
(1990) 04 MAD CK 0055
In the Madras High Court

R. Narayanaswami and Others

APPELLANT

Vs

Sri Siddha Raja Manicha Prabhu Temple

RESPONDENT

Date of Decision : 04-04-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Madras Hindu Religious Endowments Act, 1926 — Section 9(12)

Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 — Section 70

Citation : (1991) 67 MLJ 1

Hon'ble Judges : K.M. Natarajan, J

Bench : Division Bench

Judgement

K.M. Natarajan, J.—This letters patent appeal is filed by the unsuccessful defendants 5 to 7 against the judgment and decree passed by this Court in A.S. No. 730 of 1977, confirming the judgment and decree passed by the City Civil Court, Madras, in O.S. No. 547 of 1965.

2. The facts which are necessary for the disposal of this appeal can be briefly stated as follow:- For the sake of convenience the array of parties in the trial court is adopted in this appeal. The plaintiff Sri Siddha Raj Manicka Prabhu, Huminabad Mysore State, filed the suit u/s 70 of the Hindu Religious and Charitable Endowments Act to set aside the order passed by the fourth defendant, Commissioner, Hindu Religious and Charitable Endowments, Madras. The case of the plaintiff is that the suit temple, Sri Kamala Kameswari, Triplicane, Madras, was founded by late Raja Eswardos Dayavanth Bahadur and it was private property. On his death, his son and guardian became the owners of the temple and they were adjudicated as insolvents in I.P. No. 50 of 1924. Their estate including the above said temple and the right to manage the same came to be vested in the official Assignee, Madras. One of the creditors filed C.S. No. 545 of 1926 on the file of the High Court of Madras against the insolvents and others and a consent decree was passed in the suit and by virtue of the same, the ownership possession and management of the temple was transferred to the predecessor Guru of the plaintiff temple. The plaintiff who had succeeded his

predecessor was aged 7 years at the time of his succession. Since he was a minor his guardian filed O.A. No. 76 of 1954 before the Deputy Commissioner for establishing the minor's right to hereditary trusteeship of the suit temple. The Deputy Commissioner allowed O.A. No. 76 of 1954. The necessity for filing the said petition was the fourth defendant appointed defendants 1 to 3 as non-hereditary trustees of the suit temple and taking advantage of their appointment, they had installed idols of a different section. On appeal filed by the said trustees, defendants 1 to 3, before the commissioner, the said order was set aside. Thereupon the guardian filed O.S. No. 557 of 1955 on the file of the City Civil Court, Madras for setting aside the order of the Commissioner. The said suit was dismissed. There was an appeal to the High Court, Madras, in A.S. No. 14 of 1960. During the pendency of the appeal, the minor who had attained majority by that time, filed C.M.P. No. 5405 of 1962 for withdrawal of the suit on the ground that the claim of hereditary trusteeship was made by mistake as the temple was his private temple. The said C.M.P. was dismissed and subsequently the appeal against the order in the said C.M.P. was also dismissed. During the pendency of the appeal, the spiritual guru of the plaintiff temple filed O.A. No. 38 of 1962 on the file of the Deputy Commissioner for declaring the temple to be a private temple. The said application was dismissed by the Deputy Commissioner and it was confirmed by the Commissioner in the appeal. It was only to set aside the said order of the Commissioner, the present suit was filed u/s 70 of the Hindu Religious and Charitable Endowments Act, Act 22 of 1959, hereinafter referred to "the Act", for setting aside the order of the Commissioner, the fourth respondent. Defendants 5, 6 and 7 are the present, trustees appointed by the fourth defendant. Hence they were impleaded in the suit.

3. The suit was resisted by defendants, and in the written statement filed by defendants 1 and 2, which was adopted by defendants 5, 6 and 7, it was contended that the plaintiff having earlier claimed hereditary trusteeship, is estopped from claiming now that the suit temple is a private temple. Further, the temple or its management did not vest in the Official Assignee and he had no right to transfer the management and possession to anybody. The agent of the plaintiff temple was never in possession and management of the temple. The suit temple was abandoned and the residents of the street, renovated it in 1946 and arranged for worship. Thereupon, the Hindu Religious and Charitable Endowment Department appointed trustees for the management. The plaintiff cannot disown the acts of his agent in the earlier proceedings. The temple is and has always been a public temple and the claim in the plaint that it is a private temple is not correct.

4. The fourth defendant though filed a separate written statement, reiterated the averments stated by other defendants in their written statement.

5. The trial court framed as many as five issues and on the basis of the oral and documentary evidence, granted a decree in favour of the plaintiff as prayed for, holding that under Ex. A-1, the private character of the temple is recognised,

