
(1957) 10 MP CK 0003

In the Madhya Pradesh High Court

Case No : C. Miscellaneous Petition No. 18 of 1955

Tejraj

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 17-10-1957

Acts Referred:

Constitution of India, 1950 — Article 226, 25

Citation : (1957) JLJ 1088

Hon'ble Judges : Nevaskar, J;Dixit, J

Bench : Division Bench

Advocate : N.P. Engineer, D.P. Bhargava, Taraporewallah, P.R. Sharma,
Government Advocate for State, for the Respondent

Judgement

Dixit, J.—These are two petitions under Article 226 of the Constitution of India praying for the issue of an appropriate writ or direction to the opponents for the removal of a Shivling (a representation of Hindu God) kept by them in a temple situated in Ratlam City said to be a Jain temple and known as "Shri Shanti Nath Jain temple" and also as "Agarji's Temple" and for allowing the petitioners and other members of the Jain community free access to the temple for worshipping the deities installed therein according to the principles of Jain religion.

2. At the close of the arguments of the learned counsel for the parties, we reached the conclusion that the action of the opponents in placing an article purporting to be a Shivling on 26th November, 1954, in the temple constituted a clear infraction of the fundamental rights of the petitioners as Jains under Article 25 () of the Constitution to enter and worship in the temple according to the tenets of Jainism and that both these petitions ought to be granted. We accordingly made an order directing the opponents not to restrain the petitioners from entering the temple for worship and to remove forthwith the Shivling which they had placed in the temple on 26th November, 1954, and further directing them to pay costs of the petitions to the petitioners. We stated that we would give our reasons later on. Accordingly, we now give our reasons below.

3. In Civil Miscellaneous Case No. 18 of 1955, the petitioner Chandmal states that he is a Jain, professing the Jain religion and is also the Secretary of the Jain Sangh, Ratlam, that there exists in Ratlam a temple called "Shri Shanti Nath Jain Temple", also known as "Agarji's Temple" which has been for times immemorial a Jain temples containing Jain deities and a place of worship by the members of Jain community, where the members of the community have the exclusive right to practise, profess and propagate their religion according to the tenets of Jainism that the temple is a Jain temple and was recognised as such by the Ratlam Darbar; that the Ratlam Darbar and the State of Madhaya Bharat gave financial aid to the temple which was managed by Panchas belonging to the Jain community; that the Ratlam Darbar only supervised the management of the finances, properties and the estate of the temple; that the expenses of the temple were always borne by the members of the Jain community and that the temple was at no time a Hindu temple and did not at any time contain any Hindu idol or any Shivling. The petitioner further says that sometime in October-November, 1954, some persons started a false rumour that a Shivling which had been installed in the temple was removed by the Jains and started an agitation for the re-installation of the Shivling; that consequent to this agitation the Collector of Ratlam dispossessing the Panchas of the temple took possession of the temple and posted Police Guards at the temple, and thus prevented the petitioner and other members of the Jain community from catering the temple for worship. The petitioner complains that the representatives of the Jain community were never heard before the action suspending the Pancha Committee and taking over the possession of the temple was taken; and that this action of the opponents as well as the placing of the Shivling therein was arbitrary, unlawful and in breach of his fundamental rights under Articles 25 and 26 of the Constitution of India. In support of the facts narrated in the petition, the applicant has relied on numbers documents appended to the petition. The petitioner prays that an appropriate order, writ or direction be issued against the openness commanding them to refrain from violating his fundamental rights under Articles 25 and 26 of the Constitution of India and directing the opponents to allow him and the members of the Jain community to have free access to the temple for worshipping, and directing the non-applicants to remove the Shivling which was placed by them in the Garbh-Griha on 26th November, 1954.

4. The other petition is founded on substantially the same facts. It was, however, presented earlier than Chandmal's application and at the time when the Shivling had not been kept by the opponents in the temple on 26th November, 1954. Therein the petitioner Tejraj complained of a threat to his fundamental rights under Articles 25 and 26 of the Constitution and sought the issue of an order or a direction prohibiting the non-applicants from installing any Shivling in the temple. Tejraj had moved the Madhya Bharat High Court for an interim prohibitory order which was made by that Court on 26th November, 1954, But a Shivling was placed a few hours before the service of that order on the Collector and the Tahsildar of Ratlam on 26th November 1954. Thereupon Tejraj obtained

leave from the Madhya Bharat High Court to amend his petition so as to claim the same reliefs as those in Chandmal's petition.

5. The petitions are opposed by the opponents. In Chandmal's petition, a return has been filed by the Collector of Ratlam on behalf of the State and other opponents. The reply, after stating that the facts narrated therein are on the basis of "official record and exhibits filed by the petitioner", proceeds to say that the temple in question was built about the year 1790 A.D. by one Agarji, a Jati, under the patronage of Ratlam Darbar; that the then Ruler of Ratlam made a grant of certain customs income to the temple under two Sanads of 1790 and 1796 A.D. and also made a grant of Muafi-lands to Agarji for his maintenance; that the succession to the gadi of Jati qua the temple was under the control and supervision of the State of Ratlam; that Jati Ramaji succeeded to the gadi of Agarji, and Ramaji himself had applied to Ratlam Darbar for recognition of his disciple, one Tekchand, as his successor to the gadi of Jati and of one Jasraj to the management of the temple; that though Tekchand himself did not apply for recognition for his own successor, after his death one Jati Pannalal was recognised by the Ratlam Darbar as Tekchand's successor to the gadi that Pannalal's uncle-Guru Chunnilal was turned out under Ratlam Darbar orders and Jati Pannalal was also ordered to leave the temple on his own request and he did so; that when Jati Pannalal left the temple, the line of Agarji ended and no Jati succeeded to the gadi; and that thereafter the right of ownership of the temple and other properties devolved on the State of Ratlam automatically. It is further averred that the managerial function for the day-to-day administration of the temple was conducted by a State nominated panel of Vahiwatdars; that the administration of the temple by the Vahiwatdars was directly controlled by the Ratlam Darbar; that the funds of the temple were deposited by the Vahiwatdars according to the orders of the State in the treasury and in Pedhis; that they were also required to submit a report to the Darbar and explain the accounts of the funds of the temple; that the Vahiwatdars had no right of Puja or administration of the temple; that the Puja and administration could have been taken by the State from them at any time; and that the State had full and over all right and control to manage its property and could dismiss the Vahiwatdars from the temple administration if it chose to do so. The claim of the petitioners that the Jain community had the right of possession, control and management of the temple and that the community found funds for defraying the expanses of the temple is denied by the opponents. As to the existence of a Shivling in the temple it is stated on the basis of affidavits of two Pujaris (annexures Z-2 and Z-3 to the return) that a Shivling in the main temple existed and was worshipped since times immemorial along with Jain deities. It is also stated that the Hindu community have offered worship to the Hindu idols and deities installed and existing in the temple and that besides the Shivling there are many other Hindu deities in the precincts of the temple such as Ganesh, Parvati, Saraswati and Laxmi. In regard to the circumstances in which a Shivling was placed in the temple on 26th November, 1954, it is stated in the return that on getting

