HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

:SINGLE BENCH:

{HON'BLE SHRI JUSTICE ANAND PATHAK}

FIRST APPEAL NO.253/2001

Ramkrishna Sharma
Vs.
State of M.P. & Anr.

Shri N.K. Gupta, learned senior counsel with Shri Santosh Agrawal, learned counsel for the appellant.
Shri Vijay Sundaram, learned Panel Lawyer for the respondent/State.

Whether approved for reporting : Yes

Law laid down:

1. It is settled in law that Shebaitship is like immovable property, it is hereditary and heritable office and at the same time Shebaitship is having no right to sale the office nor it can be mortgaged or leased. **Ram Ratan Vs. Bajrang, AIR 1978 SC 1393** and **Profulla Chorone Vs. Satya Chorone, AIR 1979 SC 1682** relied.

2. Section 110 of Indian Evidence Act give effect to a well known principle of law, common to all system of jurisprudence, that possession is *prima facie* evidence of title. A long, peaceful and lawful possession of the plaintiff lends presumption of title. **State of Gujarat Vs. Allauddin Babumiya Shaikh, AIR 1990 SC 2220, Chief Conservator of Forests, Govt. of A.P. Vs.**

Collector and others, AIR 2003 SC 1805, State of Andhra Pradesh and others Vs. Star Bone Mill and Fertiliser Company, (2013) 9 SCC 319 and **M. Siddiq (Dead) Through Legal Representatives (Ram Janmabhumi Temple Case) Vs. Mahant Suresh Das and others, (2020) 1 SCC 1** relied**.**

3. **कवाअद माफीदारान जुज्वे आराजी व नक्दी, रियासत ग्वालियर, सम्वत 1991** makes a mechanism for cash grant to religious places (देवस्थान) irrespective of their status, whether Private/Public or State owned temples.

4. In the present case, temple declared to be Private temple on which Public Trust cannot be created.

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JUDGMENT
(Delivered on 22nd day of April, 2022)

1. Instant appeal under Section 96 of the Code of Civil Procedure, 1908 has been preferred against the judgment and decree dated 30-11-2001 passed by the XII Additional District Judge, Gwalior in Civil Suit No.30-A/2001 whereby the suit preferred by the appellant/plaintiff has been dismissed.

2. Facts in brief for adjudication are that suit for declaration and permanent injunction was filed by the appellant as plaintiff against the respondents/defendants with the pleadings that property by way of house situate at house No.39/720 Jiwaji Chowk, Bada Lashkar District Gwalior is his ancestral property

in which deities Shri Hanuman Ji, Shri Ram Janki Ji and Shri Mahadev Ji were installed and anointed by his ancestors. House was constructed around 200 years back and thereafter these deities were established by his ancestors while bringing the statues from Rajasthan. This temple is their personal temple and since inception they are taking care of the temple and whole management of the temple is being undertaken by the plaintiff. Prior to him, his ancestors were managing the temple by their own funds and time to time constructions of different nature were raised by the plaintiff and his ancestors. All festivals were being organized by the plaintiff and earlier to him their ancestors.

3. As pleaded, plaintiff's ancestor Mangilal was managing the temple (and the property) as owner of the property and thereafter his son Keshavdev took the responsibility. After his death his brother Ramswaroop, who was father of plaintiff was involved in maintenance of temple and offering Pooja to the deities.

4. In 1974 at the instance of some disgruntled people (tenants evicted by plaintiff) enquiry was conducted vide case No.2/74-75-B/121 in the Court of Additional Tahsildar, Gwalior and after enquiry Tahsildar vide order dated 05-12-1974 found that temple is not Government temple but it is personal and private property. No *nemnuk* (cash grant) was given by the Government

and matter was dropped.

5. As per the appellant/plaintiff, some tenants who were earlier inducted by the plaintiff's ancestor in part of the premises, suit for eviction was filed as owner of the suit property and same was decreed by the trial Court vide judgment dated 09-03-1978 by IV Additional District Judge, Gwalior and the same was affirmed by this Court in First Appeal No.18/1978 vide judgment and decree dated 19-04-1989 (Ex-P/20).

