
(1997) 08 AP CK 0046
In the Andhra Pradesh High Court
Case No : A.S. No. 717 of 1985

Javvadi Sriranganayakulu and Another	APPELLANT
Vs	
Sabbella Pulla Reddy and Others	RESPONDENT

Date of Decision : 14-08-1997

Acts Referred:

Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966
— Section 2, 2(4), 77(1), 78
Evidence Act, 1872 — Section 32, 33, 35

Citation : (1998) 1 ALD 78 : (1997) 6 ALT 173

Hon'ble Judges : Krishna Saran Shrivastav, J

Bench : Single Bench

Advocate : Mr. T. Anantha Babu, for the Appellant; Mr. M.S.K. Sastry and Government Pleader, for the Respondent

Judgement

1. The plaintiffs are the appellants. Their suits instituted u/s 78 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966 (for short, "the Endowment Act") for setting aside the order passed by the 2nd defendant u/s 77(1)(a) of the Endowment Act, whereby the suit house, suit Ramalayam and the suit lands have been declared as public charitable endowments and recovery of the suit house has been ordered, has been dismissed.

2. It is no longer in controversy before me that the 1st plaintiff, his father late Jawadi Laxmayya Naidu, his uncle late Narasimhamiirthy and his (late Namsimhamurihy "s) adopted son namely late Jawadi Venkata Ramasastry who was the father-in-law of the 2nd plaintiff and the 2nd plaintiff's husband, namely Jawadi Narasimharao were members of a Joint Hindu Family and had considerable movable and immovable properties in Penugonda Village. Late Laxmayya Naidu was a renowned philanthropist and a patron of arts and literature. He used to patronise Telugu Poets and used to hold literary conferences at Penugonda and also used to honour Telugu poets. This Joint Hindu Family had purchased a house bearing Door No. 17-99 at Penugonda which was

popularly known as "Keerthiseshulu Jawadi Venkata Ramasastry Dharmasala" in the memory of late Jawadi Venkata Ramasastry who had died at the age of about 22 years sometime in the year 1942. On the occasion of Sastripurthy celebrations of late Jawadi Laxmayya Naidu, in the year 1961, his well wishers had published a souvenir, Ex.B2, On 16-5-1957, the 1st plaintiff, his father Jawadi Laxmayya Naidu, his Uncle, Jawadi Narasimhamurthy and late Jawadi Venkata Narasimha Rao, husband of the 2nd plaintiff had disrupted the joint Hindu family and partitioned the immovable properties, except the property shown in "E" Schedule annexed to the partition deed, Ex.B1, in which in ItemNo.8,Ac.6-20cts. out of Ac.II-20cts.of land had been shown for maintenance of Sitaramalayam and Venkata Ramasastry Dharmasala for Akhandam, Bhogam as also for the maintenance of Jawadi Musalayya alias Laxmayya during his life time. The plaintiffs had leased out the suit house for some time to Land Mortgage Bank and for some period to the Local Library Authority. They had also paid taxes to the Grampanchayat vide Receipts Ex.A4, A5 and A7. They had agreed to donate the sale proceeds of the suit house to the Grampanchayat for construction of travellers shed in the bus stand of Penugonda Village and the Grampanchayat of this village had arranged for the sale of the suit house to the 4th defendant for a consideration of Rs.23,000/- and had executed a sale deed, Ex.B7 on 28-9-1974 and on 16-11-1976, late Jawadi Laxmayya Naidu through his advocate had filed an objection, Ex.B 17, before the Land Reforms Officer in LCC 1693/75.

3. The 1st defendant had filed a petition in OA 140/74 u/s 77(I)(a) of the Endowment Act for taking possession of the suit house as also the temple called Ramalayam together with the properties endowed to them as, according to him, these properties were public charitable endowments. The petition was resisted by the plaintiffs and J. Laxmayya Naidu, who had subsequently expired. The 2nd defendant, after holding an enquiry, accepted the petition and found that the suit , house is a public charitable endowment and, therefore, it could not be alienated to the 4th defendant and ordered the 3rd defendant to take steps for recovery of possession of the suit house to restore working of the institution and to maintain the Ramalayam. The second defendant also directed the third defendant to take suitable action in relation to Ac. 1.00 cts. of land out of Ac.1 1.20 cts. of land belonging to the plaintiffs.

