SMT. MARUA DEI @ MAKU DEI AND ORS. A

v.

MURALIDHAR NANDA AND ORS.

NOVEMBER 30, 1998

[K. VENKATASWAMI AND A.P. MISRA, JJ.] B

Orissa Hindu Religious Endowments Act, 1951

Ss. 3 (XIII), 3 (XV), 41 and 44—"Religious institution"—"Temple"—Tests to find out whether a particular temple is a private or a public one— C *Institution originated as Samadhis—Later, idols of Hindu Mythology installed and a pucca structure raised thereon—Deities regularly worshipped—Hindu public had free access to temple—Common religious festivals celebrated and public participated therein—Held, broadly speaking, features of constructions, idols and festivals celebrated indicate that the institution falls within the* D *definition of temple—High Court was right in taking adverse inference on vital aspects such as donations raised for construction of temple and other structures by holding that the institution was a public temple.*

S.44(2)—Scope of—Appeal before High Court—High Court re-appreciating the evidence and reversing the findings of Additional Assistant E *Commissioner and the Commissioner—Held, s.44 did not fetter jurisdiction of High Court from going into facts and appreciating evidence—Conclusions reached by High Court not perverse but supported by evidence and need no interference while exercising jurisdiction under Article 136 of the Constitution—Constitution of India—Article 136.*

F

Evidence—Ought to have been made available by applicant—Not adduced—Effect of.

An application under s.41 of the Orissa Hindu Religious Endowments Act, 1951 in respect of an institution was filed by appellant no.2 (applicant no.2) and another person (applicant no. 1, before the Additional Assistant G **Commissioner of Endowments for declaration that the institution was neither a public temple nor a 'math' as defined in the Act and; that it was private spiritual institution for the worship by applicants' family members only. It was claimed that applicants' ancestors were saints and exercised spiritual headship over a body of disciples. The land belonged to them and they were** H

A given Samadhi within the premises. Later, idols of gods and goddess of Hindu mythology, including those of Balabhadra, Jagannatha and Shubhadra were installed on the Smadhis. The applicants also were said to have commanded spiritual headship over a large number of disciples who offered 'Pranami' to them. The said money was used in building the pucca structure and installing idols for worship by their family members. The public was generally
B allowed to worship but not as of right.

The respondents contested the application contending that the institution was a public religious institution; though the institution originated as samadhis, it developed into a temple where Hindu deities were regularly
C worshipped; the Hindu public had free access to the temple as of right, common religious festivals like Rath Jatra, Dola Jatra; Jhoola Jatra etc. were celebrated in the institution and Hindu public participated in those functions. It was also stated that the main temple with its subsidiary temples were built with the subscriptions raised from the public.

D The Additional Assistant Commissioner as also the Commissioner held in favour of the applicants, but the High Court on re-appreciation of pleadings and the evidence held that the institution fell within the definition of temple. Aggrieved the applicants filed the present appeals.

E It was contended for the appellants that the institution which originated as private family Samadhis on the land belonging to their ancestors continued to remain Samadhis and the character never changed; there was no document to establish any endowment for any purpose nor the object of the founders was to promote Hinduism; the 'pranami' was given to the persons and not to idols; there was no proof of public construction, and access to the temple
F by the public was not as a matter of right.

Dismissing the appeal, this Court

HELD : 1.1. The High Court was right in holding that the institution
G in question is a public temple within the meaning of the Orissa Hindu Religious Endowments Act, 1951. The High Court has elaborately dealt with the matter and had given reasons for not accepting the findings of the authorities below. Broadly speaking, the features of constructions, idols and the festivals held, as noticed by the authorities and the High Court, are sufficient to hold that the institution in question falls within the definition
H of temple under the Act. [196-G-H; 197-A]

Goswami Shri Mahalaxmi Vahuji **v.** *Ranmchhoddas Kalidas and Ors.,* **[1970] 2 SCR 275;** *Pujari Lakshmana Goundan and Anr.* **v.** *Subramania Ayyar & Ors.,* **AIR (1924) PC 44;** *Pratapsinhji N. Desai* **v.** *Deputy Charity Commissioner, Gujarat and Ors.,* **[1987] 3 SCR 909 and** *T.D. Gopalan* **v.** *The Commissioner of Hindu Religious and Charitable Endownments, Madras,* **[1973] 1 SCR 584, relied on.** A B

Poohari Fakir Sadavarthy of Bondilipuram **v.** *The Commissioner, Hindu Religious and Charitable Endowments,* **[1962] Supp. 2 SCR 276;** *Bihar State Board of Religious Trust* **v.** *Palat Lall and Anr.,* **[1971] 2 SCR 650;** *Bihar State Board Religious Trust, Patna* **v.** *Mahant Sri Biseshwar Das,* **[1971] 3 SCR 680;** *C. Ratnavelu Mudaliar* **v.** *Commissioner for Hindu Religious and Charitable Endowments,* **AIR (1954) Madras 398;** *Madras Hindu Religious Endowments Board* **v.** *V.N. Deivanai Ammal by Power of Attorney agent, T.V. Mahalinga Aiyar,* **AIR (1954) Madras 482 and** *Babu Bhagwan Din and Ors.* **v.** *Gir Har Saroop and Ors.,* **AIR (1940) PC 7, referred to.** C D

