Commissioner Of Endowments & Ors vs Vittal Rao & Ors on 25 November, 2004

Equivalent citations: AIR 2005 SUPREME COURT 454, 2005 (4) SCC 120, 2004 AIR SCW 7036, 2005 (1) SRJ 190, (2005) 1 CLR 236 (SC), 2004 (7) SLT 476, 2005 (2) ALL CJ 1070, (2004) 10 JT 113 (SC), 2005 (1) CLR 236, 2004 (9) SCALE 660, 2004 (4) LRI 875, 2004 (10) JT 113, (2005) 2 ANDHLD 112, (2005) 2 ICC 1, (2005) 1 WLC(SC)CVL 273, (2005) 1 UC 379, (2005) 2 ALL WC 1984, (2005) 1 SCJ 14, (2004) 8 SUPREME 875, (2004) 9 SCALE 660

Author: Shivaraj V. Patil

Bench: Shivaraj V. Patil, B.N. Srikrishna

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           CASE NO.:
Appeal (civil)  6246 of 1998

PETITIONER:
Commissioner of Endowments & Ors.

RESPONDENT:
Vittal Rao & Ors.

DATE OF JUDGMENT: 25/11/2004

BENCH:
SHIVARAJ V. PATIL & B.N. SRIKRISHNA

JUDGMENT:
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J U D G M E N T Shivaraj V. Patil J.

In this appeal, the order dated 21.10.1998 made by the Division Bench of the High Court in Writ Appeal No. 429 of 1998 is under challenge. Parties are before this Court for the third time in relation to the same subject matter. One Fauzdar Khan donated 5 bighas of land situated at Hyderabad to one Gunnaji, the ancestor of the respondent no. 1 for the purpose of construction of a temple, now known as Sri Jangli Vittobha Temple. Gunnaji died and after his death, his sister Suguna Bai completed the construction of the temple. In 1939, one Golakishan Gir claiming himself to be the Mutawalli of the temple, mismanaged its affairs. The Government having come to know about the same, constituted a committee under Rule 156 of Andhra Pradesh (Telangana Areas) Wakf Rules. Manik Rao, father of the respondent no. 1, applied to the Registration Officer in 1962 for transfer of Towliatship of temple in his name. The Registration Officer (the Assistant Secretary of Board of Revenue) after holding inquiry by the order dated 15.1.1964 held that said Manik Rao was the rightful claimant to the Towliatship and consequently ordered for amendment of Column No. 11 of

Munthakab under Section 36(c) of Hyderabad Endowment Rules. Aggrieved by this order, the temple committee filed an appeal to the Director of Endowments, who, by his order dated 29.10.1966, confirmed the aforementioned order dated 15.1.1964. The temple committee pursued the matter further by filing a revision petition before the Government assailing the order dated 29.10.1966 made by the Director of Endowments. The revision petition was allowed and the order of the Director of Endowments affirming the order of the Registration Officer was set aside as is evident by G.O. Rt. No. 680 dated 17.06.1971. It is against this G.O. that Manik Rao filed a suit O.S. No. 509/1971 in the City Civil Court, Hyderabad, for declaration that he was the hereditary Mutawalli of the temple; for perpetual injunction against the authorities and individuals, restraining them from interfering with his Towliatship and from constituting or reconstituting any committee for the temple and for setting aside the said G.O. dated 17.6.1971. The trial court dismissed the suit. The appeal No. A.S. No. 199/77 filed against the judgment and decree of the trial court was allowed by the first appellate court by its judgment and decree dated 22.12.1978, which decreed the suit of Manik Rao granting the relief as sought for in the said suit. The temple committee preferred second appeal being S.A. No. 122/79 in the High Court against the judgment dated 22.12.1978 aforementioned made by the first appellate court. It may be stated here itself that neither the Government nor the Commissioner of Endowments (defendants 1 and 2 respectively) filed second appeal challenging the judgment and decree passed by the first appellate court in favour of Manik Rao. Although they were respondents 2 and 3 in the second appeal No. 122/79 filed by the temple committee, they did not participate. In other words, they did not put forth any plea before the High Court. The High Court dismissed the said second appeal on 2.7.1979 concurring with the findings recorded by the first appellate court and affirming the decree passed by it. The High Court held that the land in question was gifted absolutely to Gunnaji and that the Government could not claim any interest in it. The State of Andhra Pradesh and the Temple Committee acting through its Chairman, approached this Court by filing SLPs questioning the validity and correctness of judgment and decree passed by the High Court in the second appeal. This Court dismissed C.A. Nos. 702/80 & 703/80 on 12.8.1987 after granting leave in the SLPs. Thus, the judgment and decree passed in favour of Manik Rao by the first appellate court in A.S. No. 199/77 attained finality.

About two years later, the Commissioner of Endowments, Govt. of Andhra Pradesh (appellant No. 1), by his letter dated 14.6.89 addressed to the Principal Secretary, Deptt. Of Revenue, Andhra Pradesh gave a detailed report seeking permission to compromise the dispute in the best interest of the temple. In response to the said letter, Joint Secretary to the Government by Memorandum dated 27.10.89 stated that a compromise might be made on certain terms.