4. The plaintiffs filed the suit alleging that the suit house was used as a guest house for Poets, Pandits and Artists etc., who had regularly visited Penugonda at the invitation of late Laxmayya Naidu. The suit house was used for the personal guests of the family and never used as a choultry. They asserted that the suit house was never used for pedestrians or way-farers or pilgrims. They also asserted that no feeding in the choultry was ever done during the life time of late Laxmayya Naidu or his elder brother late Narasimha Murthy. The suit house was popularly called "Keerthiseshulu Jawadi Venkata Ramasastry Dhannasala" in the memory of the deceased Jawadi Venkatarama Sasfry, but it was actually never used as Dharmasala for the members of the society. The properties shown in "E"

schedule had been kept in joint possession of the all the four separated members of the Joint Hindu Family and a provision was made for the maintenance of the Ramalayam and for meeting the expenditure of repairs to the suit house out of the income from Ac.5.20 of land in Survey No.448. The suit house was utilised by the plaintiffs as their exclusive property. It was let out to Land Mortgage Bank and subsequently to the Local Library Authority. At the request of the Grampanchayat of Penugonda Village, the plaintiffs had agreed to sell to the 4th defendant the suit house for a sum of Rs.23,000/- and handed over that amount to the Grampanchayat for construction of a shelter for bus travellers at Penugonda and in addition to that they also donated certain amount for the said construction. The Endowment Department had initiated proceedings for taking possession of the suit house in the year 1967, but later, after getting satisfied, dropped the proceedings on 26-6-1974 and, therefore, the 2nd defendant was not competent to decide the issue again because it was barred by the principles of res jtdicata. The impugned order is bad in law.

5. The 1st defendant through the written statement denied the plaint allegations and alleged that the suit house was dedicated to public as public charitable institution more than 40 years ago. "Keerthiseshulu Jawadi Venkata Ramasastry Dharmasala" was named in the memory of Jawadi Venkata Ramasastry, the adopted son of late Narasimhamitrthy and it was dedicated to the public as choultry. The charitable choultry was inaugurated by Raja Vikmmadev of Jaipur. Poor pedestrians and way-farers, who used to pass through Penugonda, were fed freely and were permitted to rest free of charge in the suit house. The plaintiffs and their ancestors have also constructed a temple known as Ramalayam and for the maintenance of the suit house and the Ramalayam, they had donated Ac.5-20 of land in Penugonda for the purpose of religious poojas and functions in Ramalayam and for the up keep and maintenance of the Dharmasala. In the souvenir, Ex.B2, biography of late Laxmayya Naidu had been published in which it has been mentioned that Jawadi family had dedicated the suit house for charitable purposes. He denied that the suit property was used by the personal guests of late Laxmayya Naidu. He has pleaded that the suit is barred by limitation and the order passed by the 3rd defendant docs not operate as res judicata because he was not competent to decide the issue in question and, therefore, the suit deserves to be dismissed.

6. The 2nd and the 3rd defendants filed a joint written statement and have taken almost similar pleas as have been taken by the 1st defendant. They have pleaded that Jawadi family people maintained the suit house from 1944 to 1973 and it is a public charitable endowment and, therefore, the plaintiffs had no right to sell the suit house to the fourth defendant.

7. The 4th defendant through the written statement lias accepted the plaint allegations and further pleaded that he had purchased the suit house for a consideration of Rs.23,000/-and has been in possession and enjoyment of the same from the date of purchase.

8. The trial Court has framed the following three issues.

(1) Whether the endowment is charitable or religious in nature?

(2) Whether the impugned order of the Deputy Commissioner, Endowment is liable to be set aside? And

(3) To what relief?

9. The trial Court, taking into consideration, the statement of PW1, that his father Laxmayya Naidu was a man of charitable disposition and had performed several acts of charity and that they had an idea of perpetuating the memory of late Jawadi Venkata Ramasastry and wanted to do some act of charity to perpetuate his memory, held that Jawadi family had taken a "Sankalpa" for creation of a charitable trust. The trial Court further observed that the Maharaja of Jaipur would have not visited Penugonda village to inaugurate the suit house which was a small old tile building comprising 4-5 rooms, had it not been connected with any charitable act benefiting the public. The trial Court, taking into account, the article containing a brief biography of Jawadi Laxmayya Naidu, which is at Ex.B3, in the souvenir, Ex.B2, written by one Mancham Butchi Lingappa Sastry, wherein he had mentioned the philanthropic act of late Laxmayya Naidu in establishing a choultry to perpetuate the memory of late Jawadi Venkata Ramasastry, which was inaugurated by the Maharaja of Jaipur, the group photo, Ex.B5, published in the souvenir, Ex.B2, observed that late Laxmayya Naidu had established a choultry in the name of late Jawadi Venkata Ramasastry, particularly when PW1 had admitted in his cross-examination that the articles written in the souvenir, Ex.B2, are correct. The trial Court also relied on the evidence of the 1st defendant as also on the certified copy of the deposition of one Venkata Shiva Rao, which is at Ex.B 18, wherein they have stated that the suit house was used as "a public choultry because Jawadi Laxmayya Naidu and his family members had converted it as Dharmasala for pilgrims, poets etc., who used to stay in the said choultry during the visit to Penugonda and they were provided utensils for cooking food and the words "Jawadi Venkata Ramasastry Dharmasala" had been engraved on the suit house which were later erased by the 4th defendant after its purchase. The trial Court also found that in Schedule "E" annexed with the partition deed, Ex.B1, no reference has been made that the suit house is the joint property of the parties to the partition and it was not allotted to either of them. Land admeasuring Ac.5-20 cts. was kept for the maintenance of the Ramalayam and the suit house and has been described as "two Dharmasanthas" in the partition deed, Ex.B1. It has also taken into account the objection, Ex.B1?, filed by late Laxmayya Naidu before the Land Reforms Tribunal, Tanuku, in which it has been mentioned that the land admeasuring Ac.5-20 cts. had been dedicated for the management of the Sathram (Choultry) and for maintenance of the temple (Sitaramalayam) prior to 1957 and, therefore, it is exempted from the operation of the provisions of the Land Reforms Act and, therefore, it should be excluded from the holding of the declarant. The trial Court did not give any importance to the fact that the suit