1.2. The best evidence that could have been made available through applicant no. 1 both documentary and oral, was not forthcoming on a lame excuse. PW-7, applicant no.2, in his deposition has also said that it was the applicant no.1 who was in the know of vital things. This leads one to take an adverse inference and the High Court was right in taking such adverse inference on vital aspects such as donations raised for the construction of the temple and other structures by holding out that the institution was a public temple. [196-F-G] E

2. The High Court was considering an appeal under Section 44 of the Act and that Section did not, in any way, fetter the jurisdiction of the High Court from going into the facts and appreciating the evidence. The conclusions reached by the High Court on re-appreciation the evidence are not perverse but supported by evidence, and interference with the same while exercising jurisdiction under Article 136 of the Constitution could not be justified. [196-B-C] F

Svenska Handolsbankon **v.** *M/s Indian Charge Chrome and Ors.,* **[1994] 1 SCC 502 and** *Kondamuri Anasuyamma* **v.** *Distt. Judge, W.G.Dist. at Eluru and Ors.,* **AIR (1991) AP 47, cited.** G

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1990 of 1986.

H

A From the Judgment and Order dated 28.11.79 of the Orissa High Court in M.A. No. 16 of 1977.

R.F. Nariman, P.K. Routray, P.K. Chakravarty and P.N. Mishra for the Appellants.

B B.A. Mohanty, Ms. Mamta Tirpathi, A.K. Gupta and Farrukh Rashid for the Respondents.

The Judgment of the Court was delivered by

K. VENKATASWAMI, J. This appeal by special leave arises out of C proceedings taken by Harekrushana Das and Ram Chandra Das, predecessors-in-interest of the appellants herein, under Section 41 of the Orissa Hindu Religious endowments Act, 1951 (hereinafter called the "Act") for a declaration that the institution in question is neither a public temple nor a math as defined in the Act and that it is a private spiritual institution for the worship by the D applicants' family members only. The application under Section 41 was seriously contested by the respondents contending that the institution in question was a public religious worship place. The Additional Assistant Commissioner of Endowments, Orissa, Bhubaneswar, on the basis of the pleadings, oral and documentary evidence, by his order dated 27.5.71 held that the institution in question is neither a public temple nor a math as defined E in the Act but it is a private institution of the petitioners. Aggrieved by the order of the Additional Assistant Commissioner, the respondents preferred an appeal to the Commissioner of Endowments, Orissa, Bhubaneswar, in F.A. No. 20/71. The appellate Authority by its order dated 21st December, 1976 held that though the institution has developed all the external features of a Hindu F temple, the deities therein are worshipped by the public alongwith the Samadhis and though the members of the public have free access to the institutions, the institution has been in possession control and management of the petitioners and was not used as of right by the Hindu community as a place of public religious worship. Consequently, the Appellate Authority dismissed the appeal.

G

Still aggrieved, the respondents preferred a further appeal to the High Court of Orissa at Cuttack under Section 44 of the Act in M.A. No. 16/77. The High Court in its detailed judgment dated 28.11.1979 after elaborate discussions held that the institution satisfied all the essential features of a public temple; that the members of the public visit the place without restriction and are in H the habit of offering worship as of right that the petitioners themselves held

out and represented to the public that the institution is a public temple and that, therefore, the institution clearly falls within the definition of "temple" as given in the Act.

Aggrieved by the said judgment of the High Court, the present appeal by special leave has been filed by the appellants.

Brief facts leading to the filing of application under Section 41 of the Act are as under :-

The gist of averment in the Application under Section 41 is given below.

According to the original applicants before the Additional Assistant Commissioner, their ancestor, by name Hadibandhu Das, was a great saint and he exercised spiritual headship over a body of disciples. After his death, he was given Samadhi within his own premises which was known as 'Samadhi Gosain'. One Sadhubara Das, the son of Hadibandhu Das, was also given Samadhi in the same premises. Thereafter, Raghubara Das son of Sadhubara Das, installed two idols of Balabhadra and Jaganatha respectively on the Samadhis of Hadibandhu Das and Sadhubara Das. After his death he was also given Samadhi in the same premises by his successors Harekrushana Das and Ram Chandra Das, applicant nos. 1 and 2 before the Additional Assistant Commissioner. These two applicants installed an idol of Subhadra on the Samadhi of Raghubara Das. The first applicant, it was claimed commanded spiritual headship over a large number of disciples who offered Pranami to him. Likewise applicant no. 2 was also respected and received Pranami from the disciples. The applicants are said to have utilised the money received from the disciples in building the pucca structures over the Samadhis. They also installed a number of idols of Hindu mythology in these structures for worship by their family members. The public have no right to come and worship as of right through they were generally allowed to worship without hindrance. In the year 1948-49, the Inspector of Endowments called upon the first applicant to render accounts treating the institution as a public religious institution. On account of that, the applicants moved the Additional Assistant Commissioner under Section 41 of the Act for a declaration as mentioned at the outset.