6. It is pleaded that the tenants who were earlier inducted by the plaintiff's ancestor in part of the premises made some complaints and on the basis of those complaints, Additional Tahsildar again issued notice on 02-04-1978 and notification was issued on 25-04-1978 for appointment of Pujari. Therefore, with said cause of action, suit has been filed and it was pleaded that respondents cannot harass the plaintiff and sought relief for declaration of right and permanent injunction.

7. Written statement was filed by the State as defendants and admitted the fact about existence of temple called **Baade Ke Hanuman** (**बाड़े के हनुमान**) but denied ownership of premises of plaintiff. Facts pleaded in para 2 to 5 have been denied not in specific term but general denial was made and so far as pleadings in para 7 of the plaint is concerned defendants pleaded ignorance about the same and according to them judgment earlier passed between two different parties is not

binding over them. According to defendants, *nemnuk* was regularly given to the plaintiff and his ancestors, therefore, temple was public temple.

8. Special objections were raised by the defendants from para 19 to 26 in which it has been mainly pleaded that earlier one Devkinandan was appointed as Pujari on behalf of Gwalior State (native ruler) and he received *nemnuk* from the concerned Muafi Department and after his death his son Pannalal being ineligible to perform prayer, Sombhatt was appointed as Pujari in 1879 and thereafter after his renunciation, his disciple Mangilal was appointed as Pujari and thereafter Keshavdev performed the duties of Pujari as disciple of Mangilal. After the death of Keshavdev, Ramswaroop was appointed as Pujari.

9. Plaintiff/appellant exhibited documents in support of his submission Ex-P/1 to P/37 whereas defendants exhibited three documents Ex-D/1 to D/3. On behalf of plaintiff, five witnesses were examined and on behalf of defendants, single witness Mohanlal Daultani was examined as DW-1.

10. After considering the pleadings, evidence (documentary as well as oral) and submissions of the parties, trial Court dismissed the suit preferred by appellant/plaintiff. Therefore, instant first appeal under Section 96 of CPC has been preferred.

11. It is the submission of learned senior counsel for the appellant that trial Court erred in dismissing the suit and did not consider

legal position that written statement does not contain specific denial of the pleadings made by the plaintiff which amounts to admission of defendant as provided under Order VIII Rule 3,4 and 5 of CPC. In the whole written statement, defendants made the pleadings that temple in dispute was public temple but nowhere pleaded that temple in dispute was constructed by the State Government or by the public. Although defendants tried to trace the lineage of Pujaris appointed allegedly by Gwalior State from time to time, but neither any denial or any special objection pleaded that public has constructed the temple or State has constructed it.

12. Learned senior counsel referred**, (2016) 1 SCC 207 (Standard Chartered Bank Vs. Andhra Bank Financial Services Limited and others)**, **2009 (II) JLJ 126** (**Seth Ramdayal Jat Vs. Laxmi Prasad)** and **2007 (1) MPJR 222 (Kailash Chandra Vishwakarma Vs. Smt. Sarojani Mahuley)** to bolster his submission. According to him, since there is no pleading with regard to origin of temple and ownership thereto, hence it is presumed that facts as pleaded in the plaint were correct and temple was built and constructed by the plaintiff's ancestors and none others.

13. In earlier times, when there was no electricity in Gwalior State and everywhere lighting has to be made by lighting up of Deepak (a type of candle), therefore, irrespective of status of

temple whether it was private or State owned, some cash grant by way of *nemnuk* was issued. Therefore, *nemnuk* has nothing to do with ownership of temple. Purpose of *nemnuk* was clarified by the State of Madhya Pradesh while issuing **circular dated 12-11-1964 (Ex-P/34)** wherein three categories of temples have been delineated and it has been clarified that payment of *nemnuk* to the Pujari cannot be construed as the fact that temple is Government temple or Government owned temple. In para 3 of the said circular, a provision has been made that authority had to submit information as desired by the State Government but no such pleading was made by the defendants about steps taken and about the fact that information with regard to temple in question (Bade Ke Hanuman) has ever been submitted by any authority to the State Government indicating the temple as Government temple or public temple and when enquiring authority conducted enquiry in 1974 and ultimately found that temple is not public temple then same authority is estopped to raise such ground and to repeat the enquiry again and again.

14. According to learned senior counsel, no document placed on record by the defendants that temple in question was ever constructed or treated as Government temple. Plaintiff relied over Ex-P/1 which is list of those temples which were constructed by the State in which name of plaintiff's temple

nowhere figures and this fact was not at all denied by the defendants in their pleadings or evidence.