information that a Shivling kept in the temple had been stolen, the Collector held a spot-enquiry on 12th October, 1954, and satisfied himself that a Shivling had in fact been removed from the temple that thereafter he (the Collector) attempted to bring about an amicable settlement between the Jains and Sanatanists but he failed; and that, thereafter, "the situation grew very tense and the agitation assumed serious proportions, threatening maintenance of law and order. To avoid further complications in accordance with the directions of the Muafi Officer, Indore, who was the immediate officer in-charge of the affairs of the temple, the temple was taken under the direct charge of the State from the Vahiwatdars, Intimation of the fact was given to the public by a circular issued by the Collector on 23-11-1954". It is admitted that the Shivling was placed by the non-applicant Tehsildar in the temples on 26th November, 1954. The statements seeking to justify the taking over of the possession of the temple and the placing of the Shivling therein are contained in paragraphs 18 and 28 of the return. They are as follows: --

18. On the facts and title so set out by the State, the right, title and Interest and ownership of the temple property vests in the State and the State in the exercise of its right to property and possession has the power to restrict any unauthorised entry or alienation of its property. No member of any community has a right to alienate, or otherwise interfere with any of the properties in the temple. All the deities in the precincts of the temple are State property and any unauthorised removal of any of them was liable to be checked and controlled.

28. It is denied that the petitioner or any other member of the Jain community has any Fundamental Right to offer worship at the temple, management of which is controlled by the Respondents and notwithstanding emergence of situation endangering public order. The temple has a State Grant and is a public temple, affairs of which are controlled by the State and the State. In the exercise of its right of property and possession acted with its authority in restoring the Shivling which had been unlawfully removed. It is emphatically denied that any Jain deity was removed from the temple. The opponent No. 3 only restored it to its original seat from where it had been shifted to the place of Shivling.

The opponents contend that by restoring the Shivling in its original seat the State has neither interfered with the religious belief of any particular community nor has the State shown any preferential treatment to any of the communities; that the action taken by the State was necessary and was intra-vires; that it did not in any way violate any of the fundamental rights of the petitioners; that the petitioners have no right to any relief under Article 226 of the Constitution of India because there is no infringement of any fundamental right under Articles 25 and 26 of the Constitution; that there is no question of the enforcement of any statutory duty of the opponents; and that controversial questions of fact cannot be agitated and canvassed in proceedings under Article 226 of the Constitution. It is also added that the Collector had expressed his willingness and readiness to throw open the temple for worship to the petitioners and members

of the Jain community on the assurance that they did not tamper with any of the deities existing in the temple, but that the petitioners and the Jain Sangh declined to accept such a conditional offer, though the Sanatanists were agreeable to the suggestion. The return filed by the Tehsildar on behalf of the opponents in Tejraj's petition is substantially the same as that filed by the Collector in Chandmal's petition.

6. The petitioners have also filed rejoinders to the returns submitted by the non-applicants denying the statements made by the opponents as regards the history, nature, control, management and ownership of the temple, and contesting the construction put by the opponents on some of the documents exhibited in the case, According to the rejoinders, the temple was built in the fifteenth century by the Jain Sangh; that Agarji was only a Jati looking after the management of the temple for and on behalf of the Jain Sangh; that as he was closely associated with the temple, it came to be known as Agarji's temple; that no Jati ever sought, the sanction of the Ratlam Darbar for his successor; that a Jati nominated his own successor and sometimes informed the Ratlam Darbar of the nomination; that the Jatiship and the temple were and are two distinct matters quite independent of each other; that after the death of Pannalal Jati what devolved on the State was his personal property and not the temple or any property attached to the temple; that the ownership of the temple and its properties vest in the deity; that the rights of Jain worshippers to perform Puja and to worship in the temple are not affected by the death of a Jati or by a change in the management of the affairs of the temple; that the State never became the owner of the temple or its properties or of any of the deities installed therein, and that the temple has always been a Jain public temple open to all Jains and not to communities other than Jains, The rejoinder further says that some of the idols taken to be images of Hindu gods by the opponents are really Jain deities; that there was never any Shivling in the temple; and that no member of the Hindu community ever worshipped in the temple in the manner alleged by the non-applicants, It is said that the action of the opponents in lodging a new Shivling, which was admittedly not the same as one which was alleged to have been stolen, was high-handed, arbitrary, and one infringing the fundamental right of the Jain community to practise and worship in the temple without Interference from outside. The petitioners also add that a Shivling was originally to have been installed on 27th November 1954, but on learning that Tejraj had filed a writ-petition in the Madhya Bharat High Court praying for an order of injunction restraining the Collector from "installing" any Shivling in the temple, the Collector with a view to avoid the; prohibitory order and to forestall the order of the Madhya Bharat High Court advanced the date of the installation and placed the Shivling on the afternoon of 26th November, 1954, before the prohibitory order of the Madhya Bharat High Court could be served upon him and the Tehsildar.

7. Shri Engineer, learned counsel appearing for the petitioners, first referred us to the circumstances in which the opponents placed a Shivling in the temple on