As against the above case of the original Applicants, the respondents contended before the Additional Assistant Commissioner that the institution is a public religious institution. It has developed into a temple where Hindu deities are regularly worshipped. The Hindu public have free access to the temple as of right by offering "bhog". According to the respondents, the main temple with its subsidiary temples have been built with the subscription

A raised from the public. The common religious festivals like Rath Jatra, Dola Jatra, Joola Jatra etc. were celebrated in the institution and the Hindu public participated in those functions. Inside the premises, the Hindu scriptures like Gita, Bhagvat were recited before a large number of devotees. Therefore, the case of the respondents was that the institution, which originated from Samadhis, ceased to be so and has developed all the characteristics of a B Hindu temple as defined in the Act.

Before the Additional Assistant Commissioner, number of documents were filed on both sides and oral evidence also was let in by both sides. On the basis of the oral and documentary evidence and the pleadings, as noticed earlier, the Additional Assistant Commissioner and the Commissioner accepted C the case of the applicants, predecessors-in-interest of the appellants.

Before the High Court, the respective parties reiterated their respective stand as noticed above. The High Court on a re-appreciation of the pleadings and evidence came to a different conclusion by accepting the case of the D respondents. Aggrieved by that the present appeal has been filed.

Before going into the correctness or otherwise of the judgment under appeal, it is necessary to set out certain provisions of the Act.

"Religious institution" is defined in Section 3(xiii) as follows :-

E "religious institution" means a math, a temple and endowment attached thereto or a specific endowment and includes an institution under direct management of the State Government."

"Temple" is defined in Section 3(xv) as follows :-

F "temple" means a place by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community, or (any class or section thereof,) as a place of public religious worship and also includes any cultural institution or mandap or library connected with such a place of public religious worship."

G Sections 41 and 44 read as follows :-

"41. Assistant Commissioner to decide certain disputes and matters - (1) In case of a dispute the Assistant Commissioner shall have power to enquire into and decide the following disputes and matters:-

H (a) whether an Institution is a public or religious institution;

(b) whether an institution is a temple or a math; A

(c) whether a trustee holds or held office as a hereditary trustee;

(d) whether any property or money is of a religious endowment or specific endowment;

B

(e) whether any person is entitled, by custom or otherwise, to any honour, emolument or perquisite in any religious institution and what the established usage of a religious institution is in regard to any other matter;

(f) whether any institution or endowment is wholly or partly of a religious or secular character, and whether any property or money has been given wholly or partly for religious or secular use and; C

(g) where property or money has been given for the support of an institution or the performance of a charity, which is partly of religious and partly of a secular character or when any property or money given is appropriated partly to religious and partly to secular uses, as to what portion thereof shall be allocated to religious uses : D

Provided that the burden of proof in all disputes or matters covered by Clauses (a) and (d) shall lie on the person claiming the institution to be private or the property or money to be other than that of a religious endowment or specific endowment, as the case may be." E

44. (1) Any person aggrieved by an order passed under Section 41, or Sub-section (1) or (6) of Section 42, or Section 43 may, within thirty days from the date of receipt of the order under Section 41 or Section 43 nor from the date of publication of the order under Section 42, as the case may be, prefer an appeal to [the Commissioner]. F

(2) any party aggrieved by the order of [the commissioner] passed under Sub-section (1), may, within thirty days from the date of the order, prefer an appeal to the High Court."

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The High Court, after carefully analysing the oral and documentary evidence, ultimately summarised its findings as follows:

"23. Although direct evidence of dedication is not forthcoming, yet the evidence adduced in the case is sufficient to hold that the dedication was for the benefit of the public and that the Hindu public H

A have been using the temple premises as a place of religious worship and offering bhog as of right. The cumulative effect of the following facts and circumstances proved in the case clearly establish that the dedication was for the benefit of the public and that the temple premises are being used as of right by the public as a place of religious worship :-

B

(1) The existence of idols, some of which have been permanently installed and images of Minor deities in the temple.

(2) The institution has external features of a public temple.

C (3) Hindu religious festivals are celebrated in the temple and the members of the public participate in the same.

(4) The members of the public visit the place without restriction and are in the habit of offering worship as of right.

D (5) The land on which the temple stands has not been dedicated to any private individual or a family but to the 'Samadhi Gossain' through an ancestor of the petitioners as the marfatdar and the land is held rent free.

(6) That the temple was constructed with the aid of public subscriptions.

E

(7) That Pujaris have been engaged to carry on sevapuja of the deities and to offer bhog daily.

(8) Existence of a shop in the temple premises for sale of bhog articles to the visitors.

F

(9) The devotees visiting the temples are given food and shelter in the temple.

(10) The temple is located by the side of a public road at a place quite separate from the residential house of the petitioners.

G

(11) Existence of a tank known as 'Chakratirtha' excavated on a land recorded as Sarbasadharan.

(12) Existence of a Dharmasala in the temple premises for accommodation of the visitors.

H (13) Absence of evidence that any member of public was denied

access to the temple at any time. A

(14) The petitioners have themselves held out and represented to the public that the institution is a public temple.

24. In coming to the conclusion about the private nature of the institution, the learned Commissioner of Endowments seems to have been B influenced by the facts that the petitioners have ceased to hold the festivals for the last 8 to 10 years and that they also closed the main gate of the temple for about 3 years without any opposition by the public. He, however, overlooked the fact that the petitioners stopped celebration of the festivals and closed the main gate only after an attempt was made by the Endowment Department to assume jurisdiction over the institution. The petitioners C themselves admitted in their application under Section 41 that in the year 1948-49 an Inspector of Endowments called upon them to render accounts. It also appears that subsequently there was a proposal for appointment of trustees by the Endowment Department and the members of the public filed several complaints before the Commissioner regarding mismanagement of the D institution and in reply to those complaints the petitioners filed counters in Exts. H and J. The institution cannot be held to be a private one merely because the petitioners who are marfatdars stopped the festivals and closed the main gate for some years, if it otherwise satisfies the definition of a temple as given in the Act.

