

(2016) 07 BOM CK 0107

In the Bombay High Court

Case No : First Appeal No. 611 of 1996 With CA. 5000 of 2016 in FA. 611 of 1996 WITH CA. 5898 of 2016 in FA. 611 of 1996

Shankarlal Sandharam Master

APPELLANT

Vs

Kedargir Guru Harigir

RESPONDENT

Date of Decision : 12-07-2016

Acts Referred:

Maharashtra Public Trusts Act, 1950 — Section 2(13), 2(9)

Citation : (2016) 5 AIRBomR 78 : (2017) 2 ALLMR 839 : (2016) 6 BCR 225

Hon'ble Judges : V.K. Jadhav, J.

Bench : Single Bench

Advocate : Mr. S.V. Natu, Advocate, for the Appellants; Mr. S.V. Adwant, Advocate, for the for Respondent 1; Mr. R.D. Mane, Advocate, for the for Respondent Nos. 2 to 5; Mr. C.V. Korhalkar, Advocate, for the for Respondent Nos. 6 to 8

Final Decision : Allowed

Judgement

V.K. Jadhav, J.—Being aggrieved by the Judgment and Order dated 28.9.1995 passed by the learned Additional District Judge, Jalna in M.C.P. No.13 of 1991, the original applicants preferred this appeal.

2. Brief facts, giving rise to the present appeal, are as follows :

(a) The applicants had initiated a proceedings under section 19 of the Maharashtra Public Trusts Act, 1950 (hereinafter referred to as "The Act of 1950") for registration of Public Trust i.e. "Shri Sheriche Mahadev Mandir", Jalna. Said inquiry was numbered as 23 of 1983. The applicants have mentioned names of five persons as the trustees and the mode of succession shown as surviving trustees to appoint new trustee. The main object of the trust is shown as religious one and to continue customs and functions to be held in the said temple, to held the annual fair on every Nagpanchami day to feed the Saints and to maintain the Dharmashala in the temple premises. The movable property sought to be registered is shown as pooja utensils worth Rs. 2,000/- (Rs. Two

thousand), and immovable property shown is the land bearing S.No. 229 admeasuring 5 Acres 23 Gunthas, wherein a temple of Lord Shiva, Dharmashala, Barav (well) and some samadhis are situated. According to the applicants, the said temple is a Public Trust and property referred to above is trust property. The applicants further contends that, Mahant used to manage the temple and its property. The Mahant was a Bachelor and used to nominate his successor from one of his disciples, who is also necessarily a bachelor. There was no regular mode of succession, but, the nominated Mahant shall get rights of the Management of the temple and the property. One Shri. Shivgir Guru Harigir was the last Mahant. He did not nominate his chela (disciple). However, on 30.12.1347 Fasli, said Shivgir Guru Harigir had executed a Will deed under which a panch committee was appointed to manage and administer the above temple and the trust property. According to the applicants, respondent no.1 late Kedargir Guru Harigir was in occupation of the properties unauthorisedly and during his lifetime he had instituted a suit for cancellation of the aforesaid Will deed. It is further alleged that, respondent no.1 Kedargir Guru Harigir was disposing of the properties in dispute claiming it to be of his own. It has also alleged that, respondent Kedargir Guru sold land out of land Survey No.229 by dividing it into plots and appropriated the income derived from the said alienation. It has also contended that, the decision of the said Civil Suit went against respondent no.1. The applicants therefore, constrained to initiate the proceedings under the relevant provisions of the Act of 1950 for registration of the Public Trust and its properties.

(b) During the course of the inquiry No.23 of 1983, the learned Assistant Charity Commissioner, Jalna, issued a public notice under the relevant provisions of the Rules of the Maharashtra Public Trusts Rules, 1951. In response to the notice, respondent no.1 Kedargir had raised his objection by filing his say at Exh.13. Respondent No.1 claimed that said temple is not a public trust and the property in dispute is not the trust property. According to him, he is the absolute owner thereof and the application, therefore, deserves to be dismissed. In response to the notice issued, the purchaser had also raised objection on the similar grounds with the addition that he is the bona fide purchaser for the value without notice. In response to the said notice, respondents no.3 to 6 by their joint say have also resisted the application on the ground that their father was the protected tenant of the land to the extent of 2 acres from eastern side and ownership certificate dated 13.10.1956 also came to be issued by the competent authority. They have denied all the allegations made by the applicants, however, according to them, their claim is restricted to the extent of 2 Acres of land and contended that the same is liable to be excluded from the said proceeding. Respondents No.7 and 8 are the purchasers and they have also strongly resisted the application.

(c) Both the parties have adduced oral as well as documentary evidence in support of their rival contentions. Furthermore, the learned Assistant Charity Commissioner, Jalna had inspected the spot and notes of inspection dated 30.10.1985 are marked at Exh.108. After hearing the parties, the learned

Assistant Charity Commissioner, Sub Region, Jalna, by his Judgment and Order dated 15.1.1986 directed that said Shri. Sheri Shiva Mandir, Shamprasad Garden, Jalna to be registered as a "Public Trust" under section 20 of the Bombay Public Trusts Act, 1950 and certificate of "A" section is issued in the name of opponent Shri. Kedargir Harigir in the capacity of Manager and further due entries be recorded in the register kept u/s 17 of the Bombay Public Trust Act, 1950. Further the applicants are advised to take legal steps for recovery of the properties which are alienated under unauthorized sale by the Manager within a period of three months and, failing which the Charity Office is directed to take steps for filing of the suit as mentioned above. The applicants further advised to make an application to the Joint Charity Commissioner, Aurangabad, for framing of a scheme under section 50A of the Act of 1950 within a period of two months from the order and, in case, no application is filed by the applicants or any interested persons, then, Charity Office should move for framing of the scheme suomotto.

3. Being aggrieved by the same, the original respondent no.1 Kedargir Guru Harigir preferred an appeal No.4 of 1986 and original respondents No.2,7 and 8 preferred an appeal No.7 of 1986 before the Joint Charity Commissioner, Aurangabad. The learned Jt. Charity Commissioner, Aurangabad, by its Judgment and order dated 31.12.1990 allowed both the appeals and thereby quashed and set aside the Judgment and Order dated 15.1.1986 passed by the learned Assistant Charity Commissioner, Jalna in enquiry No.23 of 1983. The learned Jt. Charity Commissioner has rejected the application bearing enquiry No.23 of 1983.

4. Being aggrieved by the same, the original applicants preferred M.C.P No. 13 of 1991 before the District Court, Jalna. The learned Additional District Judge, Jalna, by its Judgment and Order dated 28.9.1995 dismissed said M.C.P. No.13 of 1991. Hence, this appeal.

5. Mr. Natu, the learned counsel for the appellants submitted written arguments. He submits that, temple (Math) in question has been managed by Mahant, who occupied Gaddi (Seat). It is an admitted position that, last Mahant was one Shivgiri Guru Harigir. Mode of succession of the said "Gaddi" of Mahant was by way of Guru Shishya Parampara. Mahant used to nominate in his life time his disciples to be Mahant after him. It is also an admitted position that, last Mahant Shri. Shivgiri guru did not nominate his chela, but, instead he made a Will deed on 13.12.1347 Fasali under which he appointed a Panch Committee to manage and administer the temple and its property. Learned counsel submits that, the Joint Charity Commissioner, Aurangabad as well as the Additional District Judge, Jalna wrongly observed in their respective judgments that last Mahant created a Trust under the said Will. As a matter of fact, it has never been the case of the appellants that Trust was created under the said Will. Deceased Kedargir (original respondent No.1) claimed himself to be the owner of the temple and the property. His name has been included in the revenue record showing him to be the Kabjedar of the land in dispute. Along with his name there is also the name

of said Shivgir (last Mahant) recorded as owner and both of them have been shown as 8 Annas sharers each. Deceased Kedargir had challenged the Will deed executed by Shivgir (last Mahant) in the Court and the Court has recorded the findings that deceased Kedargir (respondent No.1) was not a Mahant as he was a married person. Jt. Charity Commissioner, Aurangabd, as well as the Additional District Judge, Jalna has not considered said findings recorded by the civil Court against respondent deceased Kedargir.