26th November, 1954, that is to say on the very day on which the Madhya Bharat High Court made an interim prohibitory order against them. It was pointed out that on 25th November, 1954, the Collector had made an appeal to the public asking them to maintain peace and order and telling them; that if during the next three or four days the stolen Shivling was not recovered, a new Shivling would be installed at the very place where the stolen Shivling was in the temple on an auspicious day; that on 26th November, 1954, the Sanatan Dharm Sabha of Ratlam Issued pamphlets giving the programmes of the installation of a new Shivling on 27th November, 1954, at 9-5 A.M. that on this date the petitioner sent a telegram to the Collector requesting him to stay the installation of the Shivling pending the decision of the petitions filed in the Madhya Bharat High Court; that in reply to this telegram, the Tehsildar Informed the petitioner that the telegram had been placed before the Collector for necessary action and orders; that on 26th November 1954, at the instance of the Sanatan Dharm Sabha, Ratlam, the Tehsildar opponent made a submission to the Collector; that the noon of 26th November, 1954, was more auspicious for the Installation of the Shivling than the date and time originally announced; and that the Collector approved this suggestion and accordingly a Shivling was placed by the Tehsildar in the temple on 26th November, 1954, at 1 p.m. It was said that these circumstances plainly indicated that the opponents having come to know that the petitioners had moved the Madhya Bharat High Court for an interim prohibitory order and that such an order had been passed deliberately hastened and advanced the placing of the Shivling in the temple In order to avoid and forestall the prohibitory order made by the Madhya Bharat High Court and that this action of the opponents in itself constituted a cause of action for a direction for the removal of the Shivling even without a determination of the right claimed by the petitioners. In support of this argument, learned counsel for the petitioners relied on *Denial vs. Ferguson* (1891) 2 Ch. 27 and *Von Joel vs. Hornsey* (1895) 2 Ch. 774. Shri Engineer proceeded to argue that in the returns filed by the opponents it was not disputed that the temple was a public temple wherein several Jain deities had been installed that it was a place of worship for the petitioners and other members of the Jain community according to the principles of Jainism; and that the opponents had made no attempt to support the legality of their action in placing the Shivling except by saying that the action was taken in exercise of a right incidental to the right of ownership of the State to the temple, its properties and the deities installed therein. Referring to *Eshugbayi Eleko vs. Officer Administering the Government of Nigeria* (A.I.R. 1931 PC 248), it was said that the executive could only act in pursuance of the powers given to it by law and no member of the executive could Interfere with the petitioner's right to freedom of religion except on the condition that could support the legality of his action before a Court of justice. Learned counsel took us through the various documents exhibited in the cases pointing out that their genuineness and authenticity was not in dispute between the parties and contended that they were plain enough to show that the temple in question was founded by the Jains under the patronage of the Ratlam Darbar; that it was a Jain public temple and

though it received financial aid from the Ratlam State and the Madhya Bharat Government and though the management of the temple finances and the property was supervised and controlled by the State, the actual management and possession of the temple was vested in the Panchas belonging to the Jain community nominated by the State; that the State had at no time interfered in matters of religion, religious practice or mode of worship; that the documents filed in the case further showed that the temple was never a Hindu temple containing a Shivling or other images of Hindu gods; that at no time the Hindu community entered the temple as a Hindu temple and performed Puja and worship according to Hindu religious rites or conducted any festival such as Shivratri in the temple; that no Shivling ever existed in the temple; and that even assuming that there was a Shivling in the temple which, as alleged by the opponents, was stolen, that could not give any right to the opponents to introduce a new Shivling. It was said that the right freely to profess, practise and propagate religion is guaranteed under Article 25 (1) of the Constitution; that, that Article protects not only religious beliefs but also religious practice or performance of acts in pursuance of religious belief; that the presence of a Shivling in a Jain temple is repugnant to the religious principles of the Jain worship of their own deities and to the sentiments of the Jain community to worship in the temple; and that, therefore, the action of the opponents in placing a Shivling in the temple was in violation of the fundamental right guaranteed to the petitioners under Article 25 (1) of the Constitution, It could not be justified even as one done by the opponents in assertion of the right of the State as the owner of the temple; that, in fact, the State was not the owner of the temple or of any of the deities installed therein and that even if the State was the owner, the petitioners and the members of the Jain community, who were in long continued possession of the temple, could not be dispossessed of it by executive action and without recourse to law, Reliance was placed on the decisions of the Supreme Court in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, ; *Ratilal Panachand Gandhi Vs. The State of Bombay and Others*, ; *Ramachandra Deb and Others Vs. State of Orissa*, ; and *G. Kistareddy vs. Commr of City Police, Hyderabad*, (A.I.R 1952 Hyd 36), While not disputing the general proposition that it would not be proper for the High Court to go into and determine complicated and complex disputed questions of fact in proceedings under Article 226 of the Constitution, learned counsel for the petitioners maintained, on the authority of *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, , *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, , and *Mahabirprasad vs. B.S. Gupta, Sales-tax Officer Indore, and others* (1957 J.L.J. 374); that having regard to the fact that the petitioners were seeking to enforce their fundamental rights and that Rule 14 (Chapter 36) of the Rules framed by this Court with regard to proceedings under Article 226 of the Constitution permitted evidence to be taken in the proceedings with regard to questions of fact arising for determination, and having regard also to the fact that the material facts in the case were clearly deducible from the unchallenged documents filed by the

petitioners and from the documents filed by the opponents themselves, the petitioners could not be asked to avail themselves of the remedy of a suit on the general ground that in proceedings under Article 226 of the Constitution questions of fact could not be determined.

8. The arguments put forward by Mr. Sharma, learned Government Advocate, on behalf of the opponents, were, as I understand them: these this was not a case in which a writ of Certiorari or Mandamus or Prohibition could be issued and that a public authority acting contrary to law was in no better position than a private person and the remedy of the party aggrieved by an illegal action of a public authority was by way of a suit. It was conceded that Article 226 of the Constitution did not preclude the High Court from going into questions of fact. But it was said that in the instant case the questions of fact involved were complex and complicated and it would not be proper for the High Court to determine them especially when persons of the Hindu community likely to be affected were not parties to the petitions and when there was a possibility of the opponent State being in possession of other documents and material to rebut the facts on which the petitioners found their right. It was submitted that the complicated questions of fact were: whether a Shivling existed in the temple from times Immemorial; whether the State was the owner of the temple and whether the Hindu community also used the temple as a place of worship of their gods. Learned Government Advocate maintained that the petitioners fundamental right under Article 25 (1) of the Constitution to profess, practise and propagate religion could be no more than that which was subsisting in them before the commencement of the Constitution and as at that time a Shivling existed in the temple, the petitioners could not claim that by the placing of Shivling by the opponents on 26th November, 1954, their fundamental right under Article 25 (1) of the Constitution had been infringed; and that, the temple being a public Hindu temple also, the Hindu community had also a fundamental right to worship therein. Learned Government Advocate admitted that the action of the opponent Tehsildar in placing a Shivling in the temple could not be supported under any statute, rule or law, but claimed that the State as the owner of the temple and of the deities and images installed therein was entitled to place a new Shivling in the temple when the one already existing was found to be removed. Learned Government Advocate also advanced a somewhat startling contention that any order that this Court might make for the removal of the Shivling would be futile and would not be "capable of performance".