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25. On a consideration of the facts and circumstances, as discussed above I am satisfied that all the essential features of a public temple are found in the institution and it, therefore, clearly falls within the definition of temple as given in the Act."

Mr. R.F. Nariman, learned Senior counsel, challenged the above F conclusions reached by the High Court contending that the institution, which originated as Samadhis, continued as "Samadhis"; that the character never changed; that the object of the founders was not to promote Hinduism; that there was no document to establish any endowment for any purpose; that the alleged temple was not an ancient one but constructed only recently in the G year 1948-49; that the institution was only a private family Samadhi and the appellants and their ancestors were living in the same premises; that there was no daily rituals as usually carried on in public temples; that the Pranami was given to the person and not to the idol; that no donation was collected from the public for constructing structures; that there was no proof of public construction; that the public could not worship as a matter of right; that the H

A land measuring about 8 acres belonged to the ancestors of the appellants and that the management was always in the hands of the family. According to the learned Senior Counsel, in view of the above features, the findings and conclusions reached by the High Court cannot be sustained. In support of his arguments, he also pointed out relevant oral and documentary evidence and also cited a number of decisions which will be referred to at the appropriate place.

On the other hand, Mr. B.A. Mohanty, learned Senior Counsel appearing for the contesting respondents, invited our attention to the pleadings before the Additional Assistant Commissioner and also to the oral and documentary evidence and then submitted that the High Court was absolutely right in summarising the findings in paragraphs 23-25 after elaborate discussion on facts. He also cited a number of Judgments in support of his contention. According to the learned Senior Counsel for the contesting respondents, the Additional Assistant Commissioner and the Commissioner went wrong in deciding against the respondents by wrongly throwing the burden of proof on them. He mainly relied on the evidence of PW-7, one of the applicants before the Additional. Assistant Commissioner, to support the findings reached by the High Court.

We have considered the rival submissions.

It would be advantageous to bear in mind the principles/tests laid down by this Court and other High Courts in the matter of finding out whether an institution is a private temple or a public temple. The decisions brought to our notice at the bar may now be noted. As early as in 1924, the Privy Council in *Pujari Lakshmana Goundan & Anr.* v. *Subramania Ayyar & Ors.*, AIR (1924) PC 44 took the view that even in a case where at the initial stage the temple is a private one by reason of the founder holding it out by representing to the Hindu public that the temple was a public temple at which all Hindus might worship, then the inference will be that he had dedicated the temple to the public. This judgment of the Privy Council was noted and cited with approval by this Court in *Pratapsinhji N. Desai* v. *Deputy Charity Commissioner, Gujarat & Ors.*, [1987] 3 SCR 909. This Court observed as follows:-

> "We do not think that it would serve any purpose to refer to all the well-known decisions except a few. In *Pujari Lakshmana Goundan* v. *Subramania Ayyar* (supra), the temple was not an ancient one and there was no deed of endowment. The question was whether the

temple was a public temple or a private temple, Although the temple was a private temple, the evidence disclosed that the Pujari Lakshmana Goundan, the founder of the temple had held out and represented to the Hindu public in general that the temple was a public temple at which all Hindus might worship. Sir John Edge, in delivering the judgment of the Privy Council held that on that evidence the Judicial Committee had no hesitation in drawing the inference that the founder had dedicated the temple to the public, as it was found that he had held out the temple as a public temple. Another Privy Council decision to which we need to refer is that of *Babu Bhagwan Din* v. *Gir Har Swaroop,* LR (1939) 67 IA 1 where the grant was made to one Daryao Gir and his heirs in perpetuity and the evidence showed that the temple and the properties attached thereto had throughout been treated by the members of the family as their private property appropriating to themselves the rents and profits thereof. Sir George Rankin, delivering the judgment of the Privy Council held that the fact that the grant was made to an individual and his heirs in perpetuity was not reconcilable with the view that the grantor was in effect making a wakf for a Hindu religious purpose. That very distinguished Judge referred to the earlier decisions in Pujari Lakshamana Goundan's case, and observed;

> "Their lordships do not consider that the case before them is in general outline the same as the case of the Madras temple, 29 C.W.N. 112, in which it was held that the founder who had enlarged the house in which the idol had been installed by him, constructed, circular roads for processions, built a rest house in the village for worshippers, and so forth, had held out and represented to the Hindu public that it was a public temple."

The true test as laid down by this Court speaking through *Venkatarama Ayyar, J* in *Deoki Nandan* v. *Murlidhar,* [1956] SCR 756 in determining whether a temple is a private or a public temple, depends on whether the public at large or a section thereof 'had an unrestricted right of worship' and observed:

> "When once it is understood that the true beneficiaries of religious endowments are not the idols but the worshippers, and that the purpose of the endowment is the maintenance of that worship for the benefit of worshippers, the question whether an endowment is private or public presents no difficulty. The cardinal

A point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any 'specified portion thereof."