house had not been mutated in the name of the Dharmasala in the records of the Grampanchayat. It has taken the view that the tax receipt, Ex.A7, evidences the payment of property tax but the plaintiffs were alerted on account of the service of notice by the 3rd defendant in the year 1967 and, therefore, they had started creating evidence in an attempt to establish that the suit house is not a public charitable choultry. Similarly, the certificate, Ex.A4, issued by the Grampanchayat on 17-9-1976 was not given any importance. The letting of the suit house to the Co-operative Society and to the local Library was found to be of little consequence, because the income as personal income was shown only in the income tax return for the year 1971-72. In result, the trial Court found that the suit house was a public charitable institution within the meaning of Section 2(4) of the Endowment Act as it was used as Dharmasala or Choultry for the benefit of public and the suit land was also a public and religious endowment and the income from it should be utilised for the maintenance and up keep of the temple and choultry. Holding so, the trial Court dismissed the suit.

10. Feeling aggrieved by the impugned judgment, the plaintiffs have preferred das appeal.

11. It has been contended on behalf of the appellants that the trial Court has misconstrued the contents of the partition deed, Ex.B1. It has been clearly mentioned in the body of Ex,B1 that the appellants and other members of the family have been using the suit house as late Venkata Ramasastry Dharmasala and have been maintaining the same and, therefore, the only conclusion that can be drawn is that the suit house was utilised by them and by no other person. It was further mentioned in it that the elders of their family shall carry out the management of the two Dharmasasthas and keep them in good condition and get Kalyanams etc. performed which is indicative of the fact that the suit building was also kept in joint ownership and possession. The trial Court had committed an error in not relying on the certificate, Ex.A4, in which it has been clearly mentioned that as per tax demand register of the Grampanchayat, the name of Sri Laxmayya Naidu has been shown as the owner of the suit house till the end of 1973-74 and the house tax levied on the suit building had been paid completely till the end of 1973-74, as also on the copy of the assessment order, Ex.A6, wherein the income from the suit house let out to the Land Mortgage Bank has been shown as the personal income of the joint Hindu Family. It has been further contended that PW1 has stated only about the intention of his elders for doing some charitable act in the name of late Jawadi Venkata Ramasastry, but no decision had been taken and, therefore, in the absence of a definite "Sankalpa" in equivocal words, it cannot be said that there was really a "Sankalpa" for donating the suit house for charitable purposes. The trial Court has wrongly relied on the articles contained in the souvenir, Ex.B2, because the contents had not been proved legally. Admittedly, late Jawadi Venkata Ramasastry died in the year 1942 and, therefore, the suit house cannot be inaugurated as a choultry in the year 1961. The Defendants No.1 to 3 had not examined any witness in an attempt to establish that he had ever, during his

stay, in Penugonda stayed in the suit house free of costs and/or he was provided with food free of cost or had himself prepared food in the suit house. The Court has wrongly relied on the certified copy of the deposition, Ex.B 18, of Venkata Shiva Rao because there was no evidence on record that he was not able to come to the Court to give evidence and the lower Court has wrongly observed in Para 15 of its judgment that the 1st defendant has stated in cross-examination that the said Siva Rao was unable to talk because the 1st respondent has not stated during his cross-examination that the said Siva Rao was unable to talk. He could have been examined on commission. Therefore, the certified copy of the deposition of the said Siva Rao should be excluded from consideration. The appellants have only executed the sale deed but actually the consideration has been utilised by the Gram panchayat for construction of the shed for bus travellers and they had also donated considerable amount in addition to the donation of Rs.23,000/- and, therefore, their act was not mala fide. PW1 to PW4 have categorically stated in their evidence that the suit house was never utilised by any traveller during his stay in Penugonda village and no food free of cost was ever supplied to them. The evidence of the 1st defendant being interested, because he bore animosity with the appellants, should have been rejected. In the absence of "Sankalpa" and "Samarpan", the mere fact that the suit house has been named in the memory of the dead person, that is Jawadi Venkata Ramasastry, docs not conclude that it was dedicated to the public. The lower Court has wrongly held that the land admeasuring Ac.5-20 has been dedicated for public purposes. The learned Counsel of the appellants, however, conceded that the temple known as Ramalayam had been dedicated to the public and to this extent of the finding of the lower Court, the appellants have no grievance to make.