9. It will be convenient to dispose of first the contention of the learned counsel for the petitioners based on *Daniel vs. Ferguson* (1891) 2 Ch. 27 and *Von Joel vs. Hornsey* (1895) 2 Ch. 774, and the objection of the learned Government Advocate that in these proceedings under Article 226 of the Constitution we should not embark on an investigation into disputed facts and material. The decision in *Daniel vs. Ferguson* (1891) 2 Ch. 27 and *Von Joel vs. Hornsey* (1893) 2 Ch. 774, are no doubt authorities for the proposition that in an action to restrain a defendant from building so as to obstruct the plaintiff's ancient rights,

the defendant, who evades service of the suit or notice of motion for interim injunction, and who anticipating the order of the Court, hurries up on his building can be ordered to pull down what he has erected, without regard to the ultimate result of the action, after the plaintiff has warned that he would bang an action or apply for an interim injunction. On the documents referred to by the learned counsel for the petitioners and which are marked as Exhibits 6, 7, 8, 9, 104, 105, 106 and 107. In the paper book of Chandmal's petition and the report sent by the opponent-Tehsildar in Tejraj's petition when the interim prohibitory order made by the Madhya Bharat High Court was served on him, the conclusion is irresistible that the opponent Tehsildar placed the Shivling in the temple on 26th November, 1954, anticipating the prohibitory order of the Madhya Bharat High Court. Learned Government Advocate addressed us no arguments to say that such a conclusion was not permissible. Be that as it may, the question now to be considered is not whether the interim order made by the Madhya Bharat High Court on 26th November, 1954, should be enforced by directing the opponents to remove the Shivling and thus restoring the status-quo as it existed at the time of the filing of Tejraj's petition. It is whether a final order calling upon the opponents to remove the Shivling ought to be made. This, as pointed out by the Supreme Court in the *The State of Orissa Vs. Madan Gopal Rungta*, can only be made after deciding upon the rights of the parties. That was a case in which the Government of Orissa had made an order cancelling certain temporary permits and directing one Madan Gopal Rungta to remove his assets appertaining to a mine. Madan Gopal Rungta then filed a petition in the High Court at Orissa under Article 226 of the Constitution for a writ of Mandamus. The High Court declined to investigate and pronounce on the rights of the parties and expressly kept the determination thereof in abeyance. In the suit intended to be filed by Madan Gopal Rungta but held that at the moment the petitioner before them had no alternative legal remedy equally convenient, beneficial and effectual, and passed an order that till three months from the date of the order or one week after the institution of the contemplated suit, whichever was earlier, the Orissa Government should refrain from disturbing Rungta's possession over the mining area. The State of Orissa then appealed to the Supreme Court from the decision of the High Court. The Supreme Court, while setting aside the judgment of the Orissa High Court, observed--

In our opinion, Article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court has purported to do. The directions have been given here only to circumvent the provisions of S. 80 Civil P.C. and in our opinion that is not within the scopes of Art. 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal

rights which entitled them to a writ of Mandamus or any other directions of a like nature and pending such determination it might have made a suitable interim order for maintaining the status-quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit issue directions in the nature of temporary injunctions, under Article 226 of the Constitution.

The petitioners cannot, therefore, claim that the placing of the Shivling by the opponents in anticipation of the interim order of the Madhya Bharat High Court is in itself a cause of action entitling them to the final relief of an order for the removal of the Shivling without a determination of the rights of the parties, which should be investigated more properly in a civil suit that may be filed by the opponents.

10. In regard to the question whether in an application under Article 226 of the Constitution the High Court can embark on the investigation into disputed facts and materials no hard and fast rule can be laid down. The matter is one in the discretion of the Court, The High Court is not precluded under Article 226 of the Constitution from determining questions of fact. There is so limit to the power of the High Court under Article 226 no issue directions, writs or order in the exercise of its jurisdiction under Article 226 except such limits as the Court may in its discretion impose on itself. Now the object of Article 226 of the Constitution is the enforcement of fundamental rights and other rights and not the establishment of a legal right. The purpose of directions, orders or writs under Article 226 of the Constitution is to enforce a right which has already been established and is not to establish a right that being so, the right sought to be enforced under Article 226 must be clear and undisputable. If the right which is intended to be enforced is in substantial dispute or is one which admits of reasonable doubt or controversy and depends on facts which are disputed and which have to be established, then it would not be proper for the High Court to enter into an investigation of facts which have to be established before any writ, direction or order can be issued under Article 226, In a case in which facts have to be established, It would be proper for the High Court to refer the supplicant to a suit. This is the principle underlying the observations of the Supreme Court in *Sohanlal Vs. The Union of India (UOI)*, . In that case the Punjab High Court had made an order under Article 226 of the Constitution directing the Union of India and one Sohanlal to forthwith restore possession of a house situated in Delhi to one Jagannath who was a displaced person and a refugee from Pakistan. Against this order of the High Court Sohanlal appealed to the Supreme Court. The Supreme Court took the view that before the property in dispute could be restored to Jagannath, it would be necessary to declare that he had title in that property and was entitled to recover possession of it, and observed:--

We do not propose to enquire into the merits of the rival claims of title to the property in dispute set up by the appellant (Sohanlal) and Jagannath. If we were

to do so, we would be entering into a field of investigation which is more appropriate for a Civil Court in a properly constituted suit to do rather than for a Court exercising the prerogative of issuing writs. These are questions of fact and law which are in dispute requiring determination before the respective claims of the parties to this appeal can be decided.....In the circumstances to be mentioned hereafter, it is 3 matter for serious consideration whether in proceedings under Article 226 of the Constitution such a declaration ought to be made and restoration of the property to Jagannath be ordered.

The Supreme Court then, after indicating the question involved in the case, said that all those questions should be decided. In a properly constituted suit in a Civil Court rather than in proceedings under Article 226 of the Constitution. It is thus clear that the power under Article 226 ought not to be exercised if the right which the petitioner is seeking to enforce depends on facts which are complex and disputed and which have to be established. The dispute as to the facts persuading the High Court to decline to exercise its jurisdiction under Article 226 of the Constitution must, however, be real and substantial. It must be with regard to perception of facts as distinguished from their evaluation. The rule that the High Court should not in an application under Article 226 embark on an investigation into the disputed facts and materials for determining whether the petitioner has the right which he is seeking to enforce, cannot apply where the doubt or dispute is as to the construction of a document or a judicial order or as to the effect and meaning of a record. Again, the mere statement of the opponent in a petition under Article 226 challenging the correctness of the facts averred by the supplicant and saying that he is in possession of documents and materials to contradict the statements made by the petitioner is not sufficient for holding that the case is of the type in which facts have to be established. If such a statement is accepted as sufficient to decline to exercise power under Article 226 then the opponent in a petition under Article 226 and not the Court would be the arbiter of the question whether the case is of a type where questions of facts have to be established. The opponent is under an obligation to produce sufficient material to satisfy the Court that there does exist a real and serious dispute as to the facts on which the petitioner concerned bases his rights sought to be enforced. As will be shown presently, in this case there is no such dispute as to the material facts. When the right sought to be enforced is clear and (indisputable and is a fundamental right, the petitioner cannot be directed to avail himself of the remedy of a suit (see *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, ; and *Mahabir Prasad vs. B.S. Gupta, Sale Tax Officer, Indore* 1957, JLI 374).