that under were transferred in the name of the predecessor Guru of the plaint temple, that the temple is a private temple, that the Hindu Religious and Charitable Endowment Department that the plaintiff is not estopped from claiming to be so. Aggrieved by the same, the fourth defendant, the Commissioner, Hindu Religious and Charitable Endowment Department, filed A.S. No. 730 of 1977. The said appeal was dismissed by this court. The appellants herein who are respondents 5 to 7 in the said appeal and defendants 5 to 7 in the suit, have preferred this appeal. The fourth defendant, who was the appellant in A.S. No. 730 of 1977 and the 2nd respondent in the present L.P.A. filed C.M.P. No. 15683 of 1989 to transpose the second respondent as the fourth appellant. The said petition was filed on the ground that the appellants were the respondents 5 to 7 in A.S. No. 730 of 1977 and defendants 5 to 7 in the trial Court, that defendants 5 to 7 were the trustees appointed by the fourth defendant for the suit temple, that they preferred the present appeal in their capacity as trustees and that the fourth defendant is advised to get himself transposed as the fourth appellant in the present appeal as the interest of the appellants and the fourth defendant is similar and identical. Though the fourth defendant has not preferred any independent appeal against the judgment of the learned single Judge of this Court, he is entitled to get himself transposed as fourth appellant with a view to protect the interest of the suit temple as well as Hindu Religious and Charitable Endowment Department and the interest of the worshippers. The temple has been in the continuous management of the Hindu Religious and Charitable Endowment Department since 1945. The issue involved in the appeal is the character of the temple, whether it is a public or private temple. As such, the Department and the temple are only vitally interested in the proper adjudication of the case and the interests of justice require that the second respondent in the present appeal should be transposed as the fourth appellant to avoid any technical objection that may be raised. It is also stated that the fourth defendant has been under the impression that he could support the case of the appellants herein at the time of arguments since they represent the temple. The plaintiff, namely, the first respondent in the present appeal filed objections wherein it is stated that defendants 5 to 7 filed A.S. No. 437 of 1973 and it was dismissed as they did not prosecute the appeal. A.S. No. 730 of 1977 was dismissed after contest on 14.2.1983 and it was become final against the fourth defendant. As far as defendants 5 to 7 are concerned, the decree of the trial Court has become final by reason of the dismissal of A.S. No. 437 of 1973. The present L.P.A. No. 119 of 1983 filed by defendants 5 to 7 is not maintainable. Hence the fourth defendant, against whom the decree has become final, cannot maintain this petition for transposition. It is further stated that the appellants herein filed C.M.P. No. 10179 of 1987 for direction and the first respondent/plaintiff has raised objection regarding the maintainability of the appeal even in the year 1987. Hence, the present petition is not only highly belated but, if the appeal is filed to-day, it will be barred by limitation as six years have passed. The petitioner/ fourth defendant is seeking the judicial discretion of this Hon"ble Court and he is not entitled to any equity. He therefore

prayed for dismissal of this petition. Both this petition as well as the appeal were heard and disposed of.

6. The substantial questions that arise for consideration in this appeal are two fold: (1) Whether the plaintiff, who is the first respondent herein, is precluded from filing the present suit for the relief prayed for, by reason of the earlier proceedings and in view of Order 2, Rule 2, C.P.C., and Section 11, C.P.C., and on the principle of election of estoppel; and (2) whether on the evidence adduced before court the plaintiff has made out a case that the suit temple is a private temple and whether the finding of the courts below is sustainable. The learned senior Counsel appearing for the appellants, Mr. M.R. Narayanaswami, submitted that where a person is entitled to two inconsistent remedies, if he chooses one and pursues it, thereafter he cannot turn round and say that he would pursue the other remedy. In the instant case the plaintiff originally pursued his remedy on the footing that he is a hereditary trustee of the temple on the basis that it is a public temple. By pursuing the remedy for hereditary trusteeship, he is deemed to have given up the plea that it is a private temple. It is not in dispute that right to hereditary trusteeship and private temple are mutually inconsistent. In this connection, the learned Counsel drew the attention of this Court that in 1954 the plaintiff through his guardian instituted O.A. No. 76 of 1954 under Sections 57 and 45(1) of the Tamil Nadu Act 22 of 1959 praying that defendants 1 to 3, who are appointed by the Department as non-hereditary trustees, should be removed and that it should be declared that the plaintiff is the hereditary trustee. He also prayed for passing interim order restraining the trustees from taking proceedings in respect of the suit temple. The Deputy Commissioner, H.R. & C.E., Department, in his order dated 6.10.1954 Ex. B-7 declared that the plaintiff is the hereditary trustee of the suit temple and allowed O.S. No. 76 of 1954. As against the same, an appeal was filed before the Commissioner. The appeal was allowed under Ex. B-8, dated 31.12.1954. To set aside the said order, the plaintiff filed O.S. No. 557 of 1955 before the City Civil Court, and the said suit was dismissed. One of the issue in that suit, namely, issue No. 4 is whether the temple is a private one. Against the dismissal of the said suit; the plaintiff filed A.S. No. 14 of 1960. During the pendency of the appeal, the plaintiff attained majority. He filed C.M.P. No. 5405 of 1962 in A.S. No. 14 of 1960 seeking permission under Order 23, Rules 1 and 2, C.P.C., to withdraw the suit O.S. No. 557 of 1955 with liberty to file a fresh suit. The said petition was dismissed on 1.10.1962 by virtue of the order passed by this Court under Ex. B-11 and consequently the appeal A.S. No. 14 of 1960 was also dismissed. Ex. B-12 is the order passed in the appeal. Even before the said order was passed, the suit, which is now under appeal, to declare the suit temple as a private one, was instituted. It was also submitted by the learned Counsel that the plaintiff filed O.A. No. 38 of 1962 u/s 63-A of Act 22 of 1959, on 21.4.1962, before the Deputy Commissioner, during the pendency of the appeal in A.S. No. 14 of 1960. The Deputy Commissioner passed an order on 4.10.1963 dismissing the application. Against the said order, Appeal No. 15 of 1964 was filed before the Commissioner,

and he too confirmed the order of dismissal passed by the Deputy Commissioner. Thereafter the suit was filed on 10.2.1965 to set aside the order. According to the learned Counsel, though the principle of *res judicata* is not strictly applicable, yet the suit is not maintainable under Order 2, Rule 2, C.P.C., and on the question of the equitable doctrine of the principle of election. According to the learned Counsel, the plaintiff wanted only hereditary trusteeship. If it is a private temple, he should have put up his claim for the same in the earlier suit. But, he objected the remedy for recognising him as a hereditary trustee, and having failed in the above proceedings and also having failed in his attempt to obtain permission for withdrawing the suit with liberty to file fresh suit for claiming the relief that it is a private temple, he should be deemed to have given up the claim that the temple is private temple.