15. With regard to construction of temple and incarnation of deity in temple, the expenses incurred were borne by the plaintiff's ancestors. Documents Ex-P/2 to 13 were presented and in that regard there is no cross-examination held at the instance of defendants. When plaintiff established by way of documentary evidence that temple was constructed by plaintiff's ancestors and they incurred the expenses from time to time then the trial Court erred in coming to a different conclusion and caused illegality.

16. Learned senior counsel also raised the point regarding Section 136 of M.P. Municipal Corporation Act, 1961 to submit that present temple is not exempted from payment of property tax whereas Government owned properties are exempted so. He referred the municipal receipts Ex-P/22 to 24 to bring home the fact regarding its existence as private temple.

17. It is the submission of learned senior counsel appearing for appellant/plaintiff that plaintiff's witnesses Baikunthnath Chaturvedi (PW-3) who was 66 years of age, Prabhudayal Gupta (PW-4) who was 85 years of age and Harinarayan Sharma (PW-5) who was 74 years of age on the date of recording of evidence before the trial Court, deposed that in temple Shiv Panchayat was anointed in 1951-52 and ceremony

was attended by them but no cross-examination of these witnesses was made, so as to bring home, the case of plaintiff as false. Absence of any such cross-examination of these witnesses, has not been taken into consideration by the trial Court and committed jurisdictional error of law.

18. Plaintiff also appeared in the witness box as PW-2 and elaborately mentioned the facts regarding ownership of temple of plaintiff and his ancestors. He denied the case of respondents in specific term while not accepting the suggestions given by the defendants. Ramdas Patil (PW-1) who was Clerk Grade -1 in Muafi Aukaf Department admits the fact that except Ex-P/1 which is list of Government temples, no other register exists in the department to indicate status of temple and said register was of the time of Madhya Bharat, earlier to formation of State of Madhya Pradesh and said register contains description of Government temples at the time of Madhya Bharat and he admits the fact that name of plaintiff's temple does not figure in the said register. He further admits the fact that register does not contain the name of temple in question as recipient of *nemnuk*.

19. Learned senior counsel referred testimony of defendants' witness Mohanlal Daultani (DW-1) where he admits the fact that Muafi Kavayat Adhiniyam was enforceable over those temples who received *nemnuk* and said provisions were still

applicable over those temples. Said witness who was Muafi Aukaf Officer, Gwalior further admits the fact that in the said Adhiniyam, there is no such provision whereby *nemnuk* cannot be granted to the private temple. He also admits ignorance that when the temple was constructed and register Ex-D/1 nowhere refers the fact when Ramswaroop was appointed as Pujari and till which year temple in question received *nemnuk*. He referred that in Princely State time His Highness (then ruler) could have issued nemnuk to anybody whom he wanted to or pleased with.

20. Learned senior counsel for the appellant referred para 19 where witness admits that in Muafi Department there is no register known as Milkiyat Register and register which he submitted is not register of ownership. While relying upon the admission in respect of document Ex-P/32 in which opinion has been given that said Devsthan (temple) is not Government temple, said witness also pleaded ignorance about the fact that he has no knowledge that in 1921 under whose order, temple was constructed and after construction what was the arrangement to maintain that temple.

21. He also referred the documents Ex-P/36 and P/37, in which Ex-P/36 is the order dated 17-07-1994 in which SDO, Gwalior had mentioned the fact that payment of nemnuk does not mean that temple belongs to State Government. He also referred Ex-P/37 dated 27-11-1976 findings of office of Collector (Additional

Collector, Gwalior) in which it has been specifically mentioned that *nemnuk* is received by private temples also. All these evidence/testimony of witnesses were being ignored by the trial Court and caused illegality and perversity. According to plaintiff, civil matters are to be decided on the touchstone of Preponderance of Probability and while relying upon the judgment of Hon'ble Apex Court in the matter of **Kuldeep Chand and Another Vs. Advocate General to Government of H.P. and others (2003) 5 SCC 46** requirement for proving private temple has been established by the plaintiff beyond reasonable doubt.