The Assistant commissioner of Endowments issued instructions dated 16.1.1990 to the tenants of the temple property to pay the rents due, to Vittal Rao, the respondent no. 1 herein as the entire property had been declared as his private property by virtue of the decree passed by the civil court in A.S. No. 199/77 but the Deputy Commissioner of Endowments by his order dated 15.6.1990 set aside the instructions dated 16.1.1990 given by the Assistant Commissioner of Endowments inter alia stating that the terms of compromise mentioned in the Government Memorandum dated 27.10.1989 issued by the Joint Secretary had not been reduced into a deed of compromise. Consequently, the Assistant Commissioner withdrew his instructions dated 16.1.1990 and directed the tenants to comply with the order of the Deputy Commissioner dated 15.6.1990. Thereafter on 25.6.1990, the

Commissioner of Endowments appointed an Executive Officer for the management of the temple. The respondent no. 1 Vittal Rao filed writ petition No. 8970/90 in the High Court to quash the order of the Deputy Commissioner dated 15.6.1990 and that of the Commissioner dated 25.6.1990 aforementioned. The respondents 2 to 5 got impleaded as party-respondents in the above writ petition claiming to be interested persons. In the said writ petition, the respondents 1-3, (Officers of the Endowment Department) filed W.P.M.P. No. 15438/95 seeking direction to appoint an Executive Officer to manage the affairs of the temple and permit the officer to conduct the yearly festivals pending disposal of the writ petition. The writ petitioner (respondent no. 1 herein) filed a counter affidavit stating that he was ready to accept the terms of compromise suggested in the Govt. Memo dated 27.10.1989. Learned Single Judge by his order dated 17.10.1995 disposed of the writ petition on the submission of the learned counsel for both parties that the writ petition may be disposed of by recording the said terms of the compromise contained in Government Memorandum dated 27.10.1989 and the learned Judge further directed to implement the terms of the compromise within four weeks from the date of the order. The respondent Nos. 1 to 3 of the Endowments Department (appellants Nos. 1 to 3 herein) in the writ petition did not file any appeal against the aforementioned order of the learned Single Judge made in the writ petition but the private respondents 5-8, who were impleaded subsequently in the writ petition, contending to be the purchasers of the land, filed writ appeal No. 1536/95. The Division Bench of the High Court by the order dated 13.1.1997 held that the appellants in the writ appeal having not represented themselves in the earlier proceedings when the matter came up to the Supreme Court, the decision of the Supreme Court had become final in the matter and that in case they have any other right over the property, they have to approach the civil court. Thus, the order passed by the learned Single Judge on 17.10.1995 passed in the writ petition was confirmed by the High Court in the writ appeal.

When the aforementioned writ appeal was pending, some individuals claiming to be devotees of the temple, filed W.P. No. 2830/96 claiming to espouse public interest inter alia to declare the Memo of the Government dated 27.10.1989 (suggesting compromise) as illegal and arbitrary and to direct the Endowments Department to remove the respondent no. 1 from the post of hereditary trusteeship of the temple. The Division Bench of the High Court dismissed the said writ petition on 21.2.1997.

It is thereafter that the Govt. of Andhra Pradesh, which was not a party to the writ appeal No. 1536/95, sought review of the order made in Writ Appeal No. 1536 of 1995 in RWAMP No. 2435/97 contending that despite permission granted to the Commissioner to enter into compromise by virtue of the Government Memorandum dated 27.10.1989, no compromise was in fact entered into and therefore, it was unenforceable and that the proposal for compromise was wrongly interpreted in earlier judgments and that too on a wrong translation of the gift deed. The Division Bench of the High Court, by its order dated 12.11.1997 dismissed the review petition taking a view that the earlier Supreme Court judgment in C.A. Nos. 702/80 and 703/80 attained finality so far as the construction of gift deed made in favour of Manik Rao is concerned and that issue could not be re-opened. On the same day, the High Court rendered a judgment in the contempt case filed by Vittal Rao against the government and impleaded parties alleging that they had violated the earlier judgment of the Court in Writ Appeal No. 1536/1995. The Court did not proceed with the contempt petition stating that the Govt. had stated that they would abide by the orders of the Court in the review petition and in the contempt case. A further direction was given that the order made in Writ

Appeal No. 1536/95 be implemented within two months by taking into consideration the observations made by the Court in review petition. As against the judgment in the review petition, the Commissioner of Endowments and others filed special leave petition No. 22746/97. The said SLP was disposed of by this Court in the following terms:-

> "The learned Senior Counsel for the petitioner after some arguments seeks leave to withdraw this Special Leave Petition with a view to filing appropriate proceedings for challenging the consent order in a writ petition which according to him was a nullity as being fraudulent and contrary to law. The SLP stands dismissed as withdrawn."

It is thereafter the present appellants filed Writ Appeal No. 429/98. There was delay of 739 days in filing the writ appeal which was condoned. The Division Bench of the High Court, by the impugned judgment, dismissed the writ appeal on considerations of the material on record and accepting the preliminary objections raised by the respondent no. 1. The Division Bench also held that the Government could not go back on its assurance given in the contempt case. Hence, this appeal.

Shri P.P. Rao, learned senior counsel for the appellants in support of the appeal, urged the following contentions: -

> 1. The Division Bench of the High Court having condoned the delay in filing the writ appeal ought to have set aside the compromise said to have been arrived at between the parties. There was no concluded compromise in writing signed by the parties or their authorized representatives, but there was only proposal for compromise yet to be acted upon by the Commissioner in the manner suggested by the Government in its Memorandum dated 27.10.1989; the proposed terms of compromise having been rejected by respondent No. 1, they ceased to exist in the eye of law;

after filing of writ petition 8970 of 1990 containing serious misrepresentations of facts and before the same could be adjudicated and their falsity exposed of by the appellants the respondent No. 1 approached the High Court with a request that the writ petition may be disposed of recording the said compromise as per the Government Memorandum dated 27.10.1989 and got the order in the writ petition taking the advantage of the absence of the Advocate General at the hearing.

2. The Division Bench of the High Court committed an error in not considering the effect of Sections 14, 16, 42, 80(1)(a) and (b) and Section 87 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987 (for short 'the Act'); the Division Bench ought to have examined the legality of the alleged compromise in the light of these provisions as the illegality was writ large in the proposed terms of compromise.