7. In this connection, the learned Counsel invited our attention to the decision of this Court in *R. Sumudra Vijayam Chettiar Vs. Srinivasa Alwar and Others*, , wherein it was held:

Where a man is entitled to one of two inconsistent rights and he has with full knowledge done an unequivocal act indicating his choice of the one, he cannot afterwards pursue the other which after the first choice is by reason of the inconsistency no longer open to him. Such cases do not require detriment to the other party as foundation for their obligation. As Lord Blackburn said in *Scarf v. Fardine* (1882) L.R. 7 A.C. 345 quoting a passage from Coke, on Littleton:

Where a man has an option to choose one or other of the two inconsistent things, when once he has made his election, it cannot be retracted, it is final and cannot be altered.

This passage as well as the law contained in it received express approval from Lord Atkin in the House of Lords in *United Australia Ltd. v. Bank of New South Wales Ltd.* L.R. 1941 A.C. 1 where the learned Lord said:

On the other hand, if a man is entitled to one of two inconsistent rights, it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen to one, he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose. Instances are the right of principal dealing with an agent for an undisclosed principal to choose the liability of the agent or the Principal. The right of a landlord where forfeiture of a lease has been committed to exact the forfeiture or to treat the former tenant as still tenant and the like. To those cases, the statement of Lord Blackburn in *Scarf v. Fardine* (1882) L.R. 7 A.C. 345 applies" where a man has an opinion to chose one or other of two inconsistent things when once he has made his election it cannot be retracted.

The views in the above decision were affirmed by a Division Bench of this Court in *Margachari, V.K. v. M. Krishnaswami Mudaliar etc.* 97 L.W. 562. It was further held:

This principle has been followed by Rajagopala Ayyangar, J., in *R. Sumudra Vijayam Chettiar Vs. Srinivasa Alwar and Others*, . The same principle has been accepted by a Bench of this Court in *K. Shanmugham Pillai and Others Vs. S. Shanmugham Pillai and Others*, , Natesan, J., speaking for the Bench, spoke thus: "The doctrine of election is the principle that the exercise of a choice by a person left to himself of his own freewill to do one thing or another binds him to the choice which he has voluntarily made, and is founded on the equitable doctrine that he who accepts benefit under an instrument or transaction of his choice must adopt the whole of it and renounce everything inconsistent with it. The Court exercising jurisdiction in equity will bind him to his election and precluded him from going behind the same".

Applying the ratio to the facts of this case, the learned Counsel drew the attention of this Court to issue No. 4 in the earlier suit O.S. No. 557 of 1955 on the file of the First Assistant City Civil Court, Madras filed by the plaintiff, who is the first respondent herein, which is marked as EX. B-10. Issue No. 4 in the said suit, is:

Is the suit temple a private one?" In para 19 of Ex. B-10, it was observed:

P.W. 1 has not proved about temple being private to the exclusion of others

In para 21 it was observed as follows:

Ex. B-1 was filed for a declaration of plaintiffs' hereditary trusteeship of the temple that comes u/s 57(b) of the Act. No claim was made that the temple belongs to the plaintiffs" and that they are entitled to possession on that ground. The petition proceeded on the strength of the suit temple being a public temple. Therefore the question whether it is a private temple cannot and does not arise here. If the plaintiffs claim it as a private temple, they must have proceeded u/s 57(a) and should have prayed for such relief, which they have not done as seen from Ex. B-1. Section 57(a) read with Section 6(15) takes one to "temple" which u/s 6(20) means a place by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of or used as of right by,

The Hindu community or any Section thereof as a place of public religious worship.

In para 22 it was held:

The question canvassed in Ex. B-1 was only in respect of right of hereditary trusteeship of this institution and not whether it was a religious institution.

Ultimately the said suit was dismissed. The plaintiff therein filed Appeal No. 14 of 1960 on the file of this court. While the appeal was pending, the plaintiff filed C.M.P. No. 5405 of 1962 praying to permit the plaintiff to withdraw the said suit with liberty to establish his claim in proceedings before the Deputy Commissioner, Endowment Board, and also the appeal 14 of 1960 preferred to

the High Court against decree of the City Civil Court, Madras in O.S. No. 557 of 1955. The said petition was dismissed. It was admitted in the said application that the plaintiffs filed the petition u/s 57(b) of the Hindu Religious and Charitable Endowments Act and the Deputy Commissioner gave a decision in favour of the plaintiff recognising his right to be hereditary trustee of the temple. It was contended in the High Court that there was a formal defect in the prior petition, within the meaning of Order 23, Rules 1, 2(a), C.P.C., and hence permission can be granted to the plaintiff to withdraw the suit. The contention was repelled by this Court and it was observed that "A formal defect connotes a defect of a kind not affecting the merits of the case. But an omission to include all the causes of action which the plaintiff has against the defendants, will not be a formal defect within the meaning of this rule. In the present case, it was open to the plaintiff to have contended before the Deputy Commissioner that this institution was a private temple, and that the Board had no jurisdiction to appoint any trustee whatsoever. But, instead of doing so, the plaintiff applied to the Deputy Commissioner for the relief of recognising him as hereditary trustee, which carries with it an admission, that the temple is a public religious institution, over which the Hindu Religious and Charitable Endowment Board has jurisdiction. Therefore, the omission to contend in the prior application that the temple is a private institution and that the Board has no jurisdiction to appoint any trustee for it, is not a formal defect". Consequently the petition was dismissed. It is to be noted that A.S. No. 14 of 1960 was also dismissed.