11. On the arguments addressed by the learned counsel for the parties, the main points that emerge for consideration in these petitions are--whether the temple at Ratlam is a public Jain temple, whether the petitioner and numbers of the Jain community have a legal right to enter and worship in the temple according to the tenets and forms of Jainism, and whether the action of the opponents in dispossessing the petitioners from the temple and preventing them from entering

the temple and in placing a Shiv-ling in the sanctum sanctorum on 26th November, 1954, constituted an infringement of the petitioners' fundamental rights under Articles 25 (1) and 26. The controversy touches negatively the question whether the temple was dedicated to the worship of Shiva or other Hindu Gods and whether the customary ceremonies of Hindu worship are there carried on. But it does not involve any consideration of the rights, the Hindu community may claim in the temple to enter and worship therein, whether it be a public Jain or Hindu temple, or to instal a Shivling in the temple or to the property of the temple. Nor does it involve the question whether a Shivling did or did not exist in the temple. It is important to note that what is being challenged as violative of the fundamental rights of the petitioners is not any act of the Hindu community but the action of the opponents in dispossessing the petitioners from the temple, in preventing them from entering in for worship and in placing a Shivling therein. The petitioners have not sought any relief against any member, of the Hindu community or against the Hindu community generally, and indeed they could not. From according to the decision of the Supreme Court in P.D. Shamdasani Vs. Central Bank of India Ltd., a person whose fundamental right is. infringed by a private individual must seek his remedy under, the ordinary law and not under Article 32 or Article 226 of the Constitution. The Madhya Bharat High Court, therefore, rightly rejected on 11-5-1956 the application made by two persons Mohandas and Durgashankar for being impleaded in the petitions as representing the Hindu community of Ratlam. At the close of the arguments, Mr. V.M. Rege, learned counsel appearing for the said Mohandas and Durgashankar presented an application praying that in this order we should not make any observation likely to affect the rights of the Hindu community in the temple. We are quite aware of this caution and it has been our endeavour to avoid saying anything likely to prejudice the rights of the Hindu community in the temple. But if we have felt it necessary to say anything in the order having any bearing on the rights of the Hindu community in the temple, then, that or anything else we have said in this order cannot clearly operate to the prejudice of persons who are not parties to these proceedings.

12. If the temple is not a public Jain temple, then the applicants have not the fundamental right claimed by them and said to have been infringed by the action of the opponents. Therefore, the first question to consider is whether the temple is a public Jain temple. It is common ground that the temple has been in existence for at least 167 years and was but it by a Jain. It is immaterial whether it was built by one single Jain Individual or by the Jain community as a whole. It is also common ground that it is a public temple. It is also not disputed that Jain deities are installed in the temple and members of the Jain community enter and worship in the temple according to the religious principle and forms of Jainism. The fact that the temple is a public Jain temple is not contested in the returns and was also not challenged before us. What is said is that the temple is not exclusively a public Jain temple but that it is also a public Hindu temple. This position is on the material produced before us and also inherently, untenable.

13. The documents filed with the petitions and the returns, which are official documents and are not disputed give no support to the contention that the temple was at some time dedicated for the benefit of the Hindu public as a public temple. On the other hand, they go a considerable way to suggest to the contrary. It would be wearisome, and it is not necessary to go through all the documents. But I may briefly refer to some which are important because they conclusively show that the Ratlam Darbar and the Madhya Bharat State regarded the temple as a public Jain temple. The temple received two grants in 1790 and 1796 (Ess. 76 and 77 In Chandmal's petition) for the collection of certain customs income for the benefit of the temple, A portion of this income and some Muafi-lands were also given to Agarji, a Jain Jati associated with the temple for his maintenance. After Agarji's death the persons, who were associated with the temple and who managed it and who received the income which Agarji used to receive for his maintenance, were all Jain Jatis as is evident from Exs. 80, 81 and 82, When no Jati remained after Pannalal's death, the management of the temple, its properties and funds were entrusted to Panchas belonging to the Jain community and nominated by the Ratlam State. The temple continued to receive financial aid from the State, not in the form of customs duty collections but in the shape of a lumpsum from a Government department of the State. The grant given to the temple was shown in the budget of that department. The temple funds and properties were managed and the accounts thereof were kept in accordance with the directions and instructions issued from time to time by the Ratlam State authorities. But the Ratlam Darbar at no time interfered in religious matters of the temple or with the rights of the Jain community to worship in the temple according to their religious principles. The temple is described as Jain temple in a letter (Ex. 2) addressed on 23rd October, 1893, by the Sayardar of Ratlam to the Panchas for making proper arrangements for the collection of customs duties and also in two Robkars of Ratlam Darbar issued under the signatures of the Diwans, one (Ex. 3) of 3rd March 1894, giving directions to the Panchas about the management of the temple and the other (Ex. C. to the return in Chandmal's petition), issued on 13th September, 1906, expressing apprehension about misappropriation of customs income collected for the temple. It is so described also in two official papers of Madhya Bharat Government, namely, a letter (Ex. 93) addressed by the Manager of Court of Wards, Ratlam on 8th August, 1951, to a Pancha, and a memo (Ex- A) to the rejoinder of Chandmal to the return, issued by the Assistant Secretary, Revenue Department conveying the sanction of the Raj Pramukh of the State of Madhya Bharat to the disbursement of the amount of temple Nemnook for the years 1949 to 1953. Sari Engineer referred us to a proclamation of H.H. Maharaja Lokendra Singh of Ratlam published in the Ratlam State Gazette on 24th October, 1947. Throwing open to the Harijaas all State temples and giving a list of the State temples thrown open. It was stated that the temple in question was not included in the list and this indicated that the temple was neither a State temple nor a public Hindu temple. It is sufficient to say that the language of the proclamation and of the notification issued on 24 October, 1947, is not so precise as to enable