12. On the other hand, it has been urged on behalf of the Respondents No.2 and 3 by the Government Pleader for Appeals that, in the partition Deed, Ex.BI, it has been specifically mentioned that apart from the property mentioned in Schedule "E", which is kept joint by all of them, there is no property whatsoever which has to be partitioned by them clearly establishes that the suit house was not kept in joint ownership and possession by the appellants and their elders. Had it been kept so, there appears to be no reason as to why this fact has not been specifically mentioned in Schedule "E" annexed with the partition deed, Ex.BI. It has been further urged that from the evidence of the 1st defendant (DW3), it appears that Siva Rao was aged about 96 years and he was unable to speak and under these circumstances, the certified copy of the deposition, Ex.B18, was read in evidence legally vide Section 33 of the Indian Evidence Act, particularly when no objection had been raised at the time when it was exhibited by the 2nd respondent as Ex.BIS. Reliance has been placed on the cases of Haji Mohammad Ekramul Haq Vs. The State of West Bengal, , Bhim Mandal Vs. Magaram Corain and Others, , P.C. Purushothama Reddiar Vs. S. Perumal, , and The Land Acquisition Officer, Vijayawade Thermal Station Vs. Nutalapati Venkata Rao, . It has been further urged on behalf of the Respondents No.2 and 3 that the 1st

appellant as PW1 has admitted in cross-examination that the contents of all the articles of the souvenir, Ex.B2, are true. He has also admitted the correctness of the paragraph, which is Ex.B3, at page 20 of the souvenir, Ex.B23 relating to the suit house. The father of PW1, late Jawadi laxmayya Naidu, has specifically mentioned in the objection, Ex.B17, that Ac.5-20 cts. of land should be exempted from being considered as his holding because it has been dedicated for the maintenance of the temple, that is Ramalayam, and the choultry, that is the suit house. When this land had been dedicated, how can it be said that the income from these lands could be utilised for the maintenance of a private building, that is the suit building? Once the family decided to do some act of charity in the name of the deceased Jawadi Yenkata Ramasastry, though not for a specific purpose, but the subsequent conduct of the appellants and their elders in permitting the travellers to stay in the suit house free of cost during their stay in Village Penukonda and providing utensils for preparation of food from the year 1944 till 1957 then the subsequent act of letting the suit house to others and utilising the income derived therefrom will not change the nature of the building and they had no right thereafter to claim that the suit house was their private property and, therefore, even if the partition deed, Ex.B 1, is not read against the appellants, their previous intention to do some charitable act and the subsequent acts of utilising the suit house for public purposes and the aforementioned contents of the souvenir, Ex.B2, establish that the suit house was actually dedicated by them for public purposes. In view of the admission of PW1 that Ac.5-20 cts. of land was reserved for maintenance of the temple and the choultry, the Respondent No.2 as also the trial Court has rightly held that the suit land has also been dedicated for public purposes.

13. In the case of Menakuru Dasaratharami Reddi and another v. Duddukuni Subba Rao and others, AIR 1957 SC 797, it has been held that, dedication to charity need not necessarily be by instrument or grant. It can be established by cogent and satisfactory evidence of conduct of the parties and user of the property which show the extinction of the private secular character of the property and its complete dedication to charity. On the other hand, there may be grants or gifts showing dedication of property to charity.

14. In Para 438 of Mayne's Hindu Law., 9th Edition, occur the following words :

"The last case arises where the founder applies his own property to the creation of a pagoda or any other religious or charitable foundation, keeping the property itself, and the control over it, absolutely in his own hands. The community may be greatly benefited by this arrangement so long as it lasts, but its continuance is entirely at his own pleasure. It is like a private chapel in a gentleman's park, and the fact that the public have been permitted to resort to it will not prevent its being closed, or pulled down, provided there has been no dedication of it to the public."

15. Again, in Mayne's Hindu Law and Usage 13th Edn. the learned author, on proof of dedication, has observed that, very strong and clear evidence of an

endowment is required and the onus lies upon a party who sets up a dedication to prove that the property has been inalienably conferred upon a testator to sustain worship or upon a religious or charitable institution.

16. F.B. Mukharji, in his book entitled Hindu Law of Religious and Charitable Trusts"" (3rd Edn.) has observed that:

"The tests of a bona fide or nominal endowment are: how did the founder treat the property or how have the descendants treated it, has the income of the endowed lands been- continuously applied to the object of dedication? In order to establish a valid endowment it must be proved that the grant was made with the intention that the profits should be applied for the particular religious purpose and that the profits have been so applied. No endowment is created if the deed was not meant to be acted upon and the founder had other or ulterior motives, e.g. typing up of property out of the reach of the creditors. When however the acts and conduct of the parties show that the income of the property was employed in the performance of religious rites laid down by the founder, the mere fact that the members of the grantors" family were nominated shcbaits, or they were to be remunerated out of the endowed fund are not proper grounds for holding the dedication to be nomination."