8. In the present suit, defendants 1 and 2 contended in para 2 of the written statement that the present suit is false, vexatious and is a desperate attempt to continue the litigation which was already closed under a former Judgment of the High Court in A.S. No. 14 of 1960 which recognised and proceeded on the footing that the suit temple is a public temple. In the same appeal, an attempt was made in C.M.P. No. 5405 of 1962 for permission to file a fresh suit to establish the private character of the temple and to grant leave to withdraw the suit out of which the Appeal No. 14 of 1960 arose and it was rejected. It was held that having raised the contention that the plaintiff was a hereditary trustee and thereby impliedly conceding that it is a public temple is estopped from filing a second suit for getting a declaration that the temple is a private one and outside the scope of the Hindu Religious and Charitable Endowment Act. These judgments are conclusive in the matter and the plaint is liable to be dismissed in limine on this ground alone. On these allegations issue No. 2 was framed to the effect, "Is plaintiff estopped from filing this suit as he claimed hereditary trusteeship in, the prior proceedings?" Issue No. 4 is, "Are the prior proceedings not binding on the plaintiff?". The trial Court found issue No. 2 against the defendants distinguishing the decision of this Court reported in *Elumalai Chetty v. Commissioner H.R. & C.E., Madras* 68 L.W. 260, wherein it was held:

This petitioner moved the Board to recognise him as a hereditary trustee on the footing that this is a public temple having got himself recognised as such and obtaining all the advantages incidental thereto, he is now turning round and

asking that the temple be declared to be a private one and in which case the Board will have no jurisdiction whatsoever and no question of recognising this petitioner as hereditary trustee or otherwise, would arise. The petitioner on the principles of equitable estoppel cannot be allowed to do so!

According to the trial Judge, in the instant case, since the plaintiff applied for recognition of his hereditary trusteeship and since it was negated by the authorities and the said results have been confirmed by courts also, the said decision is not applicable. We are unable to agree with his view. The question involved is whether the plaintiff having chosen to seek the remedy for declaring him as the hereditary trustee of the suit temple on the footing that it is a private temple and subjected to himself to the jurisdiction of the Hindu Religious and Charitable Endowment Board authorities, is it open to him to put forward now that the said temple is a private temple and to apply for a declaration that it is a private temple. The mere fact that he failed in the earlier proceedings would be of no consequence. Under issue 4, the trial Judge held against the plaintiff and further held that the earlier proceedings are binding on him and the plaintiff is not entitled to ignore the same on the ground that the agent was acting negligently and had therefore fraudulently failed to safeguard interest of the Plaintiff. It was contended that the learned single Judge had not considered the scope of the contention regarding the plea of estoppel on the ground of election, but only considered the question regarding res judicata or bar under Order 2, Rule 2, C.P.C., and observed that the plea at res judicata or bar under Order 2, Rule 2, C.P.C., was never raised in the pleadings filed by defendants 5 to 7. It was also observed that unless a plea had been raised and issues framed and parties gone on trial on such pleas and issues the learned Counsel for respondents 5 to 7 cannot be permitted to raise these pleas at the appellate stage. It is further stated by the learned single Judge that the plaintiff raised the plea that the suit temple is a private temple in O.S. No. 557 of 1955 and that it is unnecessary to give a finding in the present suit. Both the reasons of the learned single Judge are not correct, as it is brought to the notice of this Court that such a plea was raised and issue No. 2 was framed. Further, the plea raised regarding the suit temple, whether the suit temple is a private temple, has been negated, and in view of the fact that the suit itself was filed on the ground that the suit temple is a public temple and the plaintiff sought for declaration of hereditary trusteeship, the question of res judicata does not arise. On the other hand, the learned Counsel for the plaintiff first respondent, Mr. T.R. Rajagopalan submits that during the pendency of the appeal, itself, the plaintiff filed an application before the Commissioner to declare the suit temple as a private temple and the earlier proceedings wherein the relief was for a declaration of hereditary trusteeship, would not operate as res judicata and that there cannot be any estoppel. In this connection, he drew the attention of this Court to the decision reported in Commissioner, H.R. & C.E., Madras v. Viswanatha Gurukkal 87 L.W. 160. On going through the above decision, we find that the said decision is not at all helpful for deciding the issue, as that was a case of rival claim for

trusteeship between two private parties. The question that arose for consideration was whether the earlier proceedings, wherein the claim was made by both the parties for declaration that they are the hereditary trustees of the temple and which was dismissed, would operate as *res judicata*. It is seen that subsequently the Department itself treated them as hereditary trustees and the Area Committee appointed a third party as a trustee. It was challenged and in the said proceedings it was contended that the earlier proceedings would operate as *res judicata*. In the circumstances, it was held as follows:

In this case, the question whether the trusteeship of the temple was hereditary or not, was not in issue between the parties in the earlier proceedings and consequently, the D.C., had no jurisdiction whatever to decide a question which was not raised before him.. Therefore, if he had rendered a finding on that question which was not in controversy or dispute before him, his finding cannot be said to be final or conclusive so as to bar the agitation of the same question in a properly framed proceeding instituted subsequently. In this view the earlier orders of the D.C., and the Commissioner on appeal therefrom, did not bar the application filed by the plaintiffs herein before the Deputy Commissioner u/s 63(b) of Act 22 of In the said case the earlier decision of this Court reported in *Sastri Ammal v. Pravalavarne Naicker* 68 L.W. 777 was cited, wherein it was held:

If the dispute is whether the office of trustee of a given religious institution is hereditary, it would certainly come within the scope of Section 57(b). In my opinion, that is all that Section 57(b) provides for. A dispute between the claimants to succeed to an office, which it is admitted on all hands is hereditary, is in my opinion not within the scope of Section 57(b) of Act XIX of 1951.