us to hold that the list of State temples thrown open to the Harijans was exhaustive of all State public Hindu temples in Ratlam. The proclamation and the notification referred to by the learned counsel for the petitioner cannot, therefore, be taken as decisive of the fact that the temple in question was recognised as a public Jain temple. These documents nowhere speak of the temple as a Hindu temple or refer to any Mahant or to any Hindu Panch or Panchas in the management of the temple. If, as the opponents say, the temple was a State public Hindu temple from times immemorial, then the opponent State would have been in possession of documents and records showing that it was dedicated to or for the benefit of the Hindu community; that a Shivling was consecrated and installed in a certain year; that besides the Shivling, the temple contained the normal and essential features of a Shiva temple, namely, Dhawaja-stambh, Baleepeeth, and Nandi; that festivals associated with Shiva were regularly conducted; that grants were made by the State for the up keep and Puja of the Shivling and that on some occasions representations were made by the Hindu community concerning temple matters. But no such documents have been produced. It is legitimate to think that none exists. Learned Government Advocate said that old records concerning the temple were with the Government at Bhopal and he was not in a position to say whether any such documents exist. This statement of the learned Government Advocate not being a positive statement that such documents do exist, cannot carry the matter any further. The opponent's return narrates the history of the temple and the various relevant documents in great detail and with much research. If, therefore, in the State records there had been documents indicating that the temple was a public Hindu temple also, it is unthinkable the opponents would have omitted to make a reference to them in their returns. The opponents have relied on (i) affidavits (Exs. Z-2 and Z-3 to the return in Chandmal's case) of two persons said to be Pujaris of the temple, (2) a letter (Ex. 101) addressed by some Jains to the Collector of Ratlam on 24th November, 1954, suggesting the name of the person who had removed a Shivling from the temple, and (3) the statement about the existence of a Shivling given by one Chandmal, again, as a prosecution witness in the criminal case pending before the Additional District Magistrate of Ratlam, about the alleged theft of the Shivling, to show that the temple was a Hindu public temple also. Very little value can be attached to this material. The affidavits are of Pujaris who are Brahmins. In some Jain temples there are Pujaris who are Brahmins. Even in some public Hindu temples in the State of Madras Pujaris are Shudras (see Pujari Lakshmana Goundan vs. Subramania Ayyar AIR 1924 PC 44 at page 47). The two Brahmin Pujaris, Chainlal Upadhyaya and Raghunandan cannot be said to be free from this. They swear in indential language that along with the Jain deities in the temple there was also a Shivling; that they and some other Hindus used to worship the Shivling; that besides the Shivling there is in the precincts of the temple a fixed and permanent (sic) ment "Choumukhi Mahadeo" with serpent and Jaladhari; and that there is also a Nandi in front of this Mahadeo; and further that there are also images of Ganesh and Parvati. Raghunandan and Chainlal, on their own admission, did not work in the

temple as Pujaris for a long period. They did not say as to when the Shivling which they worshipped had been installed in the temple and as to how and in what manner they conducted the worship of Shiva and celebrated the festivals associated with Shiva. The two Pujaris gave no indication as to whether they were appointed as Pujaris of the Jain deities or of Shivling in the temple and as to who supplied them the funds for defraying the expenses of the Shiva-Puja. Chainlal and Raghunandan have only displayed their ignorance of Jain deities and Hindu gods when they refer to the Images of certain Jain Yakshas and Yakshinis (photographs of which have been exhibited) as images of Hindu gods, the cement Choumukhi image located outside the temple in Bavan Deorii not an, image of Shiva or Mahadeo but is an Image of Bhrukuti Yaksha in the "tirtha" of the twenty-first Tirthankar of the Jains known as Naminathji, whose carrier is the bull. Likewise the image resembling Ganpati with a cobra hood spread on it is not the image of Hindu god Ganesh but it is the image of Parshwa Yaksha in the Tirth of the twenty third Jain Tirthankar, known as "Parshwanath". A reference to any illustrated book on Jainism and Jain Tirthankars will show that the images of Jain Yakshas and Yakshinis bear great resemblance to the images of Hindu gods and what the two Pujaris and also the opponent Tehsildar thought to be images of Ganesh and Shiva are really images of Jain Yakshas, The statement of Chandmal, who has given evidence on behalf of the prosecution in the criminal case, has only to be read to be rejected. Though he stated in his examination-in-chief that there was a Shivling in the temple, he admitted in his cross-examination that what he had stated to be a Shivling was really an image of a Jain deity; that the temple is a Jain temple and that in the temple there were images of Jain deities only and of no other religion, Learned Government Advocate laid great stress on Ex. 101 of Chandmal's petition saying that therein the petitioners admitted that there was a Shivling in the temple and this admission proved the fact that the temple was a public Hindu temple also. I am unable to take this view of Ex. 101. That exhibit no doubt contains the statement that one Laxmi Narayan Ojha, who was formerly an employee in the Police Department, and some other persons had a hand in the removal of the Shivling. But the exhibit, as it is before us, does not contain the names of the signatories and does not indicate whether the petitioners were amongst them. No attempt was made by the opponents to produce the original letter received by the Collector to show that the petitioners had addressed that letter. It cannot, therefore, be regarded as an admission of the applicants that there was a Shivling in the temple and that it was a public Hindu temple. Even if it is regarded as an admission on the part of some Jains that there was a Shivling in a niche in the sanctum sanctorum of the temple, that fact by itself cannot be regarded as a proof of the fact that the temple was consecrated and dedicated for the benefit of the Hindu public as a public Shiva temple. In a case such as the present one, dedication of the temple to or for the benefit of the Hindu community cannot be inferred by the mere presence of a bare Shivling in a niche in the sanctum sanctorum or from the fact that Hindus used to visit the temple for worship. The existence of a Shivling and the user of a temple by the Hindu public, when considered in the historical setting of the

temple as a Jain temple as revealed by the document referred to above, ceases to be of any value as evidence of dedication of the temple for the benefit of the Hindu public as a public temple. It would be pertinent to refer to the observations made by the Privy Council in *Babu Bhagwan Din vs. Gir Har Saroop* (A.I.R. 1940 PC 1) in regard to public user as evidence of dedication. While dealing with the case where the question was whether a certain Hindu temple was a private temple or a public temple, their Lordships of the Privy Council said:--

It is not enough in their Lordship's opinion, to deprive the family of their private property to show that Hindus willing to worship have never been turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual mela. Worshippers are naturally welcome at a temple because of the offerings they bring and the reputation they give to the idol they do not have to be turned away on pain of forfeiture of the temple property as having become property belonging to a public trust. Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting in such a case as the present; and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshipper should be turned away; and as worship generally implies offerings of some kind, it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity. Thus, in 61 I.A. 405 (*Mundacheri Koman vs. Achuthan Nair*) the Board expressed itself as being "slow to act on the mere fact of the public having been freely admitted to a temple. The value of public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right."