The learned Judge distinguished the decision of the Privy Council in *Babu Bhagwan Din* v. *Gir Har Saroop,* (supra) on the ground that B properties in that case were granted not in favour of an idol or temple but in favour of the founder who was maintaining the temple and to his heirs in perpetuity, and said:

"But, in the present case, the endowment was in favour of the idol itself, and the point for decision is whether it was private C or public endowment. And in such circumstances, proof of user by the public without interference would be cogent evidence that the dedication was in favour of the public."

It was also observed while distinguishing the Privy Council decision in Babu Bhagwan Din's case that it was unusual for rulers to make D grant to a family idol. In Deoki Nandan's case the Court referred to several factors as an indicia of the temple being a public one viz the fact that the idol is installed not within the precincts of residential quarters but in a separate building constructed for that purpose on a vacant site, the installation of the idols within the temple precincts, E the performance of pooja by an archaka appointed from time to time for the purpose, the construction of the temple by public contribution, user of the temple by the public without interference, etc."

In *Babu Bhagwan Din & Ors.* v. *Gir Har Saroop & Ors.,* AIR (1940) PC 7, while distinguishing the case of Pujari Lakshmana Goundan's case, the F Court observed as follows: -

"In these circumstances, it is not enough in their Lordshpis '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 G among persons resorting to the annual mela. Worshippers are naturally welcome at a temple because of the offerings they bring and the repute 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 H 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 worshippers 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, the Board expressed itself as being shown 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. Their Lordships do not consider that the case before them is in general outline the same as the case of the Madras temple 29 C W N 112, in which it was held that the founder who had enlarged the house in which the idol had been installed by him, constructed circular roads for processions, built a rest house in the village for worshippers, and so forth, had held out and represented to the Hindu public that it was a public temple."

In *The Poohari Fakir Sadavarthy of Bondilipuram* v. *The Commissioner, Hindu Religious and. Charitable Endowments,* [1962] Supp. 2 SCR 276, Raghubar Dayal, J., speaking for a three-Judge Bench, laid down the following tests to find out whether a particular temple is a private or a public one:-

"That an institution would be a public temple within the Hindu Religious Endowments Act, 1926, if two conditions are satisfied; firstly, that it was a place of public religious worship and secondly, that it was dedicated to, or was for the benefit of, or was used as of right by the Hindu Community, or any section thereof, as a place of religious worship.

When there be good evidence about the temple being a private one, the mere fact that a number of people worship at the temple, is not sufficient to come to the conclusion that the temple must be a public temple to which those people go as a matter of right as it is not usual for the owner of the temple to disallow visitors to the temple even if it be a private one."

In *Bihar State Board of Religious Trust* v. *Palat Lall & Anr.,* [1971] 2 SCR 650, this Court, inter alia, observed that the fact that the worshippers

A from the public were admitted to the temple was not a decisive fact, because worshippers would not be turned away as they brought in offerings, and the popularity of the idol among the public was not indicative of the fact that the dedication of the properties was for public.

This Court in *Bihar State Board Religious Trust, Patna* v. *Mahant Sri* B *Biseshwar Das,* [1971] 3 SCR 680, held that the evidence that Sadhus and other persons visiting the temple were given food and shelter was not by itself indicative of the temple being a public temple or its properties being subject to a public trust; that the mere fact of the public having been freely admitted to the temple cannot mean that courts should readily infer therefrom C dedication to the public; that the value of such public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right; that the fact that idols were installed permanently on a pedestal and the temple was constructed on grounds separate from the residential quarters of the mahant could not lead to inference of dedication to the public.

D

In *T.D. Gopalan* v. *The Commissioner of Hindu Religious and Chairtable Endowments, Madras,* [1973] 1 SCR 584, this Court while considering a similar question, observed as follows :

> "Moreover, if the origin of the temple had been proved to be private E then according to the law laid down by the Privy Council itself in Babu Bhagwan Din's case dedication to the public was not to be readily inferred. Such an inference, if made, from the fact of user by the public was hazardous since it should not, in general, be consonent with Hindu sentiment or practice that worshippers should be turned away; and, as worship generally implied offerings of some kind, it was F not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity. It was further emphasised by their Lordships that 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. In *Goswami Shri Mahalaxmi* G *Vahuji* v. *Rannchoddas Kalidas & Others,* it was pointed out that the appearance though a relevant circumstance was by no means decisive. The circumstance that the public or a section thereof had been regularly worshipping in the temple as a matter of course and they could take part in the festivals and ceremonies conducted in that temple apparently as a matter of right was a strong piece of evidence to establish its H public character. If votive offerings were being made by the public

and the expenses were being met by public contribution, it would be safe to presume that the temple was public. In short the 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 therein, the consciousness of the manager and the consciousness of the devotees themselves as to the public character of the temple were factors that went to establish whether a temple was public or private,"

In *C. Ratnavelu Mudaliar* v. *Commissioner for Hindu Religious and Charitable Endowments,* AIR (1954) Madras 398 a Division Bench of that High Court had occasion to consider a similar question. Mr. Venkatarama Aiyar, J., as he then was, speaking for the Bench, held as follows:-

"In 1946, the Hindu Religious Endowments Board called for reports on the structure and the constitution of the building. Exhibits R-2 and R-3 are the reports submitted by the office. These reports show that the building has got all the normal features of the temple, that it has got Prakaram, Dhwajastambam, Balipeetam and Nandikeswara, and there are shrines for Bhairavar, Kasi Visalakshi, Chandikeswara, and other deities. There is a 16 pillared mandapam and there are gopurams all over the shrine. It also appears from the evidence now adduced that festivals are being regularly performed, the deity is taken in procession, and archanas are performed by the worshippers. On these materials the only conclusion possible is that the institution has for a long period come to be regarded as a place of religious worship, which the public are entitled to use as a matter of right, and this being so the institution will be a temple as defined in S. 9(12), Madras Hindu Religious Endowments Act."