6. Learned counsel for the appellant submits that, deceased Kedargir (original respondent No.1) had admitted in his cross examination that, origin of temple is not known and the temple and its property was managed by Mahant who was a bachelor. He had further admitted in his cross examination that, each Mahant used to nominate his successor from his disciples. He had further admitted that, he is married having children. He had further admitted unequivocally that devotees have free access to the temple and fair was arranged at the time of Nag Panchami festival as well as other auspicious days. Learned counsel submits that, said temple is built in an imposing manner appearing to be a public temple and the members of public are entitled to worship in that temple as of right and there is nothing on record to show that any restriction or permission was required for worshipping in the said temple. Furthermore, various religious festivals are undertaken in the temple which are usually conducted in public temples. Learned counsel submits that, Mahant is a Manager or Custodian of the Institution and he has to discharge the duties in the said capacity. The assets are vested in the Mahant, as head of the Institution, as owner thereof in trust for the institution itself. The Mahant, by custom, is an ascetic who has renounced the worldly possession. Therefore, the temple in question and its property has inherent element of public institution, which needs to be upheld. Learned counsel submits that, mere entries in revenue record in the name of Mahants, without reference to the temple or Institution, will not render the temple and property as the personal property of Mahants, considering the status of the Mahant in law as expounded by the Apex Court and various High Courts.

7. Learned counsel further submits that both the appellate authorities erred in relying upon the provisions of Section 29 of the Act of 1950 to hold that the application filed was beyond the period of limitation since it was a case of trust by Will. Said Will executed by Shivgir Guru (last Mahant) was challenged by respondent No.1 (Kedargir) and held to be revoked because of compromise between them. Said will neither refers to creation of a trust nor creates a trust for the first time since it was already in existence by virtue of position of Mahant as trustee on institution. Learned counsel submits that, the Judgment and Orders passed by the Jt. Charity Commissioner, Aurangabad as well as Additional District Judge, Jalna are liable to be quashed and set aside and the Judgment and order passed by the learned Assistant Charity Commissioner, Jalna, deserves to be upheld.

8. The learned counsel for the appellants in order to substantiate his submissions

places reliance on following cases. Learned counsel for respondent no.1 submitted written arguments.

(I) Baijaynanda Giri and others, v. State of Bihar and another, Reported in AIR 1954 Patna 266.

(II) Mahant Shri. Srinivas Ramanuj Das v. Surajnarayan Das and another Reported in AIR 1967 SC page 256.

9. Learned counsel for respondent No.1 submitted written notes of argument. He submits that, the Assistant Charity Commissioner, Jalna has decided the issue improperly thereby exceeding the jurisdiction vested in him. The provisions of section 79 of the Act of 1950 are limited to the points as to i] whether or not a trust exists, ii] whether such trust is a public trust, and iii] whether a particular property is the property of such a trust. These three points are preceded by the word "Any Question". The same may arise only in the circumstances mentioned in section 19 of the Act of 1950. There are three conditions to determine the same that are :

- (i) on an application under section 18,
- (ii) On an application by a person having interest in the public trust,
- (iii) own motion.

10. The learned counsel submits that, neither of the conditions mentioned above are present in the case and therefore, the Assistant Charity Commissioner, Jalna was not conferred with the jurisdiction to decide the issues taken up before him. All the conditions mentioned in Section 19 are individually and/or cumulatively absent in the present case. It has been accepted by the applicants that, they are not the trustees and similar finding is also recorded by the learned Assistant Charity Commissioner, Jalna. Further, there is no application on record, neither any such application is made by the applicants to treat the above application as "an application made by any person having interest in the public trust," nor the Assistant Charity Commissioner, Jalna had treated such application filed by an interested person. The term "Person having interest" and "Public Trust" are defined under section 2 (1) and 2 (13) respectively of the Act of 1950. The applicants have not proved their interest in terms of these provisions. The applicants have failed to prove their interest in the temple or the Math. The temple and Math which was solely managed by Kedargir and earlier to him by his Gurus, had absolutely no relation with Bathri Teli samaj, of which the applicants are the members.

11. Learned counsel for respondent No.1 further submits that, the applicants have specifically mentioned in their application in form No.II against item No.4 that origin or creation of the trust is a Will by Shivgir Guru Harigir dated 30.12.1347 Fasli. Learned counsel further submits that, as per provisions of Section 29 of the Act of 1950, executor is under obligation to make an application within one month from the date on which the probate of the Will is

granted or within six months from the date of testator's death, whichever is earlier. Since no compliance is made under these provisions till date, on this ground alone the application is liable to be dismissed. On the other hand, it is for the first time coming on record before the Assistant Charity Commissioner, Jalna that it is not the claim of the applicants that trust is created under a Will executed by late Shivgir Guru. The Assistant Charity Commissioner has overlooked the provisions and applicability of section 29 of the Act and concluded that Public Trust was in existence before the Will and therefore, the provisions of section 29 of the Act of 1950 will not be applicable.

12. Learned counsel for respondent no.1 further submits that, the essential conditions for valid trust is :

- (a) intention to create trust,
- (b) purpose for which the trust is created,
- (iii) beneficiaries and
- (iv) trust property.

13. In a case of public trust essential criteria for a public trust was whether it was dedicated for the use of the public.

14. Learned counsel in order to substantiate his contention placed reliance in a case Shivprasad Shankarlal Pardeshi Since Deceased by Heirs Shrikant Shivprasad and ors v. Leelabai Badrinarayan Kalwar reported in 1998 (1) Mh. L.J. Page 445, wherein the test has been laid down to determine whether endowment is a private or public trust, which runs as follows :

- i. Where the origin of the endowment cannot be ascertained, the question whether the user of the temple by members of the public is as of right ;
- ii. The fact that the control and management vests either in a large body of persons or in the members of the public and the founder does not retain any control over the Management. Allied to this may be the circumstance where the evidence shows that there is provision for a scheme to be framed by associating the members of the public at large ;
- iii. Where, however, a document is available to prove the nature and origin of the endowment and the recitals of the document show that the control and management of the temple is retained with founder or his descendants, and that extensive property are dedicated for the purpose of the maintenance of the temple belonging to the founder himself, this will be conclusive proof to show that endowment was of private nature.

15. Learned counsel submits that, definition of the Public Trust includes a Temple also, and there are conditions necessary for holding such a temple to be a Public Temple. Those conditions are :

- (i) historical origin of the temple,

- (ii) the manner in which affairs of the temple have been managed,
- (iii) the nature and extent of the gifts received by the temple,
- (iv) the rights exercised by the devotees in regard to worship in temple and
- (v) the dedication of the temple for the benefit of the public and
- (vi) the value of public user as the evidence of dedication depends on circumstances which gives strength to the inference that the user was as of right, and
- (vii) the public user for a longer period without restriction.

16. The burden of proof is casted on the applicants under the provisions of Section 19 of the Act of 1950 to prove that Temple in question is a Public Temple and there exists a Temple over the property since antiquity, however, the origin of the temple is not known and nothing is on record to show that as to who built the temple. Further, there is no evidence to show that structure was erected with public contribution, or that, it is a public temple. On the contrary, the Will deed of Late Shivgir reveals that, he has been referred to as the owner of the property. The Bathri Teli Samaj or any person in general had never contributed the funds towards the construction of Temple-Math-Dharmashala, neither for its repairs, renovations, utsavs, or any other festivals, neither any document to that extent have been placed on record.

17. Learned counsel has, thus, insisted to consider the following judgments which supports the contention of respondent No.1 and dislodge the claim of the applicants.

