanhaiya Lal v. Hamid Ali (2), in view of the attitude adopted by the appellant himself and the warning which the trial Judge had issued to him in his order. There is yet another reason why the case cannot be re-opened, because the appellant himself did not choose to make any distinction between one property and another as regards the claim of his ownership. He stated that each item of property was acquired and owned in the same manner as another.

Arguments were addressed with regard to the Balaji Mandir, which is situated on S. Nos. 1353 and 1354. This land was granted to one of the appellant's predecessors by Ex. 571 by the Peshwa. At that time 3 bighas of land were given to Bapaji Buva, son of Timayya, because he was a "worthy and respectful " Brahman, for the express purpose of building a temple. No doubt, in Exs. 878 and 153 the name of the Vahiwatdar has been mentioned, and the latter is a sanad of the Governor of Bombay confirming the grant free from land revenue. The original grant was obviously made not to the Brahman concerned but for the express purpose of building a temple upon the land. We have already held that the public have a right in the deity and the temple is also public and

(1) (1925) L.R. 52 I.A. 245.
(2) (1933) L.R. 66 I.A. 263,
804

that, therefore, the grant must be regarded also as part of the property of the deity. It is significant that after the temple was built with borrowings from others a sum of no less than Rs. one lakh was paid the Peshwas and other Rulers to satisfy them. The finding of the learned Judges of the High Court could not therefore given in the absence of the deity, and we think that we should only say that in view of the case as pleaded, the declaration should have been refused without any comments adverse to the deity. A Court should not, in a case which goes by the board on a cardinal

point, decide matters which cannot arise in it but may be pertinent in another case between different parties. We are, however, clear that no declaration can now be granted in respect of this property.

The next property which was specially mentioned for our consideration is the " Shree Theatre ", in which the appellant claims to hold a third share. Here also, the extracts from the property register have been filed, and the appellant has drawn our attention to Ex. 290, which is a deed of purchase and Ex. 691, the permission by the Municipality to build upon the land. It was necessary for the appellant to show that this Theatre-was built from monies derived from a private source and not from the income of the Devasthan. He has not furnished satisfactory evidence, and in describing the source of money he referred to the sale of one property, the price whereof according to him was utilised for the Theatre. It, however, appears from the record of the case that with that money Balaji Vihar was purchased, and the case made before us was that it was the sale proceeds of Balaji Vihar which were used to build the Theatre. If that be so, then the evidence to connect the Theatre with Balaji Vihar ought to have been tendered and a plea to that effect taken. We cannot accept the argument in lieu of plea and evidence, and we think that the appellant has neglected to bring the necessary evidence to reach a finding, This matter also suffers from the same defects, -namely, the failure to join the deity as a party and also not waking a distinction between one,

805

kind of property and another. Here too, the High Court should not have expressed any opinion adverse to the deity, without the deity being a party. The same has to be said of items 3 to 10 in the first part of Sch. A annexed to the plaint and three survey numbers of Belatgavan, Deolali and other jat inams. No useful purpose will be served in examining in detail the evidence relating to these properties in the absence of the deity. It may also be pointed out that the appellant maintained no separate accounts for these properties, and made no distinction between them and the other properties to which we have referred earlier. A trustee must not mix private property with trust property, because if he does so, he undertakes a heavy burden of proving that any particular property is his, as distinct from the trust. See Lewin on Trusts, 16th Edn., p. 225. To the same effect are the observations in Srinivasa Chariar v. Evalappa Mudaliar (1).

The result is that the declaration which the appellant sought in his suit that the temple, the deity and plaint properties were all of private ownership, was rightly refused by the Courts below. The trial Judge gave a declaration that defendants 1 to 4 are en titled to custom ary worship and maintenance. Strictly speaking, such a finding was not necessary in a case of this character, and other matters concerning rights of individuals should not have been gone into in a suit filed under s. 5(3) of, the Act. The appellant is partly to blame. He set up a case of private ownership with all rights centred in himself, and defendants 1 to 4 therefore not only raised the plea that the appellant was a mere manager but also asserted their rights in the property. We think that the Courts below might have refrained from pronouncing upon the rights of the defendants, because all that they had to do was to decide whether the property was trust of a public nature. We, however, do not wish to give any direction in the matter, because the suit, as a whole, as laid by the plaintiff has

been dismissed, and to make any observations might lead to further litigation, which is not in the interests of the deity.

(1) (1922) L. R. 49 I.A. 237.

102

806

Respondents 6 and 7 raised before us the question of costs. They stated that the trial Judge had given two sets of costs, which was changed to one set by the High Court. These respondents should have cross-objected on this point against the judgment of the High Court, and in the absence of any such cross-objection, no relief can be granted to them. For the same reason, no relief can be given to respondent 7, in respect of whom the finding that he bad no right of performing the seva and getting emoluments attached to that right, as respondents 1 to 4, has not been vacated, as was done in the case of respondent 6. In view of our observations that these matters were alien to the suit which had been filed, we do not propose to deal with them.

In the result, the appeal is dismissed. The appellant will personally pay the costs of Respondent 1. The other set of respondents will bear their own costs.

Appeal dismissed.