Applying these observations here, it becomes clear that in the instant case where the fact of the temple being a public Jain temple is admitted and supported by the documents alluded to above and when there is no record whatsoever of this very old temple having been dedicated and consecrated for the benefit of the Hindu public, the mere presence of a Shivling in the temple and the use of the temple by the Hindu community cannot be regarded as significant and supporting the claim of the opponents that the temple was also a Hindu temple.

14. Regard being had to the principles of Hinduism and Jainism, the claim of the opponents that the temple at Ratlam is both a public Jain temple as well as a public Hindu temple and specially a Shiva temple, seems to be indeed a strange one. Jainism does not regard God as Creator. God in the sense of an ultracosmic personal Creator has no place in the philosophy. The Jain idea of Godhood is the perfected soul (*Siddha*) or the liberated soul (*Mukta*), The Jains worship these liberated souls (*Tirthankers* or saints) who have raised themselves by austerities to a superiority over the gods by destroying all *Karmas* and attaining salvation.

The Jains reject the scriptural character of the Vedas and repudiate some of the Brahminical doctrines. Jainism has a very definite and uncompromising attitude towards the conception of God. Whereas Jainism raises man to Godhood and inspires him to raise himself so near to Godhood as possible by steady faith, right perception, perfect knowledge and a spotless light, believers in the theory of God as the Creator of the Universe makes God a man bringing Him down to the level of need and imperfection. It is well-known that amongst the Hindus Shiva is regarded as the Creator of the Universe who through his Shakti and by using "Maya" has brought the world into being. It will thus be seen that a Jain temple being at the same time a Hindu temple is something which is fundamentally opposed to the religious principles of both Hinduism and Jainism. There are no doubt Jain temples where the two sects of Jains, Shwetambaris and Digambaris, worship in turn, But no Instance of a temple which is simultaneously a Jain and a Hindu temple or a Jain temple during certain hours and a Hindu temple at other time has been brought to our notice. The material produced before us unmistakably shows that the temple in question is a public Jain temple and not a public Jain cum Hindu temple. From what has been stated above, it will be seen that this conclusion is not (sic) on any facts which can be said to in serious dispute requiring investigation in a suit. The conclusion follows as an inference from the admission of the opponents that the temple is a public Jain temple and the official documents referred to above which have not been disputed.

15. If, as I think, the temple is exclusively a public Jain temple dedicated to and for the benefit of the Jain community, then the petitioners and other members of the Jain community have clearly a right to enter and worship in the temple according to the principles and forms of their religion. This right is a fundamental and guaranteed right under Article 25 (1) of the Constitution which provides:--

Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

The Supreme Court has explained the scope and ambit of the fundamental right embodied in Article 25 of the Constitution in the Commissioner, The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., and Ratilal Panachand Gandhi Vs. The State of Bombay and Others, . In the latter case, the principles enunciated in be Commissioner, The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., were reiterated and it was observed thus--

Article 25 of the Constitution guarantees to every person and not merely to the citizens of India the freedom of conscience and the right freely to profess, practise and propagate religion. This is subject, in every case, to public order, health and morality. Further exceptions are engrafted upon this right by clause (2) of the Article. Sub-cl. (a) of (2) saves the power of the State to make laws

regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and sub-cl, (b) reserve the State's power to make laws providing for social reform and social welfare even though they might interfere with religious practices.

Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgement or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people.

The Supreme Court also considered in these cases the right conferred under Article 26 (b) subject to public order, morality and health on every religious denomination or any section thereof to manage its own affairs in matters of religion, and made the following observations--

The language of the two cls. (b) and (d) of Art. 26 would at once bring out the difference between the two in regard to affairs in matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand, as regards administration of property which a religious denomination is entitled to own and acquire, it has undoubtedly the right to administer such property but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted; but here again it should be remembered that under Article 26 (d), it is religious denomination itself which has been given the right to administer its property in accordance with any law which the State may validly impose. A law, which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Art. 26(d) of the Constitution.

What is a matter of religion is discussed in *The Commissioner, The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, at pages 290 and 291 and in *Ratilal Panachand Gandhi Vs. The State of Bombay and Others*, at page 392. The Supreme Court pointed out that a religion may not only lay down a code of ethical rules for its followers to accept; it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress; that religious practices are matters of religion within the meaning of Article 26 (b), and that what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. In *Ratilal Panachand Gandhi*

Vs. The State of Bombay and Others, , the learned Judges of the Supreme Court expressed themselves thus in paragraph 13 of the judgment.

Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate.

16. Now, as I have attempted to point out earlier that the presence of a Shivling and the worship of it by the Hindu community it is repugnant to the principles of Jainism and of Jain worship of Tirthankars and to the sentiments of Jains who worship in the temple, then, on the principles laid down by the Supreme Court in the two cases referred to above, there can be no doubt that the opponents had no right to introduce a Shivling in the temple and prohibit the petitioners and other members of the Jain community from entering the temple and from worshipping except on the condition of Hindus being allowed to worship the Shivling. The action of the opponents in prohibiting the petitioners from entering the temple, and in placing a Shivling in the temple amounted to a violation of their fundamental rights under Articles 25 (1) and 26 (b) of the Constitution. It cannot be defended, and indeed was not defended, before us on the ground of its having been taken on considerations of public order, morality and health to which the right of freedom of religion is made subject.

17. Learned Government Advocate admitted that he could not support the action of the opponents under any rule, law or any order made under any law or statute. He, however, sought to justify the action of the opponents by contending first that Articles 25 (1) and 26 (b) only guaranteed the right to profess, propagate and practise any religion as it existed on 26th January, 1950, and as on that day there was a Shivling in the temple and the Hindu community were allowed to worship it, therefore, the petitioners could not claim that they had a fundamental right to worship in the temple after excluding the Shivling and the Hindu community from the temple. I am not impressed by this argument which runs counter to the concept of freedom of religion explained in The Commissioner, Hindu Religious Endowments. The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., and Ratilal Panachand Gandhi Vs. The State of Bombay and Others, . The fundamental right guaranteed under Article 25 (1) is the right to profess, practise and propagate religion, no matter whether the religion and the religious practices or performances of acts in pursuance of its doctrines came into existence before or after the coming into force of the Constitution. Religious practices or

performances of acts in pursuance of religious beliefs which are guaranteed under Article 25 (1) and Article 26 (b) subject to the limitations of public order, morality and health and the limitations, stated in Article 25 (2), are religious practices and performances according to the doctrines of that religion. Therefore, so long as the installation of a Shivling in public Jain temple and the worship of it by Hindus therein is repugnant to the doctrine of Jainism, the introduction of a Shivling in the temple would be in conflict with the fundamental right guaranteed under the Articles referred to above, even if at any time contrary to the doctrine a Shivling was introduced in the temple somehow or other, and worshipped by Hindus. As Shri Engineer, learned counsel; for, the petitioners rightly pointed out that the consequence of the learned Government Advocate's argument, if accepted, would be that persons who profess, practise and propagate a religion founded after 26th January, 1950, would have no fundamental rights under Articles 25 and 26. The construction put forward by the learned Government Advocate on these articles is thus totally opposed to the object of those provisions and the very concept of the fundamental right of freedom of religion conferred by the Constitution, and cannot, therefore, be accepted.