(A) In case of T.D.Gopalan v. The Commissioner of Hindu Religious Charitable Endowments, Madras reported in AIR 1972 SC 1716 Hon"ble Supreme Court has observed that, :

"To determine whether a temple was public or private, the following parameters are to be considered :

Origin of the temple.

The manner in which its affairs were managed.

The nature and extent of the gifts received by it.

Rights exercised by devotees in regard to worship .

The consciousness of the manager and the conscious of the devotees themselves as to the public character of the temple."

(b) In case of Radhakanta Deb and anr. v. The Commissioner of Hindu Religious Endowments, Orissa reported in AIR 1981 SC 798, Supreme Court has observed that :

" Test to determine whether endowment is of private or public character :

Whether the user of the temple by members of public is as of right.

Management and control of the Temple in past and Present."

(c) In case of Thakurjee Deosthan, S.I. Hora v. Viran Wd/o. Babu Dahat and others reported in 2015 (6) ALL MR 671, this Court has observed that :

"To establish the endowment as a public trust, following must be established :"

- * Clear intention to dedicate suit land for charitable purposes.
- * Relinquishment of right of ownership of the earlier owners.
- * Subject of endowment must be certain.
- * Dedication of property must be complete or partial.
- * If such dedication is complete, public trust is created, in partial dedication on charity is created.
- * History of institution.
- * Cogent evidence as regards to conduct of the parties.
- * Cogent evidence as regards to user of the properties, and,
- * Mere user of private property for a particular purpose for long time will not by itself establish that a public trust is created."

18. Learned counsel submits that, considering the ratio of the aforesaid case, it is manifest that, there is nothing on record to show that the temple is a public temple and is a endowed property.

19. Learned counsel for respondent No.1 by referring definition of "Math" in section 2 (9) of the Act of 1950, submits that, there is no presumption regarding the properties held by Mahant to be endowed properties. In a case Sathappayar v. Periaswamy (LR 14 Mad 1), Madras High court has observed that, there can be private Maths. In Verayya v. Hindu R.E. Board (AIR 1938 Madras 810), it was observed that, the existence of private Maths cannot be disputed and where the property is given to the head of the Math for his personal benefit, it cannot constitute a public religious endowment.

20. Learned counsel submits that, learned Assistant Charity Commissioner, Jalna has erroneously observed that there cannot be a personal property of a Mahant.

21. Learned counsel for respondent no.1 further submits that, a Mahant is appointed by his Guru and not by public through election or by the Bathri Teli Samaj, thus, it creates the Guru Chela relationship. Succession of the Mahantship of Math or religious institution is regulated by custom or usage of the particular institution, where a rule of succession is laid down by the founder himself who created the endowment. In the instant case, there is no endowment,

nor a Deed of Trust. It reveals from the pleadings of Shivgirguru in a Civil Suit instituted by Kedargir Guru that, Shivgir and Kedargir are the brothers, and they are from Gosavi community. In a case *Sathianama Bharati v. Saravanabagi Ammal* (18 Mad 266), it is observed that "A Goswami is not a religious ascetic like Sanyasi or Tambiran who abjures the world and its pleasures and lives a life of celibacy."

22. Learned counsel submits that, mere acquisition of the property by Mahant does not lose its secular character. The descent of the property from Guru to Chela does not warrant the presumption that it is a religious property. Though, the applicants asserted that property was transferred from guru to disciple, the property was always in their individual capacities and never acquired any religious or public character. Further as asserted by the applicant, Shivgir Guru, who was the last Mahant, did not appoint any disciple, but executed a Will deed and appointed 5 panchas for the administration of the Temple and Math, however, the said testamentary document does not propose that his intention was to create a Trust for "Public Purpose." Learned counsel submits that, various revenue documents from the year 1920 till the initiation of cause in the year 1983 are in the name of Shivgir and Kedargir, in their individual and personal capacities and not in the name of idol.

23. Learned counsel in order to substantiate his contention placed his reliance on following cases :

(i) In a case of *Pandit Parma Nand v. Nihal Chand and another* reported AIR 1938 PC 195 wherein the privy council observed that, the practise and intent of the previous "Mahant" is essential to determine the nature of the Math or Temple.

In this reported case, previous Mahants or successors did not manage the property as trust property, thus, it was then held that the Math is a private Math.

(ii) In case of *Mahanth Ramsaran Das v. Jai Ram Das and another* reported in AIR 1943 Patna, 135, the Patna High Court observed that :-

Property does not lose its secular character by mere acquisition by Mahant.

Descent of property from Guru to Chela does not warrant a presumption that it is a religious property.

To constitute a trust created for public purpose of charitable or religious nature, the author of authors of the trust must be ascertained, and intention must be indicated by words or acts with reasonable certainty.

Mere provision for feeding sadhus, guests and wayfarers in dedication to idol does not render the dedication substantially for public purpose.

Held that :

The fact that the properties belong to an idol in no way establishes that the trust was public.

Public has no legal right, but was only by invitation or permission.

Mahant did not give the public any right. Thus, suit for declaration of trust was dismissed.

24. In case of *The Bihar State Board of Religious Trust v. Mahant Shi Biseshwar Das* reported in AIR 1971 SC 2057 the Hon'ble Supreme Court observed that :

Mahant did not marry and passed on the property from Guru to Chela does not raise a presumption that it is religious property. Celebration of festivals does not make one public temple.

Family treated temple as "family property", mere fact that public visit the temple and make offerings and mela is held does not make it a public temple (AIR 1940 PC 7).

When temple property was acquired by grant to an individual or family, presumption or dedication to the public is hazardous.

An interference can be made from the usage and custom of the institution or from the mode in which the properties have been dealt with as also other established circumstances.

25. Learned counsel submits that, in view of the ratio laid down in the above cited judgments, it is manifest that, the property held by the Mahant in his individual capacity, does not lose its secular character and can not be treated as the property of the Math-Temple-Trust.

26. Learned counsel for respondent no.1 further submits that, it is not in dispute that the temple and Math are in existence since 100 years as asserted by the applicants, however, there is no evidence placed on record to show that temple and Math were erected and formed respectively from the donations offered by the devotees or public at large to Mahants. It is not the case of the parties that temple and Math were constructed by the People of the society. It is not known that, who has constructed the temple. There is no record to show that the property which is subject matter of the proceeding belongs to the Temple-Math. There is no documentary, oral or parol evidence to suggest that suit property is the property of the temple. Merely because there is worship by public in the temple, celebration of festivals and offerings by public, it cannot be considered that the temple is a public temple and that the property on which the temple is constructed is of the temple or that the temple and Math is a constructive trust. There is no clear and definite evidence to show that there had been a dedication of the institution for the use of the public in the later period. Mere presence of the idols and the festivals would not bring it within the purview of the temple must less a public temple.

27. Learned counsel for respondent No.1 further submits that, Temple-Math occupies only a small area in the total extent of the property. Entire property is being enjoyed and has always been enjoyed by the Mahant Shivgiri and later by

Kedargir and his family for their private use and occupation. The property comprises of a small Shiv Temple, rooms and Samadhis of the people belonging to Gosawi Samaj. This itself suggests that the property does not have any public character and it is not a Public Institution as such.

28. Learned counsel in order to substantiate his contention placed his reliance on a case of Hari Bhanu Maharaj of Baroda v. Charity Commissioner, Ahmedabad reported in (1986) 4 SCC 162, wherein the Apex Court has made observations :

"When the origin of temple lost in antiquity and there is no evidence to show that it was built from public funds, presumption should not be drawn that it is a public temple."

Location of the Math, Temple and the residence of the persons in it must be considered to determine public or private character of temple.

Merely a small area of the land is acquired by the temple does not make the entire property as the temple or trust property."

29. Learned counsel further places his reliance in a case reported in 2000 (1) ALL MR 210 wherein Bombay High Court has made following observations :

" Evidence shows that temple is situated in residential precincts and occupies only small portion of the entire property this shows it is a private temple and not a public trust."