After quoting the above observations, it was held in *Ramasamy Naidu v. Commissioner, H.R. & C.E., Madras* 87 L.W. 160:

This view was shared by Veeraswami, J. (as he then was) in *Chinnathambi Moopan v. Mamundi Moopan* (1966) M.L.J. 361 79 L.W. 173. We ourselves have approved of the correctness of the view of Rajagopalan, J. in our judgment in pages 479 of 1967 *Venugopala Chettiar v. Commissioner, H.R. and C.E., Madras*, dated 27th August, 1973.

It is only in the circumstances, the Bench came to the conclusion that "It is well settled that the scope of the jurisdiction of the Deputy Commissioner u/s 57(b) of Act 19 of 1951 was to decide whether the trusteeship in relation to a religious institution was hereditary or not, and not to decide whether a particular person was entitled to function as a hereditary trustee at a particular point of time with reference to a temple, the hereditary nature of the trusteeship of which had been admitted". Such a question does not arise in this case as there is no rival claim to the office of hereditary trusteeship by two parties. The said decision is not at all relevant for deciding the issue in this case. As already observed in O.A. No. 76 of 1954 the plaintiff invited the jurisdiction of the authorities of the Hindu Religious and Charitable Endowment Department for declaring that he is the

hereditary trustee on the ground that the suit temple is a public temple and it is not open to him now to say that it is a private temple and that the authorities have no jurisdiction to decide the issue. Applying the ratio laid down in the above said cases, we find much force in the contention of the learned Counsel for the respondents that the plaintiff was entitled to choose one of the two inconsistent remedies, namely, for a declaration that it is a private temple and for a declaration that the office of the trusteeship is hereditary, and since he elected one remedy, namely for a declaration that he is holding the office as hereditary trustee and pursuing the same, he cannot thereafter turn round and come forward with a prayer for the relief that the suit temple is a private temple. It is not in dispute that both the reliefs are inconsistent with one another. By pursuing the remedy for hereditary trusteeship, he is deemed to have given up the right that it is a private temple. As such, he is precluded from going behind the same as he is bound by his election. As rightly pointed out by the learned Counsel for the appellants, in view of the conduct of the earlier case and, the conduct of the present case, on the equitable doctrine of election, the plaintiffs claim must fail though not strictly on the ground of *res judicata* u/s 11, C.P.C., or under Order 2, Rule 2, C.P.C., and both the Courts below have not properly appreciated the said issue in proper prospective. Accordingly, we find this point in favour of the appellant.

9. The next question that arises for consideration is, whether on the evidence before the Court below the Court below is justified in holding that it is a private temple and not a public temple. According to the learned Counsel for the appellant, Mr. M.R. Narayanaswami, the learned trial Judge as well as the learned single Judge of this Court are not justified in proceeding that at the time of the origin of the temple, it was a private temple and it continued to be so and they failed to consider that there is no clinching evidence on the side of the plaintiff to show that it is a private temple. According to the learned Counsel, the presumption is that in South India every temple is a public temple and the burden is on the person who contends that it is a private temple to establish the same. In this connection the learned Counsel drew the attention of this Court to various provisions of the Hindu Religious and Charitable Endowments Act. As per Section 1(3) the said Act, the said Act applies to all Hindu public religious institutions and endowments including the incorporated Devaswoms and Unincorporated Devaswoms. As per Section 6(11), hereditary trustee means the trustee of a religious institution, the succession to whose office devolves by hereditary right or is regulated by usage or is specially provided for by the founder, so long as such scheme of succession is in force. Section 6(18) deals with the definition of religious institution, and it means a math, temple or specific endowment. In Section 6(20) temple has been defined as a place by whatever designation known used as a place of public religious worship, and dedicated to, or for the benefit of, or used as of right by the Hindu community or any section thereof, as a place of public religious worship. In the instant case, according to the plaintiff, the temple is founded by late Raja Iswardoss Dayawant Bahadur

and that it was his private property. On his death, his son T. Lakshmi Doss and grandson T. Venkata Prasad became the owners and they were in management of the same. Since they became insolvents, their estate including the suit temple and the right to manage the same, vested with the Official Assignee in I.P. No. 50 of 1924. In the subsequent suit, C.S. No. 545 of 1926 there was a consent decree and by virtue of the same, the ownership, possession and management were vested in the plaintiff and the Official Assignee, Madras executed necessary documents on 28.8.1931. These are all evidenced by Exs. A-1 to A-3. The learned Counsel for the appellants contended that though there was not much of information by way of record as to what took place regarding the management up to this period, it is not in dispute that in 1946 a complaint was filed by the residents of the locality where the temple is situate. Further, it is only the residents of Raja Hanumanthala Street, Triplicane, who have contributed funds for construction and that they have maintained the same as public temple all along and the family of Raja Iswardoss Dayawant Bahadur became insolvents and ceased to have any interest in the temple and in any event the temple was abandoned and the residents took interest in or about 1946 and they renovated the temple and performed the Kumbabhishekam. From that time, trustees are being appointed once in 5 years by the H.R. & C.E., Department and the appointed trustees are managing the temple all along. In this connection, the learned Counsel drew the attention of this Court to the evidence of D.Ws. 1 to 3. D.W. 1, who was a Headmaster and who was appointed as a trustee by the Endowment Board in 1951 along with one Lakshmilal Naidu, has deposed that he was appointed as trustee for 3 times of 5 years each i.e., from 1951 to February, 1966 and that defendants 5 to 7 became trustees after him and others. The suit temple is a Siva temple and a Gurukkal works in the temple. The temple is open to public for worship. There is no restriction for admission to the temple. No fee is collected for admission for worship. Donations from public subscription from public and offering of the public are the only source of income for the temple. There is Bank account for the temple. It is the Managing Trustee who pays for the Gurukkal. It is further stated that the deity is taken out on procession and that they are conducting Brahmotsavam. There is a Hun-dial in the temple. Public contribute money to the hundial. The temple is open from 6 A.M. to 10 P.M. for worship by the public. According to him, not less than 100 worshippers come in the morning and the evening daily. The trustees have no right to exclude anybody in the temple. He has done kumbabishekam in 1954 and also renovated the dilapidated vimanam and gopuram in 1954. In 1964, he consecrated temples of Lord Ganesh, Lord Subramaniya and Lord Dakshinamoorthy and at that time performed another Kumbabhishekam. His further evidence is that Archanas are performed in the temple by the public. Naivethiyam is prepared in the temple madapalli and offered to the deity. He has categorically stated that to his knowledge, the plaintiff never came to the temple at any time. Nothing tangible was elicited in cross-examination except stating that though he knew about the temple from 1941, he knew the temple only from 1948 as a regular worshipper. It was elicited that he did not know who built the temple originally. He