3. Not only the Government required the Commissioner of Endowment to see that the above mentioned terms were reduced into a deed of compromise by the parties but Order XXIII Rule 3 CPC also required the compromise to be in writing and signed by the parties; no court could accept the compromise, which was not in writing and not signed by the parties; therefore, the order of the learned single Judge accepting the compromise not signed by the parties was in violation of Order

XXIII Rule 3 CPC and consequently it was void. Rule 24 of the A.P. Writ Proceedings Rules, 1977 makes the provisions of Order XXIII Rule 3 CPC applicable to the proceedings under Article 226 of the Constitution of India.

4. Having noted the submission of the Advocate General that he did not appear before the learned single Judge, who disposed of the writ petition in terms of the alleged compromise, the Division Bench out to have ascertained the facts as to who appeared for the official respondent Nos. 1 to 4 when the writ petition was disposed of; a concession made by the counsel on the question of law is not binding on the parties; Section 96(3) of CPC is no bar for challenging the consent order on the ground of illegality and/or fraud.

5. The learned single Judge, who disposed of the second appeal No. 122/1979 on 2.7.1979, made the following observations: -

> "As pointed out by the lower appellate Court, Ex. A-I shows that the land was gifted absolutely to Gunnaji. The Government cannot claim any interest in the land. The fact that Gunnaji's sister constructed a private temple subsequently on a portion of the land, does not make the gift of the land an endowment in favour of God."

There being no pleadings, no prayer and no arguments before the learned Judge on the above aspects, it was a mistake on his part to have made such observations; it is settled law that such a mistake on the part of the court shall not prejudice anyone. Further, the observations quoted above were not 'findings' as there was no issue at all warranting the same; the above extracted observations in any event were outside the scope of a second appeal, consequently, they were without jurisdiction; a decree by a court without jurisdiction is a nullity and its validity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in the collateral proceedings.

6. The observations made by the learned single Judge while dismissing the second appeal confirming the decree of the court below declaring respondent No. one's father as a hereditary trustee of the temple, did not create any additional right; the decree alone conclusively determines the rights of the parties.

7. It was not necessary for the appellants to challenge the orders of the High Court made in PIL and in the contempt petition as they were based on order of the learned single Judge dated 17.10.1995; the principle of consequential orders applies.

The learned counsel for respondent No. 1 on the other hand made following submissions fully supporting the impugned judgment: -

> 1. The High Court rightly dismissed the appeal by the impugned order on the three grounds (a) in view of Section 96(3) of CPC an appeal against a consent decree was not maintainable, (b) the allegations of fraud and misrepresentation were without any basis and (c) the finding recorded in the first round of litigation operated as

resjudicata against the appellants.

2. Neither in the review petition nor in the writ appeal nor in the special leave petition filed in this Court in the year 1998 nor in the present civil appeal it was stated that the Advocate General was not present or that he did not consent to the decree being passed as recorded by the learned single Judge in the High Court in the writ petition; it was for the first time before the Division Bench of the High Court it was orally contended that the Advocate General was not present and his junior had appeared; at no point of time it was averred that the Advocate General or his junior were not authorized to appear or to compromise the matter or that they had acted contrary to express instructions.

3. Following were the circumstances in which the Memorandum dated 27.10.1989 was issued: -

a) The said Memorandum was the culmination of a proposal mooted by the Commissioner, Endowments on 14.6.1989 and accepted by the Government of Andhra Pradesh on 27.10.1989.

b) In the proposal dated 14.6.1989, the Commissioner of Endowment traced the entire history of litigation and stated that the land in question was gifted to Gunnaji and the grant covered by the gift deed was absolute in view of the findings recorded by the High Court and this Hon'ble Court which were binding on the Deputy Commissioner, who had to decide whether or not the grant in question was an endowment.

c) It is in this view of the matter that the Commissioner, Endowment (and not the Assistant Commissioner as contended by the other side) mooted the proposal for compromise, which was accepted by the Government of Andhra Pradesh.

d) The writ petition having been disposed on the basis of the said proposal mooted by the Commissioner, Endowment (the appellant No. 1 herein) and accepted by the Government and that too on the specific representation by the learned counsel for the appellants that the writ petition may be disposed of on the said terms, it cannot be contended that the High Court committed any error in disposing of the writ petition accordingly.

4. The consent order passed in the writ petition is not contrary to the provisions of the Act

a) In the first round of litigation findings were recorded that there was no endowment at all; the gift in question was not a gift to God; it was an absolute gift to Gunnaji and that the temple in question was a private temple. This being the position, the provisions of the Act are not attracted to the land in question in any manner whatsoever.

b) The Commissioner, Endowments having accepted in his proposal dated 14.6.1989 that the said findings were binding on the Deputy Commissioner, Endowments for the purpose of exercise of jurisdiction under Section 87 of the Act, it cannot be said that the compromise was in violation of the provisions of the Act.

5. In the earlier round of litigation a clear finding is recorded that the temple in question was a private temple and the said finding has attained finality. Merely because there is reference to a Dharamshala in the gift deed it did not imply that there was an endowment of a public character.

6. Order XXIII Rule 3 CPC cannot be strictly applied to the proceedings under Article 226 of the Constitution of India

a) The explanation to Section 141 of CPC states that the expression 'proceedings' does not include any proceedings under Article 226 of the Constitution of India. Therefore, it cannot be said that the provisions of Order XXIII Rule 3 CPC should be mandatorily followed in the writ proceedings.

b) The High Court while exercising jurisdiction under Article 226 of the Constitution of India possesses inherent powers to do justice between the parties; the power of the High Court to dispose of the matter by recording consent of the parties flows from Article 226 of the Constitution of India and not from Order XXIII Rule 3 CPC. Further, the manner in which such power is to be exercised is not controlled by Order XXIII Rule 3 CPC.

c) The contention that Order XXIII Rule 3 CPC was applicable in view of the rules framed by the Andhra Pradesh High Court is not correct. The provisions of CPC are applicable to the extent possible and having regard to the context. If the provisions of CPC are held to be applicable to proceedings under Article 226 of the Constitution, absurd consequences will follow. Then it can be urged that before deciding a writ petition issues should be framed under Order XIV, evidence should be lead, etc.

d) In the present case admittedly the compromise terms were available in writing in the form of memorandum dated 27.10.1989 and the same were accepted. Thus provisions of Order XXIII Rule 3 CPC stood substantially complied with.