30. Learned counsel submits that, a public records- revenue records have been prepared and maintained by the public officers while discharging public duties, and such record has got evidentiary and probative value under section 45 of the Indian Evidence Act and, the entries recorded therein have not been disturbed for years together. It cannot be said that the property bearing Sy. No.229 is a public property. Learned counsel in order to substantiate his contention places his reliance on a case Amardas Mangaldas Sadhu and another v. Harmanbhai Jethabhai Patel and others reported in AIR 1942 Bom 291, where in it has been observed that :

The recitals in documents indicate that properties were dealt with as private properties and no reference to temple or trust and no reference that village people created it or helped in the Management.

The property was transferred without any reference to trust in the past too.

Will was made to indicate that it was private property and not a public trust.

31. Learned counsel has also placed his reliance on the judgment passed by the Patna High Court in case of Bihar State Board of Religious Trust v. Acharya Mahanth Amrit Das and others reported in AIR 1974 Pat 95, wherein it is observed that :

For establishment of trust, beneficiaries are to be ascertained.

Tests for distinction of a private and public endowment depends on evidence of user, dedication and the circumstances of a particular case.

Math was for personal benefit only has been recognised in the past, in such cases no intention on part of grantor to fetter the grantee with any obligation in dealing with the property granted.

Names in revenue record were in individual capacity, thus it was held that it was a private property not a public trust.

32. Learned counsel further relied upon the judgment of Hon''ble Supreme Court reported in (2001) 10 SCC 464, wherein, it is observed that:

"Long standing entry in the revenue record is it could be construed to be illegal, if not challenged and there being no allegation of it being recorded fraudulently or fictitiously, such an entry would have weight for drawing inference in favour of the person in whose favour such an entry is recorded."

33. Learned counsel submits that, entries in the other rights column of the revenue record in respect of Sy.No.229 are in the nature of description of property or parameters which can be used for identifying the property. Such entry is not in the nature to stake a charge over Sy No.229. It is stated in the other right column that Temples are standing in Sy No.229 which are definitely not legal persons, therefore, there is no nexus between the said land and temple. Learned counsel submits that, unless there is a preexisting, recognisable and enforceable legal right enjoyed by a person in respect of Sy.No.229, the entry in the other rights column will not give rise to any right with respect to the said property, merely because there appears an entry. Furthermore, mere an entry in other rights column, an individual property does not acquire a religious status. Further, just because a religious status is granted to a property, the said property does not become a Public Trust. The names of deity would have appeared in the ownership column, however, same is inherently absent, therefore, said property is private property. The land S.No.229 preexisted the temple, as a private property, over which the temple has been constructed. Therefore, no proof to show that, temple was constructed by the villagers/public out of public donations or contributions. Merely because a person calls himself a Mahant, the property he holds does not partake a character of Math, Temple or Dharmashala. Furthermore, there is also no evidence that Samadhi's are built where religious leaders, revered by the public, laid their lives and the provision of collection boxes near the Samadhis would have been only for the deposit of offering for the members of the families on the Gurus or towards the fulfilment of vows taken by them. Learned counsel places his reliance on a Judgment in case of Saraswathi Ammal and others v. Rajagopal Ammal, reported in AIR 1953 SC 491, wherein, it is observed that :

"Dedication of property for worship at a tomb or Samadhi is not valid in Hindu law and same cannot be recognised as a charitable or religious purpose".

34. Learned counsel for respondent No.1 further submits that, one Ambadas Shivaji Paulbuddhe was declared as the Protected Tenant over the land Sy.No.229 admeasuring to the extent of 2 Acres from eastern side on 13.10.1956 under the provisions of Section 38(E) of the Hyderabad Tenancy and Agricultural Lands Act, 1950. After his death, in the year 1978, his L.Rs. i.e. his four sons, have inherited the tenancy rights over the suit property and, are holding it till date. Learned counsel submits that, if the property is of a trust or an endowment, the Tenancy Act cannot be made applicable and therefore, when Ambadas Paulbuddhe was declared to be the tenant of land Sy.No.229, it proves that landlords Shivgir and Kedargir had their private lands elsewhere in addition to the land Sy.No.229 in dispute.

35. Learned counsel for respondent no.1 further submits that, in view of the provisions of Hyderabad Endowments Regulations 1349 F: the founder is a person who constructs a temple and establishes an idol there and endows it with lands. The person providing the original endowment only is the founder. Persons who subsequent to the foundation, furnish additional contributions do not thereby become founders. A founder is a person who has legal estate to convey under a deed of endowment. In the case in hand, the founder of the temple is not known. Said regulations of 1349 Fasli (1940) was the statute for the erstwhile Hyderabad State which then included the Marathwada Region. Learned counsel submits that, while considering the Regulations, it is clear that property in dispute is not an "Endowment" under Regulation 2 of the Hyderabad Endowment Regulation, as there is no transfer of property made by any person for religious purposes of charity or public utility. The said property is not an "Endowed property" as defined under Regulation 2. If land survey No.229 was ever an endowed property for the endowment, the trustees, interested persons should have taken up the claim for declaration of the property as an Endowment under the Hyderabad Endowment Regulations. Therefore, the suit property was always regarded as an "individual property".

36. Learned counsel for respondent No.1 further submits that, the provisions of Transfer of Property Act, 1882 deals with transfers, inter vivos, that is the act of a living person, conveying a property in present or in future, to one or more living persons. Thus, to treat a demised under a Will as a transfer of an existing property in future, is contrary to all known principles relating to transfer of property and testamentary succession. There is absolutely no documentary evidence to prove that the suit property is that of the temple however, the entire public documents placed on record draw only one conclusion that the property is that of an individual.

37. Learned counsel submits that, the Joint Charity Commissioner and learned Additional District Judge, Jalna have dealt with issues No.1 and 2 exhaustively by considering the pleadings, the evidence and the law applicable. Therefore, no fault can be found with the judgments rendered by them. The learned Jt. Charity Commissioner, Aurangabad and Additional District Judge, Jalna have recorded

categoric finding that, the alleged temple is not a public temple and there is no grant to show that land Sy.No.229 was endowed in the name of Diety and that the property is a trust property. Therefore, the claim made by the applicants is unsustainable. Learned counsel submits that, the judgments cited by the appellants/original applicants are not applicable in the present set of facts and circumstances. Learned counsel thus submits that the appeal is liable to be dismissed with costs.

38. Learned counsel for respondents No.2 to 5 (original non applicant Nos. 3 to 6) submitted written notes of arguments and submits that respondent No.2 to 5 are the protected tenant of the land admeasuring 2 Acres from eastern side out of the land S.No.229 admeasuring 5 Acres 29 Gunthas. The respondent Kedargir Guru Harigir was the owner of the disputed property land bearing Sy.No. 229 admeasuring 5 acres 29 Gunthas as the said land is a private property. Learned counsel further submits that, Ambadas s/o Shivaji Paulbudhe was declared as protected tenant on 13.10.1956 under section 38(E) of the Hyderabad Tenancy and Agricultural lands Act, 1950 to the extent of 2 acres of the disputed land S.No.229. Said Ambadas Paulbuddhe-protected tenant died in the year 1978 leaving behind him respondents no. 2 to 5 his L.Rs. Learned counsel submits that, respondents no. 2 to 5 have produced before the Assistant Charity Commissioner, Jalna the declaration of the competent authority Exh.66, certified copy of the declaration of ownership of land Sy No.229 to the extent of 2 Acres under the relevant provisions of the Tenancy Act dated 13.10.1956 Exh.67, Namuna no.5 Exh.68, Pahani Patrak No.3 for the year 1955-1959 Exh.69, Pahani Patrak 1951 to 1952 and Khasara Patrak 1954-1955. Learned counsel submits that, the Assistant Charity Commissioner, Jalna, the Jt. Charity Commissioner, Aurangabad and the Additional District Judge, Jalna has taken into consideration the aforesaid documents and concluded that, the 2 acres of land out of Sy No.229 is a property declared in the name of protected tenant and the same is accordingly excluded the said property while deciding the proceeding. Learned counsel submits that, the provisions of The Maharashtra Public Trusts Act, 1950 cannot be made applicable to the protected tenants property to the extent of 2 acres out of land Sy No.229. Learned counsel in order to substantiate his contention placed his reliance on a case of Sahabdar Khan and anr. v. Sadloo Khan (Dead) By L.Rs. reported in (2001) 10 Supreme Court Cases page 464.