17. To constitute a valid endowment, it must be established that the settler intended to divest himself of the ownership in the property dedicated. There should be an express dedication to the public. The intention to create a trust must be indicated by acts or words with reasonable certainty. In order to establish that a charitable institution has been constituted, a strong and clear evidence is required. The charitable purpose should be clearly specified and the property" intended for the enjoyment should be set apart or dedicated for that purpose. Each case must be considered on its facts and the intention of the parties must be determined, even in the absence of a document, from their conduct.

18. PW1 has deposed that the suit house was used as guest house and no traveller had ever stayed in the suit house either by making payment or free of rent, he has also stated that no food was supplied to any traveller who had allegedly stayed there. His evidence is corroborated on material particulars by the evidence of PWs.2 and 3.

19. It is true that, PW1 has admitted in cross-examination that, they had an idea of perpetuating the memory of late Venkata Ramasaslry and to do some act of charity to perpetuate his memory. But, it has not been put to him in cross-examination that what kind of charity they actually wanted to do. In other words, the charitable purpose has neither been specified by him nor it lias been put to him during his cross-examination mat they had wished to establish a choultry or Dhannashala for the public at large. Admittedly, the father of this witness was a man of charitable disposition and had performed several acts of charity. In the souvenir, Ex.B2, in an article, the relevant passage of which is at Page 20 marked

as Ex.B3, it is written by the author of this article that, in the memory of late Venkata Ramasastry, a Satram was built and inaugurated by the Maharaja of Jaipur. But the year when it was built has not been mentioned in this article and it has also not been mentioned in it that it was ever used as a choultry prior to the publication of this article. Had this choultry been established in the year 1944 and free food was provided to the travellers staying therein, there appears to be no reason as to why this important fact was not mentioned in this article, particularly when it appears to be in the praise for the father of PW1. It is also noteworthy that, according to the respondents, this choultry was established in the year 1944. Had it been so, inauguration would have been done right then and not after 17 years. It is pertinent to note that, DW3 has stated on oath that, late Jawadi Laxmayya Naidu used to honour poets, artists etc., and used to give them presents. Scholars and poets from various places used to visit his village at the instance of late Jawadi Laxmayya Naidu and they used to stay in the suit house during their visit to his village. He has not stated that even after the inauguration in the year 1961, he had seen pilgrims or travellers staying in the suit house. He has stated that, one Banganibabu, a retired teacher, had stayed there for some time, but the respondents had not examined that person.

20. The learned lower Court in Para 12 of its judgment has observed that, the Maharaja of Jaipur would not have come from Jaipur to inaugurate a small old tiled building comprising of 4-5 rooms had not the said building been connected with any charitable act benefitting the public. This observation is uncalled for because it appears that the Maharaja of Jaipur had visited the village Penugonda to participate in the "Sastipurthi" of his friend late Jawadi Laxmayya Naidu because it was celebrated on a grand scale and not merely to inaugurate the small old tiled building comprising of 4-5 rooms, may be it a choultry or may be it a guest house. It appears that only to honour him, he had been asked to inaugurate the suit house. But, as noted above, there is no acceptable evidence on record that, even after such inauguration, the suit house was actually used by travellers or visitors against payment or without payment, as a matter of right. For the foregoing reasons, merely because the suit house was inaugurated by the Maharaja of Jaipur in the year 1961, which building was said to have been built in the memory of late Venkata Ramasastry, it cannot be concluded, on this count only, that the suit house was used as choultry for travellers and visitors free of rent or otherwise or food free of cost was ever supplied to poor persons or travellers or visitors.

21. The trial Court has relied on the certified copy, Ex.B18, of the deposition of one Siva Rao, on the ground that he had given evidence in O.A.No. 140/75 before the 2nd respondent and he was aged about 90 years at that time and, therefore, he would have attained the age of 96 on the date the evidence of DW1 was recorded and that he was bed ridden and so was not in a position to move about or talk. DW1 in his cross-examination done on behalf of the 2nd and 3rd defendants, has stated that, Siva Rao is aged about 96 years and is not in a position to move about. But, he has not stated that he was incapable of giving

evidence. Thus, the trial Court has wrongly observed in Para 15 of its judgment that, DW1 has testified that the said Siva Rao was unable to talk. The 2nd defendant at the time of recording the deposition of Siva Rao had estimated his age to be 88 years.