7. The decisions and findings recorded in the first round of litigation do operate as resjudicata against the appellants.

8. In view of the dismissal of Civil Appeal Nos. 702 and 703 of 1980 by this Court it is not open to the appellants to question the validity of the decisions and the findings, which stood concluded in the earlier round of litigation. We have carefully examined the rival contentions urged on behalf of the parties in the light of the material placed on record.

Late Manik Rao, father of respondent No. 1, filed suit No. OS No. 509 of 1971 in the City Civil Court at Hyderabad for declaration that the plaintiff was hereditary mutawalli (trustee) of Pandarinath Temple, generally known as Jangli Vithoba Temple at Osman Shahi, Hyderabad City, entitled to get

his name entered in column No. 11 of the Endowment Register, for perpetual injunction restraining the defendants from constituting or reconstituting any committee for the temple and to set aside the order of the Government dated 17.6.1971 covered by G.O. Rt. No. 680. The Government of Andhra Pradesh was defendant No. 1 and the Commissioner, Endowments (appellant No. 1 herein) was the defendant No. 2 in the suit. One Vasedeve Naik, a person appointed as Chairman of the Managing Committee constituted for the temple by the Government, was defendant No. 3 in the said suit. The trial court dismissed the suit on 23.3.1977.

The First Appeal A.S. No. 199 of 1977, filed by the plaintiff Manik Rao, was allowed on 22.12.1978 granting decree as sought for by the plaintiff in the suit. Temple Committee, the third defendant in the suit, filed Second Appeal S.A. No. 122 of 1979 in the High Court. The Government and the Endowment Commissioner (defendant Nos. 1 and 2) did not file any appeal challenging the decree passed by the first appellate court in favour of Manik Rao, father of respondent No. 1. In other words, they accepted the decree. Even otherwise the said second appeal was also dismissed by the High Court on 2.7.1979 affirming the decree passed by the first appellate court. The High Court in the said judgment made in the second appeal has noticed, thus: -

> "The case of the plaintiff is that as early as the year 1809, one Khan gifted five bigas of land in favour of his ancestor, Gunnaji, and that subsequent to the death of Gunnaji, the heirs of Gunnaji were enjoying the property in succession until his father's time and that, when his father Jagannath Rao was afflicted with a mental disease, he applied to the Government for the appointment of a Managing Committee as his son (plaintiff) was then a minor unable to manage the land and the temple and that, after he attained majority, the plaintiff is seeking the instant declaration. The case of the 3rd defendant, who is the appellant herein, is that the land was gifted in favour of a temple that the same is thus an endowment in favour of the temple; that the document created a trust in favour of Gunnaji; that the endower did not make any provision in the document in regard to the management of the temple or the land subsequent to the death of Gunnaji. According to the 3rd defendant, the heirs of Gunnaji managed the properties for sometime not by virtue of any legal right but for want of persons who agreed to manage and that, when the persons who were managing the property were found to be adopting malpractices, the Government took over the management in the year 1929 and was ever since appointing committees with chairman for such committees. The 3rd defendant is one such Chairman appointed by the Government and the plaintiff cannot therefore seek the declaration prayer for."

The High Court also has recorded that although the State and the Commissioner, Endowments were made parties to the second appeal, they did not participate in the appeal. In other words, they neither filed the second appeal, as already stated nor contested it. After hearing and considering the evidence in view of the rival contentions, the High Court has categorically recorded the findings, thus: -

> "As pointed out by the lower appellate court, Ex. A-1 shows that the land was gifted absolutely to Gunnaji. The Government cannot claim any interest in the land. The fact that Gunnaji's sister constructed a private temple subsequently on a portion of the land, does not make the gift of the land an endowment in favour of God. The land evolves according to law on the successors of the donees and the plaintiff is admittedly a successor. The fact that, due to mal-administration or the incapacity of a successor, the Government took over the management and appointed a committee is no ground to deny the rights of the subsequent successor, which flow by ordinary operation of law."

The original defendant Nos. 1 and 2 in the suit, i.e., Government of Andhra Pradesh and the Commissioner, endowments although did not file second appeal against the decree passed by the first appellant court in favour of the father of respondent No. 1, they filed special leave petition No. 3427 of 1980 in this Court aggrieved by the judgment and decree passed by the High Court in the aforementioned second appeal. Subsequently after granting leave it was numbered as Civil Appeal No. 702 of 1980. The third defendant in the suit also filed Civil Appeal No. 703 of 1980 in this Court. Both the civil appeals were dismissed by this Court by the following common order on12.8.1987: -

> "The High Court concurred with the findings of the Lower Appellate Court on a construction of the Deed Ex. A-1. It is now contended before us that the translation of Ex.A-1 is not correct. We find from the judgments of the Lower Appellate Court and the High Court and the memorandum of grounds of appeal before the High Court that it was not suggested anywhere that the translation is not correct. If the translation as set out in the judgment of the Lower Appellate Court is correct, the findings of the Lower Appellate Court and the High Court must be sustained. The appeals are therefore dismissed. No costs."