The very same Bench of the *Madras High Court in Madras Hindu Religious Endowments Board* v. *V.N. Deivanai Ammal by Power of Attorney agent T.V. Mahalinga Aiyar,* AIR (1954) Madras 482 held that in the case of an old temple, such dedication might be presumed from long user by the public as of right. On the facts, the learned Judges found that the worship was maintained and the expenses were met from out of private funds of the respondents and in the absence of any property being dedicated for the maintenance of worship in the temple, it was difficult to infer dedication of the temple to the public.

In *Goswami Shri Mahalaxmi Vahuji* v. *Rannchhoddas Kalidas & Ors.,*

A [1970] 2 SCR 275, this Court, after considering the earlier decisions on this aspect, held as follows:-

> "Though most of the present day Hindu public temples have been found as public temples, there are instances of private temples becoming public temples in course of time. Some of the private temples have
> B acquired great deal of religious reputation either because of the eminence of its founder or because of other circumstances. They have attracted large number of devotees. Gradually in course of time they have become public temples. Public temples are generally built or raised by the public and the deity installed to enable the members of
> C the public or a section thereof to offer worship. In such a case the temple would clearly be a public temple. If a temple is proved to have originated as a public temple, nothing more is necessary to be proved to show that it is a public temple but if a temple is proved to have originated as a private temple or its origin is unknown or lost in antiquity then there must be proof to show that it is being used as
> D a public temple. In such cases the true character of the particular temple is decided on the basis of various circumstances. In those cases the courts have to address themselves to various questions such as:-
>
> (1) Is the temple built in such imposing manner that it may prima
> E facie appear to be a public temple?
>
> (2) Are the members of the public entitled to worship in that temple as of right?
>
> (3) Are the temple expenses met from the contributions made by the public?
>
> F
>
> (4) Whether the sevas end utsavas conducted in the temple are those usually conducted in public temples?
>
> (5) Have the management as well as the devotees been treating that temple as a public temple?
>
> G
>
> Though the appearance of a temple is a relevant circumstance, it is by no means a decisive one. The architecture of temples differs from place to place. The circumstance that the public or a section thereof have been regularly worshipping in the temple as a matter of course and they can take part in the festivals and ceremonies conducted in
> H that temple apparently as a matter of right is a strong piece of evidence

to establish the public character of the temple. If votive offerings are being made by the public in the usual course and if the expenses of the temple are met by public contribution, it is safe to presume that the temple in question is a public temple. In brief the origin of the temple, the manner in which its affairs are managed, the nature and extent of gifts received by it, rights exercised by the devotees in regard to worship therein, the consciousness of the manager and the consciousness of the devotees themselves as to the public character of the temple are factors that go to establish whether a temple is a public temple or a private temple. In *Lakshmana* v. *Subramania,* the Judicial Committee was dealing with a temple which was initially a private temple. The Mahant of this temple opened it on certain days in each week to the Hindu public free to worship in the greater part of the temple, and on payment of fees in one part only. The income thus received by the Mahant was utilised by him primarily to meet the expenses of the temple and the balance went to support the Mahant and his family. The Privy Council held that the conduct of the Mahant showed that he had held out and represented to the Hindu public that the temple was a public temple at which all Hindus might worship and the inference was, therefore, that he had dedicated it to the public. In *Mundancheri Koman* v. *Achutan Nair,* the Judicial Committee again observed that the decision of the case would depend on the inferences to be derived from the evidence as to the way in which the temple endowments had been dealt with and from the evidence as to the public user of the temples. Their Lordships were satisfied that the documentary evidence in the case conclusively showed that the properties standing in the name of the temples belonged to the temples and that the position of the manager of the temples was that of a trustee. Their Lordships further, added that if it had been shown that the temples had originally been private temples they would have been slow to hold that the admission of the public in later times possibly owing to altered conditions would affect the private character of the trusts. In *Deoki Nandan* v. *Murlidar,* this Court observed that the issue whether a religious endowment is a public or a private one is a mixed question of law and fact, the decision of which must depend on the application of legal concepts of a public and private endowment to the facts found. Therein it was further observed that the distinction between a public and private endowment is that whereas in the former the beneficiaries, which means the worshippers are specific individuals and in the later the general public or class thereof. In that case the

A plaintiff sought to establish the true scope of the dedication from the user of the temple by the public. In *Narayan Bhagwant Rao Gosavi Balajiwale* v. *Gopal. Vinayak Gosavi & Ors.*, this Court held that the vastness of the temple, the mode of its construction, the long user of the public as of right, grant of land and cash by the Rulers taken along with other relevant factors in that case were consistent only with the public nature of the temple."