22. Learned senior counsel referred application preferred under **Order XLI Rule 27 of CPC vide I.A.No.10704/2007** and filed certified copy of the old documents which were not in possession of the plaintiff/appellant at the time of evidence and which were in the possession of State authority and all such documents go to the root of the case and have important bearing over the case. One such document is a judgment dated 31-03-1903 and another judgment dated 23-08-1904 passed by trial Court and judgment of High Court of Gwalior dated 11-10-1910 it has been proved that temple in question was private temple and plaintiff is litigating the matter as owner of the property and also initiated proceedings against the tenant and taken possession from them as owner. Therefore, as per the law laid

down by Apex Court in the case of **K. Venkataramiah Vs. A. Seetharama Reddy and others, AIR 1963 SC 1526, North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (2008) 8 SCC 511** and **Shyam Gopal Bindal and others Vs. Land Acquisition Officer and another, (2010) 2 SCC 316** since these documents are vital documents and go to the root of the case, therefore, same be taken into consideration by this Court.

23. He also relied upon Section 110 of Indian Evidence Act to submit that he is in possession of the suit property and for decades/century together he and his ancestors are in possession of the temple in question since inception. **(See; AIR 2003 SC 1805, Chief Conservator of Forests, Govt. of A.P. Vs. Collector and others)**.

24. Learned counsel for the respondents/defendants/State opposed the submissions advanced by learned senior counsel for the appellant. According to him, property in question was Government temple and that fact can be deciphered from the evidence of Mohanal Daultani (DW-1) who was Muafi Aukaf Officer, Gwalior. Plaintiff has to stand on his own legs and it was plaintiff who had to prove the case that he was owner of the temple in question and that was his private property but since plaintiff failed, therefore, trial Court rightly dismissed the suit while passing the impugned judgment and decree.

25. It is the submission of learned counsel for the respondents/defendants that in absence of any document of ownership in specific terms, long standing possession of the plaintiff/appellant if any cannot be a ground for decreeing the suit. It is Aukaf land which is Government property. He relied upon **AIR 1958 SC 886 (Razia Begum Vs. Sahebzadi Anwar Begum and others)**, **1992 RN 95 (Kanchania Vs. State)**, **1985 RN 305 (Anupdas Vs. Murlidas)** and prayed for dismissal of appeal.

26. In respect of application under Order XLI Rule 27 of CPC, it is the submission of learned counsel for the respondents/defendants that without amendment in pleadings, documents through application under Order XLI Rule 27 of CPC cannot be taken on record.

27. Heard learned counsel for the parties at length and perused the record of the case.

28. Case of the plaintiff is that his ancestors have constructed the premises in question in which deities have been anointed (प्राणप्रतिष्ठित). So far as documents regarding ownership is concerned neither the plaintiff produced any document of ownership of land over which temple was constructed nor any document was filed by the State as defendants to establish the fact that temple was constructed by defendants and was State temple. Therefore, it is to be inferred from the pleadings,

different documents and evidence led by the parties while keeping in mind the import of Section 110 of Indian Evidence Act and/or Section 27 and Article 65 of Indian Limitation Act and relevant Acts prevalent at the time of Native Ruler (Princely State).

29. Plaintiff in his plaint has specifically pleaded that building vide house No.39/720 Jiwaji Chowk, Bada Lashkar District Gwalior is of ownership of plaintiff in which Mandir Shri Hanuman Ji, Shri Ram Janki Ji and Shri Mahadev Ji were anointed and established. **Temple is known as Baade Ke Hanuman (बाड़े के हनुमान)**. Specific pleadings have been made by the plaintiff about efforts of his ancestors to bring deities/statues from Rajasthan and anointed them in premises in question and for last two centuries/many decades they are performing Pooja to the said temple as owner of the premises/temple.

30. Genealogical table is also referred and earlier proceedings were specifically pleaded in which enquiry held and thereafter dropped because temple found to be private temple and no *nemnuk* was received in recent times by the plaintiff.

31. Plaintiff also pleaded about earlier litigations and its fallout (vide Ex-P/19 and P/20) and tried to establish through pleadings that plaintiff and his ancestors are owner of the premises in which temple is constructed and deities were installed.

32. In the written statement although defendants tried to rebut the

case of the plaintiff but no specific denials have been made except in special objections. Incidentally respondents/defendants everywhere tried to assert that *nemnuk* was given by the State to the temple as cash grant and ancestors of the plaintiff were appointed as Pujari from time to time therefore according to them it is not private temple of plaintiff, but surprisingly nowhere pleaded in specific terms that temple is State temple or temple constructed by the erstwhile ruler and/or by the present department of State Government. No pleadings are made to the extent that plaintiff was never appointed as Pujari or claiming over the property in question as encraocher or trespasser.