It is clear from the order of this Court, extracted above, that this Court specifically recorded that the findings of the lower appellate court and the High Court must be sustained. There is also reference to Ex. A-1, the gift deed, which deed was interpreted by the first appellate court and the same interpretation was accepted by the High Court holding that it conveyed absolute gift of land in favour of the ancestors of the respondent No. 1, the temple was a private property and that the land was not an endowed property. Thus, in the first round of litigation the findings, referring to Exh-A-1, gift deed, recorded by the first appellate court as affirmed by the High Court in the second appeal that under Exh A-1, gift deed, the land was gifted absolutely to Gunnaji; the Government cannot claim any interest in the land and the construction of a private temple on a portion of the land did not make gift of the land an endowment in favour of the God, had attained finality. On 14.6.1989, almost after a period of one year and ten months after the judgment was delivered by this Court in aforementioned Civil Appeal Nos. 702 and 703 of 1980, the Commissioner, Endowments sent a detailed report to the Secretary of Revenue Department suggesting a compromise by indicating the circumstances and the reasons. In the said report, detailed history of the litigation and also as to the findings recorded by the first appellate court, High Court and Supreme Court in relation to the land in question in the first round of litigation, as already stated above in detail, were stated. This report shows that there has been proper consideration and application of mind as to how and why it was in

the interest of the temple that a compromise was needed. In response to the said report/letter Joint Secretary to the Government of Andhra Pradesh by Memorandum No. 1295/Endts-II-1/84-21,Rev. dated 27.10.1989 permitted the compromise on certain terms stated therein. On the representation made by respondent No. 1 to the Assistant Commissioner to issue necessary instructions, the Assistant Commissioner of Endowment issued instructions dated 16.1.1990 to the tenants of the temple property to pay the rents to respondent No. 1 as the properties had been declared as his private property. However, the Deputy Commissioner, Endowments set aside those instructions on the ground that the term of compromise mentioned in the Memorandum dated 27.10.1989 had not been reduced into a deed of compromise. Thereafter, the Assistant Commissioner, Endowments, withdrew his earlier instructions. When the things stood thus, the Commissioner of Endowments appointed an Executive Officer by the order dated 25.6.1990 for the management of the temple. Under these circumstances the respondent no. 1 filed Writ Petition No. 8970 of 1990 for setting aside the aforementioned orders of the Deputy Commissioner, Endowments dated 15.6.1990 and of the Commissioner, Endowments dated 25.6.1990 respectively. This writ petition was disposed of by the learned single Judge by order dated 17.10.1995. Operative portion of the said order reads: -

> "During the pendency of the writ petition the respondents filed W.P.M.P. No. 15438/1995 seeking permission to appoint an Executive Officer to manage the affairs of the temple in question and also to permit the said officer to conduct the yearly festival pending disposal of the writ petition. The writ petitioner filed a counter affidavit in the said WPMP stating that he is ready to accept the terms and conditions mentioned in the Government Memo No. 1295 dated 27.10.1989. Now, counsel for both parties have represented that the writ petition may be disposed of recording the said compromise as per Government Memo No. 1295 dated 27.10.1989. Accordingly this writ petition is disposed of in terms of the compromise both parties to implement the terms embodied in the said Government Memo within a period of four weeks from today. Writ petition disposed of accordingly. No costs."

Thus, it is clear that the learned single Judge disposed of the writ petition by the consent of the parties accepting the compromise memo dated 27.10.1989. Against this order of the learned single Judge the present appellants did not file any appeal. The private parties, who were subsequently impleaded in the writ petition before the learned single Judge, filed Writ Appeal No. 1536 of 1995 aggrieved by the aforementioned order of the learned single Judge. The Division Bench of the High Court dismissed the said writ appeal on 13.1.1997 observing that the appellants in the writ appeal had not represented themselves in the earlier proceedings when the matter came up to this Court and that the decision of this Court in the earlier round had become final. Officers of the Endowment Department including the Commissioner, Endowments sought review of the order passed in the aforementioned Writ Appeal No. 1536 of 1995, which was dismissed on 12.11.1997 holding that the earlier judgment of this Court in Civil Appeal Nos. 702 and 703 of 1980 had attained finality so far as the construction of gift deed made in favour of Manik Rao, father of respondent No. 1 and the issue could not be re- opened. Hence the order passed by the learned single Judge accepting the compromise on the basis of the statement made on behalf of the parties was upheld. Respondent No. 1 had also filed a contempt petition alleging the violation of the judgment of the Division Bench made in Writ Appeal No. 1536 of 1995. The Contempt Petition also was disposed of on the same day,

i.e., on 12.11.1997. In the said order it is recorded, thus: -

> "We have disposed of the Review W.A.M.P. (SR) No. 84816 of 1997 today and in view of the definite stand taken in the counter-

affidavit by the Respondents that they will abide by the orders of this Court. We are of the opinion that it is not a fit case to proceed with the contempt cases. We, therefore, direct the implementation of the orders of this Court in Writ Appeal No. 1536 of 1995 by taking into consideration the observations made in the review W.A.M.P. (SR) No. 84816 of 1997 which is disposed of by us today. The Respondents will however implement the order in the W.A. No. 1536 of 1995 within two months from today."

Against the dismissal of the review petition the Commissioner, Endowments and others filed Special Leave Petition No. 22746 of 1997 before this Court. The same was dismissed as withdrawn on the statement made by the learned counsel that the petitioners wanted to file appropriate proceedings challenging the consent order made in the writ petition by the learned single Judge. It is only thereafter the appellants herein filed Writ Appeal No. 429 of 1998, which was disposed of by the impugned judgment.