22. In the case of Bhim Mandal (supra), the plaintiff claimed himself to be a minor at the time of execution of the sale deed. The entry evidencing his date of birth in the school register had been filed. This entry had been made on the statement of his mother. The mother could not be examined in the Court because PW5 had stated that the mother of the plaintiff was very old and had become blind and was unable to move. The learned single Judge of the Patna High Court has observed that, it could not be said that, had the mother been able to move and capable of giving evidence, she would not have deposed for her son. It has been further observed in this case that, onus of establishing the circumstances that would bring a case within any one of the exceptions of Section 32 of the Evidence Act, lies on the party wishing to avail itself of the exception and to hold that ., the incapacity should be of permanent character in the strict sense would be to push the meaning beyond reasonable limits. A person may not be stricken with illness, for example of a permanent character, but may yet be incapable of attending the Court and giving evidence. The evidence of PW5 was found credible and the view of the appellate Court was accepted that the mother of the plaintiff had become incapable of giving evidence.

23. Section 33 of the Indian Evidence Act reads as under :

"Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated - Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided-

that the proceeding was between the same parties or their representatives in interest:

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding."

24. This section lays down as to when the evidence of a witness in a previous judicial proceeding is relevant. It consists of two parts; the main section and the proviso. The main section lays down the conditions which are required to be

satisfied for the previous statement of a witness in a judicial proceeding to be admitted in evidence in the later proceeding. The question, therefore, is whether the said Siva Rao was incapable of giving evidence before the trial Court?

25. A plain reading of Section 33 of the Indian Evidence Act reveals that it is not a requirement of this section that, such a witness should be incapable of giving evidence in a subsequent judicial proceeding or in the later stage of the same judicial proceeding by entering into the witness box. It has not been mentioned in this section that, when a witness is incapable of giving evidence in the Court. The omission of the words "in the Court" is indicative and suggestive of the fact that such witness should be incapable of giving evidence even at his residence, because a witness although may be old, infirm, weak or bodily ill, yet he may be in a sound mental condition to give evidence on commission at his residence. On the other hand, if such a witness, whose statement has been recorded in the previous judicial proceeding, is able to come to the Court or to be brought to the Court by the party, because he is keeping good health, but has lost his memory or is mentally sick, it cannot be said that because he has come to the Court, he is capable of giving evidence. To my mind, "incapable of giving evidence" means when a witness is unable to make a statement either in the Court or at his residence on commission because he is unable to speak due to paralysis etc., or due to mental illness etc., etc., but when his mental faculty is in proper order and is capable of making a statement, it cannot be said that such a person is incapable of giving evidence, merely because he has become old, infirm or weak. To hold that the incapacity should be bodily illness or bodily incapacity to move, would be making the provision for examination of witness on commission, though he is mentally alert, to be redundant. For the foregoing reasons, with due respect to the learned single Judge of the Patna High Court, I disagree with the view that when a person becomes very old and blind and is unable to move, he must be held to have become incapable of giving evidence. But, when such a person is also unable to make a statement for the aforementioned reasons, it should be held that he has become incapable of giving evidence. I, therefore, hold that the respondents have failed to establish that the said Siva Rao had become incapable of giving evidence, merely because due to his old age he was unable to move about.

26. It is a matter of record that the statement, Ex.BIS, which had been recorded by the second defendant, during the course of the enquiry conducted by him u/s 77 of the Endowment Act, was previous judicial proceeding between the same parties. It is also a matter of record that the deposition of Siva Rao, certified copy of which is at Ex.BIS, was marked with the consent of the plaintiffs. The question, therefore, is whether the deposition of Siva Rao is admissible in evidence on account of the consent given by the plaintiffs at the time of marking the document in the suit, though it does not fall within the ambit of Section 33 of the Evidence Act?

27. Evidence given by a person in a judicial proceeding or where a person

authorised by law records a statement, such statement is relevant, in order to prove the truth of facts which he states, when such witness is dead or cannot be found or incapable of giving evidence or is kept out of the way by the adverse party or his presence cannot be obtained without an amount of delay or expenses and under the circumstances of the case Court considers it unreasonable, during the course of the later stage of the same judicial proceedings or in a subsequent judicial proceeding subject to the three conditions mentioned in proviso to Section 33 of the Evidence Act. Unless the conditions contained in the main part of Section 33 of the Evidence Act or the three conditions laid down in its proviso stand satisfied, the statement of such a witness recorded in the previous judicial proceeding is not relevant for the purposes of proving the truth of facts which he states neither in the subsequent judicial proceeding nor in a later stage of the same judicial proceeding. It is too well settled that, inadmissible evidence cannot be made admissible by the consent of parties. If the statement in question cannot be brought within the four corners of Section 33 of the Evidence Act, it cannot be made admissible with the consent of a party, though the evidence otherwise admissible and relevant when received in evidence with the consent of parties or for want of objection to the wrong manner in which it is sought to be brought on record disentitles the consenting party from objecting to such evidence subsequently. Foundation is to be laid for reception of such evidence strictly as per the provisions of Section 33 of the Evidence Act. Relevancy and admissibility are not the same thing. A document per se inadmissible may be objected to at any time even if it is marked, though, as noted above, an objection as to the mode of proof should be objected to at the time when the document is attempted to be put in. A distinction is to be drawn between waiving the necessity of marking a document and objecting to the admissibility of the evidence which is per se inadmissible.