39. Learned counsel for respondents no.6 to 8 has submitted written notes of arguments and supported the case and cause of respondent no.1 and adopted the submissions made by the learned counsel appearing for respondent no.1. Learned counsel further submits that, the appellant has failed to discharge the burden of proving as to whether it is really a public temple and public religious trust. The appellant has not made any endeavour to prove the same. The appellants have miserably failed to prove that the institution under construction was a trust and it was a public trust. There is no iota of evidence to show that there exists any board of trustees at any point of time by whom trust was managed in all these years. It was first instance and occasion when the

appellants were appointed as administrators by outgoing Mahant would not be a valid justification for disposing with the proof of previous similar appointments. The appellants have taken conflicting and contradictory stands to avoid rigour of section 29 of the Act and its inevitable fallout.

40. Learned counsel submits that, performance of a different festivities, running of a dormitory for wayfarers and providing them with food and shelter, right of entry and worship to all does not mean and establish that a given temple is a public temple and therefore a public trust under the Act. The owner of a private temple also furnishes all these facilities to the visiting devotees only and sense of humanity and appreciation and regard for the worshipers due to their faith in the god. There is no evidence to show that subject land bearing Sy No.229 has even been endowed to the temple, either by the erstwhile preindependence Hyderabad State or by the first ever Mahant. The Temple or the said property had never been recorded under the Endowment Register maintained by the Hyderabad State. Thus, there has never been dedication of the said property for the public religious purpose by any of the person in the name of the temple. It follows by necessary implication that it was treated as private property of its owner and not as an "Endowed Property" of the temple, even in the then Hyderabad State. Thus, said property is private property of Shivgir and Kedargir. Learned counsel submits that, Shivgir died prior to the year 1956. He was survived admittedly by none except Kedargir i.e original respondent no.1. Therefore, half share of Shivgir in the suit property will devolve upon original respondent no.1 Kedargir as per rules and order of succession to the Males in the Bombay State enumerated in Article 72 (11) of Chapter VI of Mulla's Hindu Law. Furthermore, assuming without prejudice to the earlier contention that Shivgir and Kedargir were also disciples or the students of the same preceding Mahant, Shivgir's property on his death in absence of any kindred, shall pass to his preceptor, and if there be no preceptor, to his disciple and if there be no disciple to his fellow-student.

In the case in hand, there is no evidence that, deceased Shivgir was survived by his preceptor or a disciple. On the contrary, facts reveals that he was survived by his fellowstudent Kedargir. Learned counsel submits that, taking either view of the matter, the only legally possible inference would be that, Kedargir succeeds to the private property of deceased Shivgir and thus owns the entire suit land Sy.No.229.

41. Learned counsel submits that, the acquisition of ownership and title of the protected tenant over the subject matter to the extent of 2 acres by fiction of law u/s 38 of the Hyderabad Tenancy Act clearly goes to show that it has been private and individual property of original respondent no.1 Kedargir. Learned Assistant Charity Commissioner, Jalna has also not disputed this fact. Learned counsel further submits that, decree dated 30.11.1981 passed in R.C.S. No.393 of 1981 in a suit instituted by respondent no.1 Kedargir Guru against Jalna Municipal council, for decree of perpetual injunction thereby restraining the

Defendant Municipal Council from causing any disturbance to his peaceful possession over Sy No.229 also proves the fact that, said property has always been his privately owned property and not otherwise.

42. Learned counsel further submits that, respondent no.6 has purchased part of the land Sy. No.229 only to the extent of 3600 sq. ft. on 10.5.1983 i.e prior to filing of the application filed by the applicants before the Assistant Charity Commissioner. Respondent no.6 had verified the title of the respondent pertaining to the suit land Sy No.229 from the long drawn revenue record respecting the same. It was only on his satisfaction based on such verification about clear cut out indisputable and marketable title of respondent no.1 to the same. He entered into an agreement to sell with him and later on entered in to a transaction of sale for monetary consideration. Respondent no.6 also received a no objection certificate for running a Kerosene Agency on the said plot on the basis of the agreement of sale. Thus, respondent no.6 is the bona fide purchaser of the plot in question for value without notice and that too he had purchased the same before the application for registration was moved by the applicants. Respondent no.6 did not ever start any activities or the user of the said plot even until today right from the day one because he is of the firm conviction that he shall put the same to use only after it receives the seal of the Court of law regarding legality and validity of the transaction of the sale he had entered into. Learned counsel also relies on the case relied upon by learned counsel appearing for respondent no.1. Learned counsel submits that the appeal is thus liable to be dismissed.

43. In the given set of facts, the relevant provisions of the Act of 1950, are required to be reproduced as below :

Section 2 (8) "Manager" means any person (other than a trustee) who for the time being either alone or in association with some other person or persons administers the trust property of any public trust and includes:-

(a) in the case of a math, the head of such math.

(b) in the case of a wakf, a mutawalli of such wakf.

(c) in the case of the society registered under the Societies Registration Act, 1860, its governing body, whether or not the property of the society is vested in a trustee.

Section 2 (9) "Math" : means an institution for the promotion of Hindu religion presided over by a person whose duty it is to engage himself in imparting religious instructions or rendering spiritual service to a body of disciples or who exercises or claims to exercise headship over such a body and includes places of religious worship or instruction which are appurtenant to the institution:

Section 2(10) "person having interest" includes-

(a) in the case of a temple, a person who is entitled to attend at or is in the habit

of attending the performance of worship or service in the temple, or who is entitled to partake or is in the habit of partaking in the distribution of gifts thereof,

(b) in the case of a math, a disciple of the math or a person of the religious persuasion to which the math belongs,

(C) in the case of wakf, a person who is entitled to receive any pecuniary or other benefit from the wakf and includes a person who has right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah, maqbara or other religious institution connected with the wakf or to participate in any religious or charitable institution under the wakf,

(d) in case of a society registered under the Societies Registration Act, 1860, any member of such society, and (e) in the case of any other public trust, any trustee or beneficiary;

Section 2 (13) "Public trust" :means an express or constructive trust for either a public, religious or charitable purpose or both and includes a temple, a math, a wakf, church, synagogue, agiary or other place of public religious worship, a dharmada or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860 (XXI of 1860).

2 (17) "Temple" means a place by whatever designation known and 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.

44. Section 18 of the Act of 1950 provides for registration of the public trust and makes it duty of the trustee of public trust to which the Act applies to make an application for registration of the public Trust.

45. Section 19 provides an inquiry to be conducted by the Deputy or Assistant Charity Commissioner :

(i) on an application u/s 18 of the Act,

(ii) on an application made by any person having an interest in public trust,

(iii) suomotto when it comes to the notice of or is brought to the notice of the Deputy or Assistant Charity Commissioner that a public trust exists or that a certain property is the property of a public trust.

46. There is a tendency to claim trust property as a private, particularly, in case of temples. Anyone interested can ascertain whether a public trust is registered or not and, he may move the authorities for registration of the trust which though liable to be registered found not to have been registered.