It was not contended on behalf of the appellants, till it was raised for the first time during the course of arguments before the Division Bench in the Writ Appeal No. 429 of 1998, that the learned Advocate General did not appear before the learned single Judge and it is not the case of the appellants that the counsel representing the appellants before the learned single Judge were not authorized to make the consent statement to accept the compromise. However, it was contended before us that a concession made on the question of law by the learned counsel does not bind the parties. Learned Single Judge disposed of the writ petition on the representation of learned counsel for the parties recording the compromise as per the Government Memo No. 1295 dated 27.10.1989. The writ petition was disposed of in terms of the compromise with a direction to implement them within a period of four weeks. The representation so made or consent given for disposal of the Writ Petition before the Learned Single Judge, in our view, is not and does not amount to giving of concession on a point of law particularly when we are taking a view that the provisions of the Act have no application to the property in question. The two decisions in Nedunuri Kameswaramma vs. Sampat Subba Rao [1963) 2 SCR 208] and (2) B.S. Bajwa & Anr. vs. State of Punjab & Ors. [(1998) 2 SCC 523] have no application to the facts of the present case for the reasons that they were the cases dealing with concession on the point of law given by the counsel and those decisions were rendered on the facts of those cases. Further, we are of the view that in this case, there was no concession by the learned counsel on behalf of the appellants on a point of law.

The contention that the order passed by the learned single Judge accepting the compromise when it was not in writing and not signed by the parties could not be accepted by the learned single Judge, in our view, has no force for the reasons more than one.

The decisions in Gurpreet Singh vs Chatur Bhuj Goel [(1988) 1 SCC 270] and Banwari Lal vs. Chando Devi (Smt.) through L.Rs. & Anr. [(1993) 1 SCC 581] cited by the learned counsel for the

appellants to contend that the order passed by the learned Single Judge in the writ petition based on the consent statement made on behalf of the parties when the compromise was not reduced to writing and was not signed by the parties could not be accepted, do not advance the case of the appellants. These decisions dealt with the validity of the compromises arising out of suits. It is true that under Rule 24 of the Andhra Pradesh Writ Proceedings Rule, 1977, the provisions of the Code of Civil Procedure would apply to the writ petitions or the writ appeals. Section 141 of CPC provides that procedure provided in the Code in regard to suits shall be followed in all proceedings in any court of civil jurisdiction. But, the explanation to Section 141 states that the expression `proceedings' does not include any proceedings under Article 226 of the Constitution of India. By virtue of Rule 24 of A.P. Writ Proceedings Rules, the provisions of Civil Procedure Code could be applied as far as possible. The learned Single Judge disposed of the writ petition in terms of Memorandum dated 27.10.1989 on the basis of the submissions made by the learned counsel for the parties. The Memorandum was issued by the Government at the instance of the Endowment Commissioner and the same was accepted by the respondent no. 1 though not initially but during the pendency of the writ petition in the High Court. Further, it is not the case of the appellants that the counsel did not have authority to make a statement before the court to accept the compromise. In Byram Pestonji Gariwala vs. Union Bank of India & Ors. [(1992) 1 SCC 31], in para 39, it is held thus:-

> "39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by vakalatnama, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated."

The High Court while exercising jurisdiction under Article 226 of the Constitution of India has jurisdiction to pass appropriate orders. Such power can neither be controlled nor affected by the provisions of Order XXIII Rule 3 CPC. It would not be correct to say that the terms of order XXIII Rule 3 should be mandatorily complied with while exercising jurisdiction under Article 226 of the Constitution of India. Otherwise anomalous situation would arise such as before disposing of the writ petition, issue should be framed or evidence should be recorded etc. Proceedings under Article 226 of the Constitution of India stand on a different footing when compared to the proceedings in suits or appeals arising therefrom. There was some dispute as to whether the learned Advocate General himself appeared on the date when the writ petition was disposed of by the learned Single Judge in terms of the compromise or his junior appeared. In the impugned judgment, it is stated that the State Government was duly represented by a lawyer. In State of Maharashtra vs. Ramdas Shrinivas Nayak & Anr. [(1982) 2 SCC 463], dealing with the practice and procedure regarding statement of fact recorded in the judgment of a court, this Court held that such a statement is conclusive and not open to be contradicted in appeal. Paras 4 to 8 of the said judgment read:-

> ."4. When we drew the attention of the learned Attorney-General to the concession made before the High court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation (Per Lord Atkinson in Somasundaram Chetty v. Subramanian Chetty, AIR 1926 PC 136 : 99 IC
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> 742)." We are bound to accept the statement of the judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call the attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in Madhu Sudan Chowdhri v.

Chandrabati Chowdhrain, AIR 1917 PC 30 : 42 IC 527). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. In R v. Mellor ((1858) 7 Cox CC 454 : 6 WR 322 : 169 ER 1084) Martin, B. was reported to have said :

> We must consider the statement of the learned judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity.
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> 6. In king-Emperor v. Barendra Kumar Ghose (28 Cal WN 170 : AIR 1924 Cal 257 : 38 Cal LJ 411 : 25 Cri LJ 817), Page, J. said :

...these proceedings emphasis the importance of rigidly maintaining the rule that a statement by learned Judge as to what took place during the course of a trial before him is final and decisive : It is not to be criticized or circumvented; much less is it to be exposed to animadversion.

7. In Sarat Chandra Maiti v. Bibhabati Debi (34 Cal LJ 302 : AIR 1921 Cal 584 : 66 IC 433) Sir Asutosh Mookerjee explained what had to be done :

...It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment...

8. So the judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the judge himself, but nowhere else. "

Under the circumstances, the Division Bench of the High Court was right in not disturbing the order of the learned Single Judge accepting the compromise as represented by learned counsel for the parties. Thus, on the facts of the case, it is not possible to hold that the order of the learned Single Judge disposing of the writ petition was bad in law particularly when he exercised his jurisdiction under Article 226 of the Constitution of India. At any rate, when the findings recorded and the decision made in the first round of litigation between the parties being binding, the appellants cannot take advantage on the ground that compromise was not reduced to writing and not signed by the parties. Even otherwise, if this compromise is to be annulled accepting the contention of the appellants, it would be to their disadvantage in the light of the findings recorded earlier in the first round of litigation.