categorically denied that the worship in the temple is confined only to the people who get the consent of the plaintiff. His evidence has not been challenged materially with regard to the character of the temple as a public one. The fact that from 1946 to 1951 and from 1951 to 1966 he and his predecessor were appointed as trustees was not disputed. D.W.2 is a Gurukkal of the suit temple from 1952. He has deposed that it is only the trustees who paid his salary and rice for offering pooja in the temple. This witness belongs to the office of hereditary Gurukkal. He would depose that the suit temple is Siva Agama temple. Vinayagar, Murugan, Dakshi-namurthi, Mahavishnu, Durgai, Kameswarar, Kamakala Ambigai and Navagraham deities were consecrated in the temple. There were Nandhi Balibeedam and Thuvasthambam. Besides, there are Praharam, Artha Mandapam and Maha Mandapam. Daily poojas were performed five times and monthly utsavams were done according to Agamam. Brahmotsavam was conducted for 10 days every year. There are vaganams for deities and the deities are taken in procession in street. No permission is required to enter the temple. People belonging to all castes can come and worship from 6 a.m. to 12 noon and from 4 p.m. to 9.30 p.m. For performing Archanas, worshipper has to obtain chit from Devasthanam, and after the amount is collected, the Archakas are paid half and the devasthanam was taking the remaining half. There is a Hundial. Kumbabhishekams are performed. Collections are made for festivals as well as for functions of the temple. According to him, in 1964 Anjaneyar deity was consecrated by D.W. 1 and he issued Ex. P4 notice in connection with the said celebrations. He also produced other records Exs.P5 and P6 in regard to celebration of Kumbabhishekam and other festivals. According to him, neither the plaintiff nor his agent ever came to the temple and the temple is managed only by the trustees of the H.R. & C.E. Department and that he is in possession of the keys of the temple. His evidence has not been challenged on many material particulars. It was elicited in cross-examination that he is aged 40 years at the time of the examination. In 1952 when he was appointed as Gurukkal, he came to know of the affairs of the temple. He emphatically denied that it is a private temple. However, he would state that he is not aware as to when the temple was founded. D.W. 3 is an official in Burma Shell and he is a trustee of the temple from 1966. He produced Exs. B 20 and B 21, original sanction order of the budget and Ex. B-22 report of the Verification Officer of the H.R. & C.E. Department. It is clear from the evidence of these witnesses that from 1946 the temple is under the control of the department and that it is being treated as a public temple and public came to the temple as a matter of right and the public also contributed for the maintenance of the temple. The learned Counsel for the appellants submitted that on the side of the plaintiff, except the plaintiff, who was examined on commission, no other witness was examined and his evidence is also not in any way sufficient to hold that it is a private temple. The learned Counsel for the appellants pointed out that P.W. 1 has categorically admitted that the word "private" before the word "temple" is not there in Schedule C in Ex. A1 or in Ex. A 12. He has frankly admitted that he has no personal knowledge of the temple,

during the time of Raja Ishwardossalala and he cannot say who built the temple. He has also stated that he has no accounts in regard to the income from 1931 to 1966 and that he has also no account to show how much was spent by him on the suit temple. He was aged about 33 years, when he was examined on 24.1.1973. He has frankly admitted that he did not know the installation of idols of Mahaganapathi and Murugan or building of Vimanam for Mahaganapathi and Murugan. He also stated that he did not know whether any Kumbabhishekam was performed on 21.8.1964. He is unable to say how many sanctum sanctoriums are there in the temple or praharams or about the physical features of the places where various idols are installed. He would state that he does not know the name of the poojari of the temple. According to him, he attained majority in the year 1957. He did not know whether the residents of Triplicane worship at the Kamakala Kameswari temple and whether celebrations of festivals like Navarathri are performed in the temple and about the hours during which the temple is being opened. His evidence is not in any way helpful for deciding the question whether it is a private temple. On the other hand, it only supports the case of the defendants that it is a public temple. In this connection, the learned Counsel for the appellants drew the attention of this Court to various decisions wherein the question whether the temple is private or public is dealt with. In *V. Mahadeva Gurukkal Vs. The Commissioner for the Board of Hindu Religious Endowments*, , it was held:

A temple which began as a private temple may, in course of time, become a public temple by express or implied dedication, the latter being proved by use of the temple by the Hindu public as of right and without taking any permission from anyone. Express dedication is unnecessary to be proved where it is proved that the temple is used as of right by the Hindu community or any section thereof.

There is no warrant for holding that once private, a temple will continue to be private.

In the absence of proof of express dedication. There is nothing in law preventing a thing which began as private property becoming public property later on. Where the evidence on record conclusively proves that the Hindu public have been using the temple as a place of public religious worship as of right, the definition in Section 9(12) of the Madras Hindu Religious Endowments Act, 1927, applies to the institution.