B

The above judgment was followed by this Court in Pratapsinhji N. Desai (supra).

C Apart from the above decisions, learned senior counsel appearing for the appellants also challenged the correctness of the judgment of the High Court in interfering with the findings rendered by the Additional Assistant Commissioner and the Commissioner of Endowments by citing a judgment of this Court in *Svenska Handelsbanken* v. *M/s. Indian Charge Chrome & Ors.*, [1994] I SCC 502, The passage relied on by the learned counsel reads as D follows:-

> "Whenever an appeal is heard it is the duty of the appellate court to examine the finding of the trial court and if the findings of the trial court are not correct, to deal, with it."

E

According to the learned counsel, the High Court failed to do its duty as expected of it. For the same proposition he also placed reliance on a judgment of the *Andhra Pradesh High Court in Kondamuri Anasuyamma* v. *Distt. Judge,, W.G. Dist at Eluru and Ors.*, AIR (1991) AP 47.

F After going through the facts in detail and the relevant tests laid down by this Court in various judgments noted above, we find that on the basis of the materials available in this case. It can fairly be stated that the authorities (Additional Assistant Commissioner and Commissioner Endowments) had considered the matter fairly and elaborately to come to a conclusion that the G institution in question is a private one. Equally the High Court on appeal had considered the evidence exhaustively and arrived at a conclusion that the institution in question is a public religious institution. At this juncture, it must be borne in mind that the High Court was not handicapped in considering the oral and documentary evidence as an appellate court though the appeal before the High Court was second appeal, having regard to the scope of H Section 44 of the Act. It is also not argued before us that the High Court has

exceeded its jurisdiction in appreciating the oral and documentary evidence. A

With this background, let us deal with the factual aspects of the case.

As noticed earlier, the conclusion reached by the Addl. Assistant Commissioner was affirmed on appeal, by the Commissioner. The Commissioner had made a local inspection before giving his findings on the issues raised B before him. Before the Commissioner, it was conceded that the institution in question was not a math. The only question argued before the Commissioner was whether the institution is a temple within the meaning of the Act or a private institution. On the basis of the evidence and on the basis of his local inspection, the Commissioner found that an extent of 1.04 acres was given by C way of gift by Raja of Darpan to the first ancestor of the Petitioners and another extent of 7.28 acres was given by the Collector, Cuttack; that the structures have all the external signs of Hindu temple and in the subsidiary temples within the premises there are installed different Gods and Goddesses of Hindu mythology; that the main temple is about 30-40 ft. high; that within the premises there is a jhulan mandap and snanan mandap, a Rosaghar for D cooking food for feeding the sisyas and that the idols are of large size built of either stone or cement'. The Commissioner also found that there was a bhog shop and bhog articles are supplied to sisyas on payment of cost within the premises. It was suggested that there was auctioning of bhog shop but the Commissioner found that in the absence of any evidence by auction E purchaser the same cannot be taken for granted. The Commissioner also found that there is no sufficient evidence to find that daily rituals are observed in the institution as are commonly seen in any Hindu temple. On the basis of the evidence, he also found that the car festival was being observed in the institution at least upto 1960. As regards the resources utilized for the F construction of the temple and installation of idols, the Commissioner was of the view that the evidence available on record was not adequate to establish that the petitioners were raising funds from the public by engaging Hundawallas or by issuing appeals. He also found that the petitioners and their ancestors were given pranamis out of reverence and that was utilized for the construction G of temple and installation of images. The Commissioner took note of the fact that the petitioners have stopped conducting the Rathyatra since 1960 and have closed the temple gates for three years, which did not invoke any protest from public and on that basis the Commissioner was of the view that the public had visited, the temple not as of right though they had free access to the premises to worship the deities installed therein. H

A The Commissioner ultimately found that the institution originated from a samadhi of a saint and had developed to a place of religious worship; that the premises of the institution contained large pucca structures which are akin to Hindu temples and bear all the external features of such temples including the size and manner of construction of the building and that the temples accommodate various deities of Hindu mythology including Jagannatha, B Balabhadra and Subhadra idols installed on the samadhis of the ancestors of the petitioners. Those deities are worshipped by the outsiders, who offer bhog. The Commissioner found that the main source of income of the institution was 'Pranami' and 'Dakhina' received from the sisyas of the petitioners; that the institution used to hold different Hindu religious festivals like Rathajatra, C Dola Jatra, Jhulan Jatra till 1960 and the members of the public used to participate in such festivals; that the members of the public freely enter the premises of the institution to have darshan of the petitioners and to worship the deities in the temple and offer bhog to them. But no right of use by the members of the public was established. That the control, regulation and management of the institution had been with the petitioners and their ancestors D since the time of the founder. The Commissioner further found that the temple and other constructions were not made out of donations raised from the public and that the members of the public had no control over the management of the institution. On the basis of this, the Commissioner found, affirming the conclusion of the Addl. Assistant Commissioner, that the institution was only E a private one.