In the earlier round of litigation, it was specifically held that the gift deed did not create an endowment and the temple in question was not a public temple and the land was gifted absolutely to Gunnaji. In a private trust, the beneficiaries are specific individuals and in a public trust, the beneficiary is general public as a class. In a private trust, the beneficiaries can be ascertained whereas in a public trust, they are incapable of ascertainment. In the present case, the ascertained individual was Gunnaji. This position is clear from the decision in Deoki Nandan vs. Murlidhar [(1956) SCR 756].

Mere use of the premises as a `Dharamshala' for number of years could not lead to an inference that the same belongs to a public trust. Whether an endowment is of public or private nature, depends on the facts of each case satisfying certain tests and guidelines. This position is evident from the judgment of this Court in Kuldip Chand & Anr. vs. Advocate-General to Government of H.P. & Ors. [(2003) 5 SCC 46]. Para 34 of the said judgment reads:-

> "Long user of a property as Dharamsala by itself would not lead to an inference that dedication of the property by Kanwar Bir Singh in favour of the public was complete and absolute. Had such dedication been made, the same was expected to be recorded in the revenue records."

The argument that the impugned order is unsustainable on the ground that the Division Bench did not consider the effect of Sections 14, 16, 42, 80(1)(a) and (b) and Section 87 of the Act also does not help the appellants in the light of the specific finding of fact that the gift made in Exh. A-1 in respect of the land was absolute in favour of the ancestors of the respondent No.1, the temple was a private temple and the land was not endowed under the gift deed. As is evident from Section 1(3) of the Act, it applies to all public charitable institutions and endowments whether registered or not. This being the position, having regard to the findings as to the nature and scope of the gift of the land in favour of the ancestors of the respondent no. 1, the temple was a private temple and the land was not endowed under the gift deed, the Division Bench did commit no error in not considering the effect of the aforementioned Section of the Act when the Act itself did not apply to the properties in question. In the suit O.S. No. 509/1971, although no specific issue was raised as to the scope and nature of the gift deed, the Commissioner of Endowments (appellant no. 1) in the written statement, had raised a plea that the gift deed merely gave general power of attorney to Gunnaji. In that situation, in order to decide the issues that arose for consideration in the suit, it was necessary to decide as to what rights were conferred by the gift deed on Gunnaji and what was the nature and scope of the gift deed. It cannot be said that these aspects as to the nature and scope of the gift deed and the rights that were conferred on Gunnaji did arise for consideration. Both the parties knew about the same. The High Court in the second appeal No. 122/79, as already stated above, noticing the findings of the lower appellate court, recorded a findings that the land was gifted to Gunnaji absolutely, the Government could not claim any interest, temple constructed on a portion of the land was a private temple and it did not make the gift of the land an endowment in favour of the God. These findings have attained finality. Failure to frame a formal issue by the court would not invalidate the findings of the binding judgment between the parties. The aforementioned findings against the appellants could neither dilute nor deprive their binding character merely because specific issue was not raised in the suit. It was also contended that in the suit, father of the respondent no. 1 claimed only declaration as to his Mutawalliship and if he was Mutawalli, the question of claiming absolute right over the land did not arise. In the suit, one of the reliefs sought by Manik Rao was that the order passed by the appellant no. 1 holding that the gift in favour of Gunnaji was an endowment be set aside which relief was ultimately granted to Manik Rao. For setting aside the order of the appellant no. 1, it was necessary to consider the nature and scope of gift deed and, therefore, the finding in that regard, which had attained finality, could not be re-opened. Merely because Manik Rao claimed declaration of his mutawalliship under misconception or wrongly, that does not affect the merit of the case of the respondent no. 1 when there are positive and categorical findings as to the nature and scope of the gift deed conferring absolute right over the land in question. It is pertinent to state here itself that the findings of the first appellate court and the second appellate court regarding the nature of the gift deed were specifically impugned by the appellants in Civil Appeal Nos. 702 and 703 of 1980 and thus the issue was raised. The contention was raised in the aforementioned appeals before this Court that the courts below had wrongly interpreted the gift deed and the findings should be overturned. This Court in the judgment dated 12th August, 1987 made in the said appeals has

clearly stated that the findings of the lower appellate court and the High Court must be sustained. It may also be noticed that the appellants challenged the judgment of the first appellate court and the High Court in the first round of litigation before this Court substantially on the grounds which are urged in the present appeal. Some decisions are cited on the question as to whether the judgments in the first round of litigation operate as res judicata and whether they are binding on the parties.

The decision in Mathura Prasad Bajoo Jaiswal & Ors. Vs. Dossibai N.B. Jeejeebhoy [(1970) 3 SCR 830] and Madhvi Amma Bhawani Amma & Ors. Vs. Kunjikutty Pillai Meenakshi Pillai & Ors. [(2000) 6 SCC 301] relied on by the learned counsel for the appellants to support the contention that any observation made or finding given in the judgment in the absence of an issue framed does not operate as res judicata. In the first case, the question that arose for consideration was whether a decision relating to the jurisdiction of a court erroneously decided would operate as res judicata subsequently. This Court held that by an erroneous decision, if the court assumes jurisdiction which it does not possess under the statute, such a decision would not operate as res judicata between the parties. This is not a decision on the point that a finding given by the courts having jurisdiction on the question of fact, does not bind the parties or such a finding does not operate as res judicata. In the second case, the question for consideration was whether an order of granting succession certificate under Section 373 of the Indian Succession Act, 1925 would operate as res judicata to the suit for partition in a civil court between the same parties. This Court held that the finding recorded while granting succession certificate did not operate as res judicata in the suit filed for partition in a civil court. It was noticed that the grant of succession certificate falls under Part X of the said Act. Under Section 387 of the Act, no decision under Part X upon any question of right between the parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties. In para 16 of the judgment, it is stated thus:-

> "16. This leaves no room for doubt. Thus any adjudication made under Part X of this Act which includes Section 373 does not bar the same question being raised between the same parties in any subsequent suit or proceeding. This provision takes the decisions under Part X of the Act outside the purview of Explanation VIII to Section 11. This gives protective umbrella to ward off from the rays of res judicata to the same issue being raised in a subsequent suit or proceedings."