18. It will be seen that the question whether a Shivling existed in the temple and was removed therefrom is not at all material in the Case. Even if it did exist that could not afford any justification for the opponents' action when it clearly (Constituted an infringement of the petitioners fundamental rights under Article-25 (1) and Article 26 (b) of the Constitution. If an act constitutes an infringement of a fundamental right guaranteed under the Constitution, then clearly it cannot be justified by saying that a similar act was done in the past.

19. It was also submitted by the learned Government Advocate that as the State was the owner of the temple and of the deities therein, it had a right to place a Shivling when the one kept therein was found to be missing. The contention is devoid of any substance. The documents produced before us do not lend support to the claim of ownership set up by the State. They only show that after the death of Pannalal Jati, the State succeeded to the personal property of Pannalal and not to the temple or its properties. This is clear from the judgment of the Court of Sar-Nyayadhish of Ratlam State and of the Ratlam High Court on the application of one Nanakchand for the grant of succession certificate to the effects of Pannalal Jati (Exs. B. & C.) to the rejoinder filed by Chandmal. The payment of a grant in aid or a Nemnook to the temple by the State is also incompatible with the claim of ownership. It is, however, not necessary to consider whether the State is the owner of the temple. It is not the contention of the opponents that the temple was a private temple of the Ruler of Ratlam State and that thereafter it became a private temple of the Madhya Bharat Government. Being a public temple, and therefore *res extra commercium*, its character as a public Jain temple cannot be taken away by any assertion on the part of the State of a right of ownership; and by that assertion a public temple cannot be made a museum for an exhibition of deities and idols of all religions. The temple being a public Jain temple, only images or deities of Jain religion can

be kept therein even if the State is the owner of the temple.

20. Learned Government Advocate also urged that this was a case in which there was a conflict between the fundamental rights of the Jains and of the Hindus to enter and worship in the temple. The argument involves an assumption that the temple is a public Hindu temple also which, as has been shown earlier, is baseless.

21. I am unable to appreciate the contention that any writ or direction issued by this Court for the removal of the Shivling and for allowing the petitioners to enter the temple for worship would be futile and not capable of performance. It is incomprehensible to me as to how a direction which this Court may issue would be futile when the temple is in existence, when the Shivling is there and when the petitioners are still prevented from entering the temple for worship. A writ or a direction issued by this court would be effective in the case and has to be enforced. Any suggestion that for certain reasons it may be difficult and even impossible for the opponents to carry out the orders of this Court can only be viewed with dismay and cannot but impel us to say that it would be the end of the rule of law when the State and its authorities find themselves in a position where they cannot enforce the orders of this court and secure obedience to them.

22. For all these reasons, I am of the opinion that the action of the Collector of Ratlam and the Tehsildar of Ratlam in placing a Shivling in the sanctum sanctorum of the temple and in preventing the petitioners and other members of the Jain community from entering the temple for worship except on certain conditions is indefensible, without any sanction and in utter violation of the fundamental rights under Articles 25(1) and 26 (b) of the petitioners as members of the Jain community. It is somewhat surprising that the Collector and the Tehsildar easily persuaded themselves in believing that they had the power to do what they did. The Executive will do well, to remember the observations of Lord Atkin in *Eshugbayi Eleko vs. Officer Administering Govt. of Nigeria* (A.I.R. 1931 PC 248) which have been quoted with approval by Das C.J. in *Bidi Supply Co. Vs. The Union of India (UOI) and Others*, . The observations are that "the executive can only act in pursuance of the powers given to it by law and it cannot interfere with the legality, property and rights of the subject except on the condition that it can support the legality of its action before the Court." The petitioners have said that the Collector and the Tehsildar did not act bona fide and surrendered themselves to "elements bent upon committing breaches of law and peace." We are not, however, concerned with the motives of either side. It may be that the Collector and the Tehsildar acted with the best of motives feeling sympathy for the efforts of a section of the Hindu community of Ratlam to rise to a high form of worship of Shiva for gaining strength, inspiration, consolation and proper guidance. It may be that the Collector and the Tehsildar were satisfied about the existence of a Shivling in the temple and about the justness of the claim of the Hindus to worship in the temple. But the action taken by them to keep a Shivling for worship in the temple was wholly unjustified by law. Whether

a Shivling did or did not exist in the temple, or whether the claim of the Hindus was just and well founded or whether it was an unreasonable and unfounded pretension, the right course for the Collector was to direct the Hindu community to have their claim to the temple and their rights to worship a Shivling in the temple established in a Court of law. If the Collector found that on account of the alleged theft of a Shivling from the temple the situation in the city was tense threatening a breach of peace, he should have made an order under the appropriate law for the maintenance of law and order. If he had done that, instead of placing the Shivling in the temple with the aid and advice of the Tehsildar with reprehensible haste, anticipating the interim prohibitory order of the Madhya Bharat High Court and invading the fundamental rights of the petitioners, he would not have placed himself in a situation where he has neither the sympathy of the right-minded men nor the protection of the Court.

23. In my judgment, the petitioners are entitled to the relief they seek. There is no question here of the Issue of a writ of certiorari or a writ of prohibition or a writ of mandamus to enforce a statutory duty. But it is too late in the day to suggest that the power of the High Court under Article 226 is confined to the issue of writs mentioned therein and is not wide enough to give redress to the petitioners against the wholly illegal action of the opponents infringing their fundamental rights as Jains under Articles 25 (1) and 26 (b) of the Constitution, I would, therefore, grant these two petitions and direct the opponents not to prevent the petitioners who are members of the Jain community from entering and worshipping in the temple and to remove forthwith the Shivling which they placed in the temple on 26th November, 1954. The opponents shall pay costs of these petitions to the petitioners. Counsel's fee is fixed at Rs. 200.

Nevaskar, J.

24. I agree.