47. In a case in hand, appellant Shankarlal and others filed an application Exh.1 in a prescribed form with requisite particulars. It is stated in the application that,

the temple in question is known as "Sheriche Mahadev Mandir". The object of the trust shown as religious one and the movable property sought to be registered shown as pooja utensils worth of Rs. 2000/- and the immovable property is the land S.No. 229 admeasuring 5 Acres 23 Gunthas wherein a temple of Lord Shiva, Dharamshala, Barav etc. are situated. It is further stated in the application Exh.1 that the Management of this temple was looked after by Bathri Teli Samaj of Jalna Town and the said temple is a "Shradha Sthan" of the said Bathri Teli Samaj. It is further asserted that, a Mahant used to manage the temple and its property. Mahant was a bachelor and used to nominate his successor from one of his disciples, who is also necessarily a bachelor. The succession of the temple and its property was not by way of regular mode of succession, but the nominated Mahant was to get the rights of the management of the Temple and the property. Different Mahants occupied the Gaddi of the Math and mode of succession to the said Gaddi was from Guru to Chela. Last Mahant was one Shivgir Guru Harigir and the said Shivgir Guru Harigir did not appoint his disciple during his lifetime. The last Mahant Shivgir guru Harigir had executed a will deed during his life time on 30.12.1347 Fasali, wherein he had appointed a panch committee of six persons from Bathri Teli Samaj for administration of the Temple. It has further alleged in the application that the original respondent no.1 Kedargir came in unauthorized possession of the Trust property. The original respondent no.1 Kedargir treated the trust property as his private property and he had also disposed of certain part of the trust property during his life time by treating the said property as his private property. It is further asserted in the application that there are temples of God Mahadev and God Maruti in the land and the temple constitutes a public temple, wherein religious ceremonies are held and, so also annual fair at the time of "Nagpanchami" festival are held.

48. The original respondent no.1 Kedargir had filed his objection at Exh.13 categorically stating there in that, he is the owner in possession of the suit land Sy.No.229 by virtue of succession and that, the said property is private property and not the property of Trust/Temple or Math. All the objection petitioners have asserted that, the land Sy. No.229 the property is private property and it is not a trust property.

49. The question whether the Temple or Trust is a private Trust or the Public Trust had come up for consideration before various courts including the Apex Court from time to time. The learned counsel for the appellant as well as the counsel appearing for the respondents placed their reliance on various cases decided by the High Courts, and the Apex Court from time to time.

50. In order to determine whether a particular trust is Public Trust within the meaning of Section 2 (13) of the Act of 1950, the Supreme Court and the High Courts prescribed the principles and various guiding factors for determination of the said question. Needless to say that, there can be no simple or conclusive factual test to determine the character of a Trust. The totality of the circumstances and their effect must be considered. The same is also required to

be determined in the peculiar facts of the present case, such as, the origin of the temple is not known and it is also not known as to who built the temple. It is stated in the application that, the said Temple was constructed 100 years back and the property was dedicated for the use or benefit of the public.

51. The Apex Court as well as various High Courts highlighted the distinguishing features between the Private Trust and the Public Trust.

52. In order to avoid the unnecessary length of the Judgment those principles or guiding factors can be summarised in the following manner without referring the cases relied upon by the respective counsel. The essentials of the public temples are that:

- (1) the place must be used as a place of public religious worship; and
- (2) it must be dedicated to the Hindu community or any section thereof; and
- (3) the dedication or use of the place must be as a place of public religious worship.

53. Furthermore, the historical origin of the temple, is required to be considered and also the manner in which the affairs of the temple have been managed. A trust is a public trust when it is either for the benefit of public at large or for section or class of public which is uncertain and a fluctuating body of persons. The real test is whether the user by the public is as of right. Furthermore, if the origin of the temple is unknown or lost in antiquity, then there must be a proof to show that it is being used as a public temple. In such a cases, the true character of a particular temple is required to be decided on the basis of various circumstances such as :

- (i) is a temple built in such a imposing manner that it may prima facie appear to be a public temple.
- (ii) Are the members of public entitled to worship in the temple as of right.
- (iii). Are the temple expenses met from the contributions made by the public.
- (iv). Whether the Sevas and Utsavas conducted in the temple are those usually conducted in the temples.
- (V). Have the management as well as the devotees being treating the temple as public temple.

54. A religious endowment be held to be private or public according as the beneficiaries there as under are specific persons or the general public or section thereof. A place in order to be Temple, must be a place for a public religious worship used as such place and must be either dedicated to the community at large, or any section thereof as a place of public religious worship. Dedication may be made orally or can be inferred from the conduct or from given set of facts and circumstances. There need not be a document to evidence dedication to the public. The consciousness of the Manager of the Temple or the devotees as

to the public character of the temple, long use by the public as a right to worship the Temple are the relevant factors drawing a presumption strongly in favour of the view that the temple is a public temple. The true character of the temple is required to be decided by taking into consideration diverse circumstances. The origin of the Temple when lost in antiquity, it is difficult to prove the public worship and it must be inferred from the facts and circumstances of a given case.

55. It is submitted on behalf of the respondents that, appellants/original applicants have not proved their interest in the temple or the math. They are not the persons having interest in the alleged trust and, as such, the Assistant Charity Commissioner, Jalna exceeded the jurisdiction vested in him. It is also submitted that the appellants/original applicants have specifically mentioned in their application in form No.II against item no.IV that documents about the origin or creation of the trust is Will executed by Shivgir Guru dated 30.12.1347 Fasli. It is submitted that, as per the provisions of Section 29 of the Act of 1950 the executor is under obligation to make an application within one month from the date on which the probate of the Will is granted or within six months from the date of testator's death, whichever is earlier. According to the respondents, since no compliance is made under the provisions of section 29 by the applicants, therefore, on this score alone the application is liable to be dismissed.

56. On careful perusal of original proceeding most particularly, original application Exh.1, it appears that, there are sub paragraphs "A" and "B" to paragraph no.4 in the application. So far as sub paragraph no. "A" of paragraph no.4 of the application is concerned, it speaks about the particulars of the documents creating the trust and sub paragraph no."B" of paragraph no.4 is about the particulars of other than documents about creating or origin of the Trust. In response to sub paragraph "A" of paragraph No.4, no information is provided, however, in response to sub paragraph no."B" of paragraph no.4, reference has been given to Will Deed executed by Shivgir Guru Harigir with a reference that said public trust is a Dharmapith having a Gaddi of Mahant and other documents are not available. Furthermore, in a sheet attached to the format, it is specifically contended that, said temple is known as "Sheriche Mahadev Mandir" since last 100 years and the temple and its property is a public Trust. It is also stated in the said additional sheet that, the persons belonging to Bathri Teli Samaj, Jalna are looking after the management of the temple and said temple is their Shradha Sthan. It is further added that, unmarried Mahant's are appointed for managing the Trust and mode of succession is that Mahant during his life time appoint next Mahant from his disciple for looking after said temple. A further reference is given that one Shivgir Guru Harigir was the last Mahant and by executing a Will deed he had appointed the committee of six persons and he had not nominated to next Mahant from his disciple. By any stretch of imagination, I do not find that the appellants/original applicants claim that, said Will Deed is a document creating trust. It is stated in the application that, Public Trust is in existence and that last Mahant had not appointed his successor from his disciples, instead by executing a Will deed appointed a panch committee. The

learned Assistant Charity Commissioner, Jalna has thus rightly held that Will deed in question, therefore, cannot be said to be a document creating a Trust. In my opinion, the learned Jt. Charity Commissioner, Aurangabad as well as the Additional District Judge, Jalna have committed a grave error while treating the said Will Deed as a document creating the Trust.

57. The appellants/original applicant no.1 examined himself before the Assistant Charity Commissioner, Jalna. According to him he visited said temple since his childhood and he is a devotee of Lord Shiva and he used to visit Shiva Temple. He further stated that, there are in all 100 families belongs to Bathri Teli Samaj, Jalna and all persons from this family visit to this temple. Definition of expression "Person Having Interest" in section 2 (10) of the Act of 1950 is wide enough to include not only trustees but also the beneficiaries and other persons interested in the trust. The term must be liberally construed so as to include all the persons who may be directly or indirectly concerned. It is not disputed by the respondent that "Institution" is a "Math" and the temple exists in the premises to which members of public in general are having free and unrestricted access. This makes it clear that the premises is not only deemed to be a religious endowment but also deemed to be a Hindu Public Religious endowment.