28. In the case of Haji Mohammad Ekramul Hag (supra), the witness for the respondent namely Nanibhushan Sen Gupta had stated on oath that Rs.2,200/- would be a fair rent for the premises in question and he has based his calculation on the Award passed by the Arbitrator in respect of two premises and had proved the judgment, Ex.D. This document, Ex.D, was not on record before the Apex Court. No objection has been taken to its admissibility either before the Arbitrator or before the High Court. The objection was that this witness had erred in taking into account the rent payable for the Premises No.22 as recited in the judgment Ex.D, which was an Award for Premise No.31. Because the document was not on record and the respondent witness Nanibhushan Sen Gupta had proved the document Ex.D the Apex Court held that no objection as to the admissibility of the document could be raised in the Supreme Court.

29. In the case of P.C. Puntsholhama Reddiar (supra), in discharge of duty, the Head Constable covered the meeting and had submitted the report Ex.P35, which was proved by the Inspector, PW24, without objection. This Head Constable was deputed by this Inspector, PW24. Under these circumstances, the Apex Court has held that the report, " Ex.P35, was marked without any objection and, therefore,

it was not open to the respondents now to object to their admissibility. In this case, the question regarding the mode of proof of the document, Ex,P35, was involved and the Apex Court observed in Para 20 of its judgment that the first part of Section 35 of the Indian Evidence Act says that an entry in public record stating a fact in issue or relevant fact and made by a Public Servant in discharge of his official duty is relevant in evidence and quite clearly the requirement in question was met by the public servant in discharge of his official duty. Under these circumstances, the Apex Court observed that, no objection regarding the admissibility of that document could be raised before the Apex Court.

30. In the case of the Land Acquisition Officer, Vijayawada Thermal Station (supra), secondary evidence was led to be marked for one party without objection during the trial. Therefore, it has been held in this case by a Full Bench of this Court that no objection could be permitted to be raised by the opposite party at a later stage in the same Court or in appeal that conditions for adducing secondary evidence have not been made out initially. The mode of proof was irregular or insufficient was the question involved in this case.

31. As noted above, in the case on hand, the point for consideration is whether the requirement of Section 33 of the Indian Evidence Act had been complied with before marking the statement of Siva Rao as Ex.BIS or not, and not regarding the mode of proof of that document and, therefore, the cases of Haji Mohammad Ekramul Haq (supra), P.C. Purnshothatna Reddiar (supra) and the Land Acquisition Officer, Vijayawada Thermal Station (supra), are of no help to the respondents for the simple reason that the deposition of Siva Rao, which is at Ex.BIS, does not fall within the ambit of Section 33 of the Indian Evidence Act and, therefore, it is excluded from the record of the case.

32. It is alleged that the choultry was inaugurated only in the year 1961 and, therefore, it is expected that if there was any dedication, the persons who were present at the relevant time, could give evidence regarding the dedication. DW3 in his whole deposition has not stated that, late Jawadi Laxmayya Naidit during the inauguration of the choultry had made declaration that the suit house had been dedicated to the public though he claims to have been present during the inaugural function. Admittedly there is no such evidence worth reliance. There is no evidence on record that late Jawadi Laxmayya Naidit or PW1 had ever stated that the suit house would be converted into a choultry in the memory of the deceased Venkata Ramasastry. But, that appears to be a pious wish that some memorial should be built in the memory of Venkata Ramasastry. In the partition deed, Ex,BI, it is mentioned that it was not possible to partition the properties mentioned in the schedule "E" annexed with this document and there was no other property to be partitioned amongst them. But, it is also pertinent to note that, it has been specifically mentioned in Ex.B 1 that they have been using and maintaining the suit house as late Jawadi Venkata Ramasastry Dharmashala. I get from the evidence of PW1 that when the suit house was assessed to pay house tax, it was paid by PW1 and his late father Jawadi laxmayya Naidu. The

suit house has been let out to the Land Mortgage Bank and thereafter to the Co-operative Society continuously for a couple of years and the rents were received and utilised by PW1 and his father late Laxmayya Naidu. This is a strong circumstance which establishes that no traveller or visitor had stayed in the suit house during this period and no one ever objected to the letting out the suit house. The Certificate, Ex. A4, shows that the suit house was recorded in the name of Jawadi Laxmayya Naidu in the house tax demand register of the Panchayat upto the year 1973-74 and the tax was paid for the year 1973-74 while the property tax receipt Ex.A7 shows that house tax. was paid for the years 1969 to 1971. No mutation was done in the property tax register of the Panchayat till the year 1973-74. It is noteworthy that, Sitaramalayam was maintained from the income obtained from-the produce of Ac.5-20 cts. of land, but this land was also kept in joint ownership and possession of the plaintiffs and their elders. Out of this income, some amount was also spent for the upkeep of the suit house. This land has been shown to have been donated for that purpose vide the recital in the objection, which is at Ex.B17, dated 16-11-1976. Exemption had been claimed in respect of this piece of land because of usufruct was utilised for the maintenance of Sitaramalayam and for the upkeep of the suit house, but that by itself cannot be said to be conclusive proof that the suit house was a charitable institution. The true copy of the income tax. statement, Ex.A1, which was marked without objection during the trial shows that the rent received from the Land Mortgage Bank and the Cooperative Society has been shown as income of the assessee.