As against the above conclusions of the Commissioner, the High Court, on a re-consideration of the evidence, reached just the opposite conclusion. The High Court found mainly on the basis of the evidence of PW7, who is Petitioner No.2, that the institution owns 8.50 acres of land out of which an F area of 7.28 acres was granted by 'Sarkar' and that the rest of the area consisted of lands gifted by other people. For coming to this conclusion, the High Court placed reliance on Exbt. B/1. By referring to R.O.R. (Exbt.2) the High Court was of the view that the recording of the land in favour of the Samadhi Gosain and description of Raghubar Das as a marfatdar, on the facts G of the case, would show that the land had been dedicated for the benefit of Hindu public and not of any private individual or family. Rent free character of the land has continued upto date and that is a strong cirumstance which is in favour of holding that the land was dedicated for the public benefit. To strengthen the above conclusion, the High Court referred to Exbt.-A, a copy of the objection filed by one of the predecessors of the petitioner in which H it was stated that many people used to visit Chhatia Bata (premises in

question) daily and more so on festive occasions and that as there was scarcity of water in the area, the people of the locality held a meeting and passed resolutions for requesting the Government for permission to excavate a tank on behalf of Chhatia Bata. Only on the basis of the above representation, the Government accorded permission for excavation of the tank over the Government land. The High Court, with reference to Exbt.-E, a receipt book for collection of subscription from the public for construction of temple at Chhatia Bata was of the view that the petitioners themselves held out and represented to the public that the institution is a public temple. Though the Commissioner was of the view that in the absence of individual concerned with Exbt. E & F had not been examined and those document could not be accepted as proof of facts contained therein, the High Court took the view that the evidence of O.P.W. -9 who spoke about those documents could not be discarded especially petitioner no.1 who was said to be in the know of things, avoided the witness box. Though the petitioner no, 2, as PW-7, gave evidence saying that petitioner no. 1 was suffering from blood pressure, that was disproved by the evidence of PW-1 who deposed that the petitioner no.1 was not suffering from any physical infirmity. The High Court also took note of the fact that though it was admitted on behalf of the petitioners that they were receiving money as 'Dakshina' from the devotees, but no account was maintained to support the same. As against the evidence of PWs, the High Court preferred the evidence of OPWs to hold that the donations and subscriptions were collected from the public for construction of the temple and though PW-3, one of the witnesses of petitioners, had stated that accounts were maintained by Harekrushna Das for construction of the temple and the accounts have not been produced. The High Court has taken note of the important features of the temple such as that a lion's gate abutting the public road and the words 'Chhatia Bata' had written on the gate. Again believing the evidence of OPWs, the High Court came to the conclusion that the members of the public had free access to the temple. Again placing reliance on the evidence of PW-7 (petitioner no.2) the High Court took note of the fact that in the evening some religious discussions used to be held in the temple and that the Brahmins have been engaged to carry out puja and to offer bhog to the deities. The High Court was conscious of the fact that there was no direct evidence of dedication but the evidence adduced in the case was sufficient to hold that the dedication was for the benefit of the public and that the Hindu public have been using the temple premises as a place of religious worship and offering bhog as of right. We have already set out the conclusions reached by the High Court on the basis of the oral and documentary evidence.

A B C D E F G H

A In the light of the diametrically opposite conclusion reached on the main issue as regards the dedication and the right of the public to worship the temple in question, the point for consideration will be whether the High Court was justified in taking the view differing from the Commissioner that the institution in question is a public temple within the meaning of the Act.

B We have already pointed out that the High Court was considering the appeal under Section 44 of the Act and that Section did not, in any way, fetter the jurisdiction of the High Court from going into the facts and appreciating the evidence. That being the position, if we find as we do that the conclusions reached by the High Court on re-appreciation of the evidence are not perverse C but supported by evidence, then we feel that we may not be justified in interfering with the conclusions reached by the High Court while exercising jurisdiction under Article 136 of the Constitution. No doubt Mr. Nariman, learned senior counsel appearing for the appellants vehemently argued that the findings reached by the High Court are perverse and contrary to the evidence available in the case.

D

However, on a careful reading of the judgment under appeal and after perusing the evidence placed before us, we are unable to hold that the findings of the High Court are perverse.

E In the earlier portion of this judgment, we have set out the tests laid down by this Court and other High Courts for considering whether an institution is a temple as defined in the Act and bearing those tests in mind let us consider whether the High Court has come to a right conclusion in holding that the institution in question is a temple as defined in the Act. We must also bear in mind that the best evidence that could have been made available F through the first petitioner (late Shri Harekrushana Das), both documentary and oral, was not forthcoming on a lame excuse. PW-7, petitioner no.2, in his deposition has also said that it was the first petitioner who was in the know of vital things. This leads one to take an adverse inference and the High Court was right in taking such adverse inference on vital aspects such as donations G raised for the construction of the temple and other structures by holding out that the institution was a public temple. We are not adverting to the various tests laid down by this Court and other High Courts separately as we are satisfied that broadly speaking, the features of constructions, idols and the festivals held, as noticed by the authorities and the High Court, are sufficient to hold that the institution in question falls within the definition of temple H under the Act. We are also not agreeing with the contention of the learned

Senior Counsel, Mr. Nariman, that the High Court failed to examine the findings of the authorities below before reversing their conclusions. We are satisfied that the High Court has elaborately dealt with the matter and had given reasons for not accepting the findings of the authorities below. A

In the light of the tests laid down by this Court in several judgments extracted above, we find that the High Court was right in holding that the institution in question is a public temple within the meaning of the Act. B

In the result, the appeal fails and is accordingly dismissed. There will be no order as to costs.

R.P. Appeal dismissed. C