58. Religion is a state of life bound by monastic vows; or action or conduct indicating a belief in, reverence for and desire to please a divine ruling power, or the exercise or practise of rights or observances implying this. The term "religion" which has not been defined refers certain characteristics types of data i.e. belief, practise, feelings, moods, attitudes, etc. Religion in general may be said to have three aspects is I] theology, ii] Mysticism and iii] rituals. Temples are closely related to rituals. Definition of temple is comprehensive and essence of the temple is that, it should be as of right for Darshan or worship. The appellant/original applicant no.1 has stated about the long course of worship of said temple and the same is also not disputed by the respondents. In my opinion, the applicants have real, substantial and existing interest in the temple/Math and its properties.

59. Undisputedly, the Math was presided over by Mahant and Mahant exercise spiritual leadership over the disciples and succession to the office of the Mahant was regulated by the usage of the institution. The distinction between a public trust and private trust, broadly speaking, that, in a public trust the beneficiaries of the trust are the people in general or some section of the people, while in the case of private trust the beneficiaries are an ascertained body of persons. The beneficiaries of a Math are the members of the fraternity to which the Math belongs and the persons of the faith to which the spiritual head of the Math belongs, and constitute, therefore, at least a section of the public. Maths, in general, consequently are public Maths.

60. In a present case, there is no evidence as to who actually founded the Math by granting the property to a spiritual preceptor. There is no evidence, whoever the founder be, that any particular family is the only body of persons who is

interested in the Math. When the persons interested in a Math are not in a particular family, the spiritual preceptor of the Math consisting of his disciples, and the disciples in succession cannot be deemed to be such a private family for whose benefit the Math is founded. The body of disciples and the disciples' disciples, is a very unascertainable body. Thus, such a Math is not a private Math. Further when gifts of properties have been made to the Math for the enjoyment of the Chelas, Shishyas and anusishyas, though ostensibly in the name of Mahant, the Mahant holds the properties as a trustee for the indeterminate class of beneficiaries, and this stamps the Math with a public character.

61. Opponent Shri. Kedargir Guru has deposed that, the temple belongs to him and the same is in his possession for last 50 years. He has stated in next breath that, there is 5 acres of land of the temple. According to him, Mahantas are the owners of the property. He has further stated that succession of the temple is Guru to Chela. He has further clarified that Mahant nominated his Chela during his life time by observing certain ceremonies. He has further unequivocally made a statement that, Mahant Shivgir has not nominated a disciple. Said Shivgir asked him to look after the "Gadi". According to him, Mahant Shivgir is 50% owner of the temple and he is owner of the temple to the extent of 50%. He has admitted in his cross examination that, he married before 40 years, having three sons and three daughters and he married when Shivgir was alive. He has further stated in his cross examination that, he is a Chela of Harigir and Shivgir is Chela of Ramgir. He has also admitted in his cross examination that, all above Mahants are Bachelors and Sanyasis and temple is ancient one. He was not able to tell the origin of the temple and as to when it was constructed. It appears from his evidence that he has made a self contradictory statement. In view of his own admissions he could not be nominated as a "Mahant". It is difficult to digest that he was asked by Shivgir to look after the Gadi and that Shivgir was 50% owner of the temple and he is owner to the extent of remaining 50% of the temple. He has deposed in his examination-in-chief itself that there is 5 acres of land of the temple and there is an idol of Mahadev, Maruti and Devi in the temple.

62. Opponent late Shri. Kedargir Guru Harigir has further admitted in his cross examination that, general public visit the temple for Darshan and large Mela used to be held at the time of Nagpanchami (Hindu Festival) and Mela is still performed at the time of "Shivratri". Needless to say that, the gathering of the followers used to be held in the temple of God Shiva at the time of Nagpanchami. Furthermore, festival Shivratri is a festival largely followed in the temples of God Shiva by its followers. He has further admitted that, few persons used to visit the temple daily and food is supplied to the poor persons at the time of Mela. Furthermore, offerings are placed before the deity. In response to the court questions, he has made it clear that, there is free entry in the temple. There is a Barav (big well) and Par (platform) to the temple. Bhandara (public feast) is held in the month of Shravan and at the time of Nagpanchami. He spent the income for temple purposes. It is not disputed that while entering into the temple there

are Samadhis of wrestlers and their names are engraved on the plates fixed on it.

63. In light of the above admissions, it is necessary to look into the spot inspection report placed on record by the learned Assistant Charity Commissioner Exh.108. Spot Inspection of the temple as requested by the parties was held on 30.10.1985 in presence of the parties and their respective counsel. The learned Assistant Charity Commissioner in his spot inspection notes Exh.108 mentioned that, the temple is situated in the heart of the city on the bank of local river and at the entrance of the temple there are Samashis of said wrestlers. He has further observed in his inspection notes Exh.108 that, there is main temple facing towards East and there is a big Arch on which there are small idols of Gods. Main temple is in the construction of walls, which may be about 100 x 100 feet. He has further observed that, there is a Gabhara (internal part of templemath where idols are kept) of the size of 10x10 feet approximately. There is a pind (Body) of God Mahadeva at a lower level and further there is a statue of Nandi (means of conveyance for God Mahadeva) on the front side of said Gabhara. He has further observed that there are big steps around the Gabhara and on the right side of said Gabhara, there are open woveries. Further, there are woveries on the back side of the temple also. In addition to this, on the left back side of the temple, there is a small room of 10x10 feet wherein there are deities of different Gods and Goddesses and same are kept on the platform. Near to this room, there is Gadi of the Mahant where photos of the Mahant and Gods are kept. Said Gadi is constructed by cement having small wall to the height of 2 ? feet approximately as a back side of the platform of Gadi and there is a small temple of God Hanuman in front of the Gabhara. The Learned Assistant Charity Commissioner has further observed in his inspection notes that, there is (i.e. ornamental piece of painted wood as fixed on the spires of temples) on the top of Mahadev Pind which may be in height of approximately 35 feet. Said Kalas is engraved with the statues of gods constructed with Mud and Lime. There are constructed Samadhis to the left side at a height of 45 feet. There are also Samadhis outside main construction. In all there are 14 Samadhis of different Mahants of temple. Construction of Samadhis is with an Arch over it and a small roof. There is one big well (known in the local language as Barav) situated towards right side of the temple having steps to go down.

64. It is a matter of record that, on 1347 Fasli Mahant Shivgir had executed a will deed and translation of the same is marked in the record at Exh.89. I have considered the contents of will deed to some limited extent relevant for the present discussion. Mahant Shivgir stated in the said will deed that he is Mahant of "Shere Mandir" situated at Jalna and he is in possession of its property as detailed in the margin as owner after the demise of his owner Harigir. In the margin, description of the property is mentioned as Sy.No.229 admeasuring 5 Acres 15 Gunthas. Further, by appointing the Committee, Mahant Shivgir directed them to perform ceremony just like him and keeping the building of the temple in repairable condition and further serve food to the Sadhus on occasion of Nagpanchami Festival. However, it further appears that during the life time of

Shivgir, the opponent Kedargir had instituted a suit bearing No.12/4 of 1351 Fasli against Shivgir and said panch committees for cancellation of the said will deed wherein it is averred that the opponent Kedargir and Mahant Shivgir are the real brothers and that will deed came to be executed without any right and against law. It is apprehended that rights of opponent Kedargir Guru will be affected. Mahant Shivgir Guru who is defendant no.1 in the said suit settled the dispute by way of compromise and accepted the pleadings of opponent Kedargir Guru. In the light of the said compromise suit came to be disposed of. Being aggrieved by the same, Panch Committee has challenged the said compromise decree by preferring an appeal before the Additional District Judge, Jalna, wherein the Appellate Court has allowed the appeal by setting aside the Judgment and Decree passed by the Trial Court and, further dismissed the suit with the observations that, the opponent Kedargir Guru cannot be the owner of the property nor he is Chela of Harigir or abilities to be taken as Chela. It has also observed that consent statement of Shivgir Mahant/defendant no.1 proved to be collusive. It has also observed by the Appellate Court in the said appeal that statement of Mahant Shivgir is full of suspicion and tends supportive. It has also observed that the plaintiff i.e. opponent Kedargir herein has not proved that he is the Chela and jointly in possession of the property. It has also observed that in the light of the written statement filed by Mahant Shivgir/defendant no.1 in the suit, said will deed is presumed to be cancelled. Said Judgment of the Appellate Court has attained the finality. It is thus clear from the contents of the will deed that Mahant Shivgir has accepted the property as mentioned in the will deed, belonging to the Temple and that he is looking after the management of the said property as Mahant after demise of the earlier Mahant, who nominated him as a next Mahant.