33. The trial Court has observed that the aforesaid tax would have been paid and the rent received for the suit house had been shown in the copy of the income tax return, because in the year 1967, the Assistant Commissioner of Endowments had issued a notice to the plaintiffs calling upon them to produce their register and records relating to the suit house and, therefore, the plaintiffs had been alerted and they created evidence in support of their contention that the suit house was not a public choultry and it was only a private guest house of the plaintiffs. It is pertinent to note that, there is material on record that the suit house was not declared as charitable institution either by the Assistant Commissioner of Endowments or the Deputy Commissioner of Endowments in spite of the notice issued by the Assistant Commissioner of Endowments in the year 1967 and it appears that suitable reply was submitted to the authorities in answer to the notice and, therefore, no further action had been taken thereafter by them. Had the plaintiffs decided to create evidence, nothing prevented them from creating evidence in their favour before submitting reply to the notice issued in the year 1967, but instead of doing so, they had enquired from the authorities as to what action had been taken by them after submission of reply to the notice. The tax would be paid . only when it is levied by the Panchayat and not before that. There is no evidence that, after issuance of the notice in the year 1967, the plaintiffs" or late Laxmayya Naidit had got the property tax assessed in respect of the suit house. DW3 was also a member of the Gram

Panchayat but he has not stated that at the initiation of late Laxmayya Naidit or the plaintiffs the suit house was assessed to tax. It is highly improbable that a person like late Laxmayya Naidu, who had created other endowments and has donated generously and has not only donated the whole amount of consideration of Rs.23,000/- but also donated substantial amount for constructing traveller's shed at the bus stand would create evidence to save an old tiled house containing 4-5 rooms from the rigors of the Endowment Act. Under these circumstances, the reasoning given by the trial Court for rejecting the aforesaid document docs not appear to be proper.

34. As discussed above, no witness has been examined in an attempt to establish that late Laxmayya Naidu or PW1 had ever specifically made an open declaration that the suit house would be converted into a charitable institution. There is also no evidence that right from the year 1944, the suit house was used as a choultry in the sense that anybody was permitted to stay in it with or without rent and was provided food free of cost. The suit house was admittedly used by the plaintiffs and late Laxmayya Naidu for accommodating their guests. It was under their control and they used to maintain the same out of the income from their land which land was jointly owned by them at least upto 16-11-1976. The suit house was known as "Keerihiseshulu Jawadi Venkata Ramasastry Dharmasala" and the name of the choultry was engraved in the suit house without any express dedication to the public and in the absence of evidence that it was utilised by the public as choultry, it would not make the suit house as charitable institution merely on its nomenclature. Under these circumstances, disagreeing with the learned lower Court, I hold that the suit house was the private property of the plaintiffs and their elders and it remained their, private property till it was alienated to the Defendant No.4.

35. In the partition deed, Ex.BI, though Ac.5-20 cts. of land in Rs.488 has been shown to be in the joint ownership and possession of the parties to that document, yet, it has been mentioned in it that the income from this land would be utilised for Sitaramalayam and the suit house and the objection filed by late Laxmayya Naidu through his Advocate in LCC No. 1693/75 before the Land Acquisition Officer on 16-11-1976 which is at Ex.B 17, A has been specifically mentioned that this piece of land had been donated for charitable purposes and it should not be included in his holding. These facts establish that this piece of land had been dedicated by the plaintiffs and their elders for the maintenance of Sitaramalayam at least with effect from 16-11-1976. Therefore, no fault can be found out with the observation of the learned lower Court made in Para 22 of its judgment that the suit land is a charitable and public endowment, though it has committed a small mistake in mentioning the word "Public" before the words "charitable and religious endowment" and, therefore, the word "public" is deleted wherever it occurs in Para 22 of the judgment of the lower Court and the lower Court is directed to amend this paragraph accordingly.

36. In result, the appeal is partly allowed and the judgment and decree of the

learned lower Court, whereby the order passed by the 2nd respondent in O.A.No.140/74, dated 12-2-1979 has been confirmed declaring the suit house is public charitable endowment, is set aside and it is declared that the sale deed, Ex.B7, dated 28-9-1974 is valid. However, in the circumstances of the case, I leave the parties to bear their own costs through out.