33. In fact, in the written statement it has been pleaded that it is public temple and *nemnuk* was given but at the same time it has been pleaded that Ramswaroop (father of plaintiff) was appointed as Pujari in 1911 and prior to him Mangilal was appointed as Pujari of the temple but origin of temple and its construction has not been clarified but at the same time it is accepted that for more than 100 years (it may be even 140 years or so) ancestors of plaintiff were Pujari and were in-charge of temple.

34. The Apex Court in the case of **Seth Ramdayal Jat (supra)**, held in following words:

> **"*24.*** *Having regard to the fact that the averments*

contained in the paragraphs 3 of the plaint were not traversed, the same would be deemed to have been admitted by him in terms of Order VIII, rule 5 of the Code of Civil Procedure.

In Gautam Sarup V. Leela Jetly (2008) 7 SCC 85, this Court held:

"14. An admission made in a pleading is not to be treated in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigor."

(See also Ranganayakamma and another v. K.S. Prakash (D) by LRs and others [2008 (9) SCALE 144]"

35. Later on, in the case of **Standard Chartered Bank (supra)** need for specific denial is reiterated by the Apex Court while relying upon earlier judgment of Supreme Court in **Balraj Taneja Vs. Sunil Madan, (1999) 8 SCC 396**. Therefore, in the present case, defendants have not specifically denied status of appellant in categorical terms, nor defendants denied the fact that appellant is not in lawful possession. This strengthens the case of appellant.

36. In absence of any specific pleading by the defendants about ownership of temple (as State owned temple) and the admission of defendants regarding performing Pooja by him and his ancestors uninterruptedly, Section 110 of Evidence Act assumes significance.

37. It is the case of plaintiff that temple in question is private

property but since it is open for public at large then it does not assume character of public temple owned by the State but it is public temple owned by plaintiff and his ancestors. Even otherwise when a temple is over public place, offering of Pooja by public cannot be ruled out, but at the same time it does not give temple, the character of State owned. Ex-P/1 is a list of State temples prepared by the Muafi Department of erstwhile State and said register is in fact admitted by the employee of Muafi Aukaf Department -Ramdas Patil (PW-1) and he admits this fact that except Ex-P/1 no other register exists in our department regarding Government temple and in the said register, particulars of State owned temples are given (as per para 3).

In subsequent para 4, he admits the fact that description of temple in question does not find entry in the register and he has no information whether temple received any *nemnuk* or not. He further admits in same para 4 that no other register exists in our department about temple in question. It is worth mentioning the fact that said witness was working as clerk Grade -1 at the time of deposition in Muafi Aukaf Department and in cross-examination he admits that in register description of temples which receive *nemnuk* are given and name of this temple does not exist. He further admits that he does not know whether temple is public temple or not because particulars of

public temple are not registered in the Aukaf Department, meaning thereby that when description of public temple are not registered in Aukaf Department, therefore, it would be hypothetical to assume that temple in question was public temple because no such documents exist to indicate such factual aspect.

38. Defendants' witness Mohanlal Daultani (DW-1) admits in specific term (specifically in para 10) that Ex-D/1 is a Register maintained by Gwalior State and he is not having knowledge that on what basis *nemnuk* was being paid at the time of Gwalior State with further admission that he is not having knowledge neither any record in his office nor he is in a position to say that when temple was constructed and by whom. Further in para 12 he admits that in Ex-D/1 there is no mention with regard to appointment of Pujari and he could not state that upto which period *nemnuk* was paid to the temple. He further deposed that in Ex-P/32 opinion (from 'A' to 'A') was given by same person because the handwriting of this note is in the same handwriting as above recital in same document (Ex-P/32). He further admits that he had no knowledge that in 1921 under whose order, temple was constructed and after construction what was the arrangement made for maintaining the temple. In para 19 witness further admits that in Muafi Department there is no Register known as Milkiyat Register and Register which he

has submitted is not Register of ownership. Therefore, it can be safely concluded that no evidence led by the defendants about the construction of temple under the instruction of then Government/Ruler or any other authority or in the matter any assistance for construction was provided by them. Therefore, temple in question was not public temple.