65. The learned Additional District Judge in the said appeal has observed that, it is an admitted fact that Shivgir Guru (original defendant no.1 in the suit) is the Chela and Guru was Harigir and property is Devals Property (temples property). The learned Additional District Judge, Jalna has also observed that, statement of the defendant no.1/Shivgir Guru proved to be collusive. So far as compromise decree passed in the said suit is concerned, the same was held to be a collusive decree by the District Court in appeal. Thus, the only inference could be drawn that the opponent Kedargir had convinced Shivgir Guru about the compromise and one does not know as to how Mahant Shivgir Guru, who was the Sanyasi, tempted to effect a compromise with opponent Kedargir in the said suit. Admittedly, different Mahantas occupied the Gadi of temple and mode of succession to the Gadi was from Guru to Shishya. Further, last Mahant Shivgir did not appoint his disciple during his life time. Opponent Kedargir claiming to be a real brother of Shivgir started asserting his rights as owner of the temple as well as its properties. Same is eminent from the fact that in the revenue record though entry of the temple, Samadhis etc., are mentioned, names of opponent Kedargir along with Shivgir came to be mutated. Furthermore, opponent Kedargir sold some of the land out of land Survey No.229 and income was appropriated

by him. In the old revenue record, though name of Mahant is shown as Kabjedar in respect of the property land Survey No.229, the said property is not mentioned alone but the temple, Samadhis and well have been shown in the revenue record. The initial Revenue record indicates that, Mahant is the Kabjedar of the landed property on which the temple exists. However, after some years, the name of opponent Kedargir appeared in the revenue record as a Kabjedar to the extent of 50% without any base. It is needless to observe that, said entries are the manipulated entries. Thus, in the given facts and circumstances of the case, I am not inclined to give much importance to the said entries in the revenue record.

66. Thus, in the light of above discussion and the oral and documentary evidence led by the parties, I am convinced that the place where the temple exists is a place or religious worship dedicated to the Hindu Community or section thereof and said dedication and use of the place as a place of public religious worship. Further, said temple is built in such a imposing manner that it appears to be a public temple. Most crucial test is the "Kalas" (i.e. ornamental piece of painted wood as fixed on the spires of temples) which unmistakably points out that the temple is a public temple. Usually, in a private temple, where the entry is restricted, the "Kalas" (i.e. ornamental piece of painted wood as fixed on the spires of temples) of the temple is not built. There is enough evidence to indicate that the members of the public are entitled to worship in the temple as of right. Furthermore, sevas and utsavas are being conducted in the temple and management as well as devotees are treating the temple as a public temple. The Mahantas as well as devotees were knowing about public character of the temple and long use by the public as a right to worship further confirms that it is a public temple. It is true that there is no presumption in law that whatever owned by the Mahant or Manager of the temple must be the property of the Trust. However, there is absolutely no evidence to show that some devotees presented the said landed property to the Mahant. The fact that unmarried Mahantas were being nominated strongly indicates the character of the property. Religious Institution, includes a Samadhi and when it is established or maintained for public purposes together with the temple, it would indisputably come within the purview of the said definition of temple.

67. Furthermore, it also appears that Mahant Shivgir Guru when could not find any suitable person from his disciples for being nominated as Next Mahant, considering the public character of the temple and its properties preferred to appoint a Panch Committee to look after the temple and its properties. The learned Assistant Charity Commissioner has therefore rightly held that the property land Survey No.229 except which is declared in favour of the tenant Ambadas, is a property of the public trust. Even in the tenancy certificate, the temple, samadhis and well have been shown with the remarks that the tenants should not, in any manner, create any disturbance in the management of the temple and its properties. Besides said remark, the authorities under the Hyderabad Tenancy and Agricultural Lands Act, 1950 has ignored the provisions

of Section 102A of the said Act. Only on the basis that a tenancy certificate, as provided under section 38E of the said Act, has been issued, no inference could be drawn that the property land survey No.229 is the personal property of Mahant Shivgir.

68. In my considered opinion, the learned Assistant Charity Commissioner, Jalna, has rightly directed that Sheri Shiva Mandir, Shamprasad Garden, Jalna be registered as a Public Trust and further directed to take legal steps for recovery of the properties which are alienated under unauthorized sale. The learned Assistant Charity Commissioner, Jalna has further rightly advised to make an application for framing of a scheme as provided under section 50A of the Maharashtra Public Trusts Act, 1950. In an inquiry under section 19, it is necessary to find out as to who are the persons in whom the properties are vested and unless that is done, it is not possible to find out who are the trustees, however, it may happen in certain cases that original trust property is vested in particular persons, but, in course of time those trustees do not apply their mind in the management with the result that somebody else takes up the management and manages the Trust. In the case in hand, the learned Assistant Charity Commissioner, Jalna has observed in the similar manner and further directed to issue certificate of "A" Section in the name of opponent Shri. Kedargir Guru Harigir in the capacity of Manager. It further appears that during the pendency of MCP No.13/1991 before the District Court, Jalna, L.Rs. of Kedargir Guru Harigir are brought on record, however, the Additional District Judge, Jalna, by its impugned Judgment and order dated 28.9.1995, had not suggested modification in the order of Assistant Charity Commissioner, Jalna, with regard to issuance of certificate of "A" section in the name of Shri. Kedargir Guru Harigir in the capacity of Manager. In light of the discussion made in the foregoing paragraphs, it would be appropriate to direct the learned Assistant Charity Commissioner to reconsider the issuance of certificate of "A" section by appointing a proper person as a Manager to look after the day to day affairs of the Trust and its properties till framing of the scheme of the Trust, as directed. Hence, following order is passed.

ORDER

I. Appeal is hereby allowed.

II. Common Judgment and Order passed by the Joint Charity Commissioner, Aurangabad dated 31.12.1990 in Appeal Nos.4/1986 and 7/1986 and also the Judgment and Order dated 28.9.1995 passed by the Additional District Judge, Jalna in MCP No.13/1991 are hereby quashed and set aside.

III. The Judgment and order dated 15.1.1986 passed by the Assistant Charity Commissioner, Jalna, Sub-Region Jalna, in inquiry No.23/1983 stands confirmed with the following directions :

(a) The learned Assistant Charity Commissioner, Jalna, Sub Region, Jalna shall appoint proper person as a Manager in respect of the Trust Shri. Sheri Shiva

Mandir, Shamaprasad Garden, Jalna and certificate of "A" Section be issued in the name of Manager so appointed within ONE MONTH after receipt of the Record and Proceedings.

IV. In the circumstances, there shall be no order as to costs.

V. Record and Proceedings be returned back forthwith.

VI. First Appeal is accordingly disposed of.

69. Pending civil applications, if any, also stands disposed of.

V.K. Jadhav, J.

70. At this stage, Mr. Adwant, the learned counsel for respondent No.1 prays that, the effect, execution and implementation of this judgment and order may be stayed for four weeks. The order passed by the Assistant Charity Commissioner, Jalna is dated 15.1.1986. I am not inclined to grant stay to the order since the matter is very old. Hence, request for stay stands rejected.