Rameshwar Dayal vs. Banda (Dead) through His LRs. & Anr. [(1993) 1 SCC 531] also does not help the appellants. That was a case where question of title was incidentally determined by the Small Causes Court and when a plea of res judicata was sought to be raised in a subsequent suit based on title, the Court held that there was no bar of res judicata. The question of title incidentally considered by the Small Cause Court in eviction proceedings against tenant could not be taken as bar to apply principle of res judicata in a subsequent suit based on title.

This Court in Raj Laxmi Dasi & Ors. Vs. Banamali Sen & Ors. [1953 SCR 154] while dealing with the doctrine of res judicata reproduced the observations of Sir Lawrence Jenkings made in the judgment of the Board in Sheoparsan Singh vs. Ramnandan Singh [(1916) 43 I.A. 91] which read:-

> "In view of the arguments addressed to them, their Lordships desire to emphasize that the rule of res judicata while founded on ancient precedent, is dictated by a wisdom which is for all time. `It hath been well said' declared Lord Coke, `interest reipubliae ut sit finis litium otherwise, great oppression might be done under colour and pretence of law' (6 Coke, 9a). Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnaneswara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus:`If a person though defeated at law, sue again, he should be answered "you were defeated formerly". This is called the plea of former judgment. And so the application of the rule by the courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

(Emphasis supplied) In support of his submission, the learned counsel for respondent no. 1 contended that as long as an issue arises substantially in a litigation irrespective of the fact whether or not a formal issue has been framed or a formal relief has been claimed, a finding on the said issue would operate as res judicata, strongly relied on the decision of this Court in Sajjadanashin Sayed MD. B.E. EDR. (D) by LRs. Vs. Musa Dadabhai Ummer & Ors. [(2000) 3 SCC 350]. Paras 18 and 19 of the said judgment read:-

> "18. In India, Mulla has referred to similar tests (Mulla, 15th Edn., p. 104). The learned author says : a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter "directly and substantially" in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was "directly and substantially" in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls ? One test is that if the issue was "necessary" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case (Mulla, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwer Singh v. Sarwan Singh (AIR 1965 SC 948) and Syed Mohd. Salie Labbai v. Mohd. Hanifa ((1976) 4 SCC 780 : AIR 1976 SC 1569). We are of the view that the above summary in Mulla is a correct statement of the law.
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> 19. We have here to advert to another principle of caution referred to by Mulla (p. 105) :
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> "It is not to be, assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to

> be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision."

(Emphasis supplied) In the light of what is stated above, in the case on hand, in our view, it was necessary for the Court in the earlier round of litigation to decide the nature and scope of gift deed Exbt. A-1. Accordingly, the courts decided that the gift made in favour of ancestors of the respondent no. 1 of the land was absolute and it was not an endowment for a public or charitable purpose. On the facts of the case, it is clear that though an issue was not formally framed, the issue was material and essential for the decision of the case in the earlier proceeding. Hence, the bar of res judicata applies to the facts of the present case.

In Vithal Yeshwant Jathar vs. Shikandarkhan Makhtumkhan Sardesai [(1963) 2 SCR 285], this Court observed that "it is well settled that if the final decision in any matter at issue between the parties is based by a Court on its decisions on more than one point each of which by itself would be sufficient for the ultimate decision the decision on each of these points operates as res judicata between the parties."

The following three decisions were relied on by the learned counsel for the appellants in support of his submission that a `finding' is a decision on an issue framed in a suit and not otherwise:-

> (1) Income-tax Officer, A-Ward,Sitapur vs. Murlidhar Bhagwandas, Lakhimpur Kheri[(1964) 6 SCR 411] (2) Daffadar Bhagat Singh & Sons Vs. The Income-tax Officer, A-Ward, Ferozepore [(1969) 1 SCR 828] (3) C.I.T. Andhra Pradesh Vs. M/s. Vadde Pulliah & Co.

[(1973) 4 SCC 121] These three decisions are rendered interpreting Section 34(3) of the Income-tax Act. They do not help the appellants. There are not the authorities to say that a finding is a decision on an issue framed in a suit. This Court observed in the said decisions that a finding, which can be considered as relevant under the second proviso to Section 34(3) of the Income-tax Act, must be one which was necessary for deciding the appeal before the authority. In view of the discussion made above on the point of res judicata, we have taken the view that the findings recorded between the parties in the earlier round of litigation are binding on the appellants. Thus, we do not find any merit in the submission of the learned counsel for the appellants that there are no binding findings against the appellants in the earlier round of litigation on the ground that those findings were recorded without there being any issue.

In the impugned judgment, the Division Bench of the High Court, after detailed consideration upheld both the preliminary objections namely (1) as to the maintainability of the appeal against the order of the learned Single Judge as the said order was passed on the basis of the consent of the parties and (2) on the basis of doctrine of res judicata or constructive res judicata, raised on behalf of the respondent no. 1 and rightly so in our opinion. We do not find any good ground or valid reason to interfere with the impugned judgment.

Thus having regard to all aspects and viewed from any angle, we do not find any merit in this appeal. Consequently it is dismissed but with no order as to costs.