In *Nallakaruppan v. Commissioner, H.R. & C.E.* (1966)1 M.L.J. 109 : AIR 1966 Mad. 109, it was held that "unlike the temples in Malabar and Kerala, there is a presumption in the case of temples in South Indian, that they are public and the burden is on the party who asserts that they are private to prove it." In that case, the decisions in AIR 1934 230 (Privy Council) and *Ramaswami Jadaya Gounder Vs. Commissioner, Hindu Religious and Charitable Endowments Administration and Another*, , were referred to. In *T.V. Mahalinga Iyer Vs. State of Madras and Another*, . Their Lordships of the Supreme Court held as follows:

It is undisputed law that so far as Tamil Nadu is concerned, there is an initial presumption that a temple is a public one, it being up to the party who claims that it is a private temple, to establish that fact affirmatively. This initial presumption must be rebutted by clinching testimony and the crucial question is as to whether the public worship in the temple as of right. Ordinarily, there may not be direct evidence regarding the exercise of such right and inference has to be drawn from a wealth of circumstances. The dedication to the public need not be by a deed and may be spelt out of the circumstances present. The right of the public present. The right of the public to worship is also a matter of inference. In the instant case the temple itself is situated on government property, processions with the deity are taken out and offerings are made, the structure especially of Gopuram and Mandapam also indicates the public nature of the temple. The fact that there had been contributions made by the public also leads to the conclusion that the temple was not a private one.

In *Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others*, it was observed:

The question of intention to dedicate the place for the use of the public or of the user by the public being as of right is necessarily a matter for inference from the institution and the nature of the user and the way the institution has been administered once a long course of user by the public for the purpose of worship is established, and the fact of a separate endowment in trust for the deity is also proved, it is fair to infer that the institution must have been dedicated for use by the public unless the contrary is established—particularly when the character of the temple, its construction, the arrangement of the various parts of the temple and the nature of the deities installed there are similar to what obtains in admittedly public temples. Similarly, when user by the public generally to the extent to which there is a worshipping public in the locality is established, it is not unreasonable to presume that the user by the public was as of right, unless there are circumstances clearly suggesting that the user must have been permissive or that the authorities in charge of the temple have exercised such arbitrary power of exclusion that it can only be ascribed to the private character of the institution.

In *Ramasamy Naidu v. Commissioner, H.R. & C.E. Madras* 87 L.W. 595 after considering the above Supreme Court decisions and other decisions, a Bench of this court:

Held: that the institution in question does not bear the trappings of a private temple. On the other hand, it is a public temple, as rightly pointed out by the trial Judge. The existence of Moolasthanam, Mahamandapam, Prakaram, idols of Chief and other deities, Utsavamurthis, daily poojas, special poojas and processions during Navarathri festivals, worship by the local public belonging to different communities are all factors which positively give the undoubted impression that the temple is a public one. The public have been visiting the temple and performing poojas therein and there are no circumstances suggesting

that the user was permissive or that the authorities in charge of the administration of the temple and performing poojas therein and there are no circumstances suggesting that the user was permissive or that the authorities in charge of the administration of the temple never exercised the right so as to exclude such members of the visiting public

10. The learned Judges in the above case also took into consideration the existence of two hundies in the temple to which the public were contributing liberally, as a clinching factor. The learned Judges also look into consideration another factor of the appointment of trustees for a continuous period of 20 years by the Religious Endowments Board to administer the affairs of the institution and consequently the learned Judges held that it is only a public temple and not a private temple. The above ratio is in all fours applicable to the facts of the instant case. It is needless to mulct the other decisions on this point. As already discussed the evidence of D.Ws. 1 to 3 has not been challenged and it is not in dispute that at least from the year 1946 the temple is being managed by the trustees appointed by the Board continuously. Further, there is acceptable evidence that the public are visiting the temple freely without any interruption, that they have been contributing, that idols were installed that poojas are performed regularly to the deities, that worship is being done, that there are hundials in the temple to which the public are contributing and that there are Mahamandapams, Moolasthanam and Praharams. Various deities are installed, processions are taken. Festivals are conducted. Special poojas are performed on Navarathri and other festival days. The people in the locality belonging to different religion offer their worship. These are clinching circumstances suggesting that the temple is only a public one and not a private one. On a careful analysis of the entire materials, we find that the court below has not properly appreciated the various factors and the and the learned Judge was carried away by the transactions under Exs. A1 to A3. Hence, we find this point also in favour of the appellants.

11. Next, we have to consider the question of allowing or disallowing the petition C.M.P. No. 15683 of 1989 filed by the second respondent herein who is the fourth defendant in the suit (Commissioner, Hindu Religious and Charitable Endowments, Madras) and who filed the appeal A.S. No. 730 of 1977. It must be noted that the present appellants are respondents 5 to 7 in A.S. No. 730 of 1977 and they are the trustees appointed by the Commissioner, H.R. & C.E., Department, for the suit temple. They filed the appeal A.S. No. 730 of 1977 challenging the judgment and decree of the trial Court in O.S. No. 547 of 1965 and their appeal was dismissed for default for not complying with the pleading set. However, they were permitted to argue the appeal. It is observed in the judgment:

The learned Counsel for the respondents 5 to 7 (defendants 5 to 7 in the suit) Vehemently contended that by not asking a relief of declaration that the suit temple is a private temple in the earlier suit the plaintiff is barred by the principle

of res judicata as well as under Order 2, Rule 2, C.P.C., from again agitating the issue that the suit temple is a private one

The Court negated the same on the ground that no plea was raised and no issue was framed and they cannot be allowed to agitate the same. Incidentally it was referred that there was no separate written statement filed by defendants 5 to 7. The learned Counsel for the plaintiff submitted that the appeal filed by defendants 5 to 7 is incompetent and as such, the question of transposing the second respondent, namely, Commissioner, H.R. & C.E., Board, as the 4th appellant does not arise as it is barred by res judicata u/s 11, Code of Civil Procedure. In this connection, the learned Counsel relied on the decision of the Supreme court in Sheodan Singh Vs. Smt. Daryao Kunwar, , wherein it was held:

Where the trial Court has decided two suits having common issues on the merits and there are two appeals the refrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial court's decision stands confirmed, the decision of the appeal court will be res judicata and the appeal Court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision-of the trial court given on merits, and if that is so, the decision of the appeal court will be res judicata.

As rightly contended by the learned Counsel for the appellants, the said decision is not helpful to the case of the plaintiff, as in the instant case there are no two suits but in the very same suit, decree was passed as against them and two appeals were filed and one of the appeals was dismissed on the ground of default in furnishing pleading set. Yet, respondents 5 to 7, the present appellants, were allowed to argue in the appeal filed by the second respondent herein. It is to be noted that the interest of the second respondent, Commissioner, H.R. & C.E., Board and that of the appointed trustees, namely, the appellants herein, is one and the same, and the second respondent is also concerned in fighting for the same cause viz., it is a public temple and not a private temple and the plaintiff has title lo it whatsoever. On the other hand, the learned Counsel for the proposed fourth appellant as well as the appellants 1 to 3 drew the attention of this Court to the decision in Narhari and Others Vs. Shankar and Others, , where, while considering the Limitation Act when two appeals were filed in one suit and one appeal was dismissed, it was thus stated:

From the decree of trial Court in favour of the plaintiff two separate appeals were taken by two sets of the defendants. The appellate Court allowed both the appeals and dismissed the plaintiffs suit by one judgment and ordered a copy of the judgment to be placed on the of the other connected appeal. The plaintiffs preferred two appeals. One of the appeals was time barred and on the principle of "res judicata" the High Court dismissed both the appeals.

Held, that it was not necessary to file two separate appeals in this case. The question of "res judicata" arose only when there were two suits. As there was

one suit and both the decrees were in the same case and based on the same judgment and the matter decided concerned the entire suit, the principle of *res judicata* did not apply.

The above view was affirmed in *Sheodan Singh v. Daryao Kunwar* (1966) 2 S.C.J. 768 In *R.S. Madanappa and Others Vs. Chandramma and Another*, , it was held:

The power under this provision is exercisable i.e., Order 1, Rule 10(2), C.P.C., by the court even *suo motu*. As pointed out by the Privy Council in AIR 1931 162 (Privy Council) the power ought to be exercised by a court for doing complete justice between the parties. Here both the plaintiff and the first defendant, they have been fully considered and adjudicated upon by the High Court while allowing her appeal. Since the trial Court upheld the special defences urged by defendants 3 to 8 and negatived the claim as the unnecessary to order her transposition as plaintiff. But the High Court could while upholding her claim, well have done so. Apparently it either over looked the technical defect or felt that under Order 41, Rule 33, it had ample power to decree her claim.

The learned Counsel for the plaintiff is not seriously challenging the proposition that the Court has got ample power to order transposition if it is necessary for final and complete adjudication of the dispute between the parties and to avoid multiplicity of proceedings, that it is purely a discretion of the court and that it can be done at any stage. It was also brought to the notice of this Court that the appellants herein filed the petition C.M.P. No. 4772 of 1975 to restore the appeal which was dismissed for default for not furnishing pleadings and the same was not disposed of; but the appellants were allowed to take part in the appeal filed by the second respondent who is sought to be transposed as the fourth appellant. The learned Counsel for the appellants drew the attention of this Court to Order 41, Rule 4. C.P.C., which reads as follows:

Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs, or to all the defendants, any one of the plaintiffs, or of the defendants may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

The learned Counsel also drew the attention of this Court to Order 41, Rule 33, C.P.C., which reads as follows:

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all although such respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decree in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees although an appeal may not have been filed against such decree.

The learned Counsel submitted that the CPC is applicable to Letters Patent Appeal under Clause 15, in view of Clause 39. According to the learned Counsel for the appellants, the right of appeal is available to any party to the proceedings and also pointed out that Section 96, C.P.C., refers to "decree", whereas Clause 15 of the Letters Patent Appeal refers to "judgment". According to the learned Counsel, the objection by the plaintiff is only technical and it is only purely the discretion of the Court and if the court feels that the transposition is necessary for proper and final adjudication it can do so. The power of transposition cannot be challenged. We find much force in the said contention. In view of the circumstances of the case and since the appellants in the case are the appointed trustees of the second respondent and both of them represent the temple and put forth the same contentions and in view of the fact that the second respondent herein is also a party to the appeal in A.S. No. 730 of 1977, certainly he can prefer this appeal irrespective of the fact that the appeal filed by the present appellants, separately, was dismissed for default and it cannot be said that the appeal filed by them is itself incompetent and is liable to be dismissed. As already discussed, in view of the question involved in this appeal, we are of the view that the transposition is absolutely necessary for proper and final adjudication of the dispute and to avoid multiplicity of proceedings. Accordingly, we allow C.M.P. No. 15683 of 1989 for transposition.

12. In the result, this appeal is allowed; the judgment and decree passed by the learned single Judge of this Court in A.S. No. 730 of 1977 confirming the decree and judgment of the trial Court in O.S. No. 547 of 1965, are here by set aside and the suit filed by the first respondent herein in O.S. No. 547 of 1965 is dismissed. Each parties are directed to bear their respective costs in this appeal.