39. Similarly Ex-P/32 is a document (फाम दाखिल –खारिज माफीदार) column 2 indicates that it was देवस्थान माफी in which name of माफीदारान (receiver of cash grant) is referred as Keshavdev and his legal heir in column 4 is referred as Ramswaroop. In column 9 it has been specifically written that covenant/सनद is not government. It is reproduced in following words for ready reference:

"९. सनद (१) सरकारी. – नहीं"

and in para 15 it has been written that it may be Government temple because people say like this and name of father of plaintiff (Ramswaroop) is referred as possessor of the property in column 16. This is material piece of evidence because in same document vide note dated 22-06-1929, it has been mentioned that this Devsthan is not Government and no Sanad is given to *nemnuk*.

40. Circular dated 12-11-1964 vide Ex-P/34 classifies three categories of temples and it clarifies the position that because of payment of *nemnuk* to the Pujari of a temple does not

catergorise that temple as Government temple or Government owned temple. This document is in the nature of circular issued by the State Government and it made the provision that authority concerned had to submit certain information as desired by the State in that circular but there is nothing in the pleading nor in the evidence that at any point of time any information with regard to plaintiff's temple has ever been submitted by any of the authority to the State Government showing the temple to be Government temple or public temple. Rather, authority/district administration put it conversely; authority earlier conducted an enquiry and found that temple is not public temple.

41. With regard to construction of temple, anointment of deities in the temple and the expenses borne by the plaintiff's ancestors, documents exhibited vide Ex-P/2 to P/13 were submitted and explained by witnesses including plaintiff himself but in that regard no cross-examination was done by the defendants. When plaintiff established by documentary evidence that temple was constructed by his ancestors and submitted documentary evidence regarding expenses, then those evidence (oral and documentary) cannot be ignored. If this evidence is seen in juxtaposition to other documents as well as documentary evidence especially Ex-P/13, wherein permission for construction of temple has been sought, then case of plaintiff

strengthens further.

42. Right from 1940 Privy Council 7 (Babu Bhagwan Din and others Vs. Gir Har Saroop and others) in which it has been held that if any grant (including cash grant *nemnuk* etc.) is given to a temple or a person and if temple if private in nature then only by virtue of the fact that people come for Darshan or offering their Pooja does not make temple public nor it can be termed as dedicated. Judgment of Hon'ble Apex Court in the matter of **Haribhanu Maharaj of Baroda Vs. Charity Commissioner, Ahmedabad, AIR 1986 SC 2139** can be profitably relied where it has been held that if a temple is being made by family members from their personal earning then on the basis of fact that devotees are coming for Darshan does not make temple public unless genesis of temple is known. In the matter of **Poohari Fakir Sadavarthy of Bondilipuram Vs. Commr. Hindu Religious and Charitable Endowments, AIR 1963 SC 510**, **The Bihar State Board of Religious Trust (Patna) Vs. Mahanth Sri Biseshwar Das, AIR 1971 SC 2057** and **Radhakanta Deb and another Vs. The Commissioner of Hindu Religious Endowments Orissa, AIR 1981 SC 798**, all propound the law in same spirit that if Government has attached some land to the temple that does not make character of temple as Government temple and Government cannot interfere into administration of temple by departmental orders.

43. Similarly in **State of M.P. Vs. Smt. Shivkunwar and others**, **1972 MPLJ 284 (SC), State of M.P. Vs. Kamalpuri (Mahant), 1965 JLJ 418, Prem Ballabh Vs. State of Rajasthan and others, AIR 1954 Rajasthan 193, Khub Narain Missir and others Vs. Ramchandra Narain Dass, AIR 1951 Patna 340, Jagannath Deb Roy Vs. Byomkesh Roy and others, AIR 1973 Calcutta 397, Shivprasad Shankarlal Pardeshi Vs. Leelabai Badrinarayan Kalwar and others, AIR 1998 Bombay 131** are also worth consideration in this regard which revolve around the legal position regarding extent of power of interference of State Government in private temples.

44. One aspect worth consideration is that Devkinandan was ancestor of plaintiff which is reflected from Ex-P/32 and thereafter it came into the hands of Pannalal then Sombhatt, then Mangilal, then Keshavdev and then Ramswaroop (father of plaintiff) and Devsthani *nemnuk* might have been given to the ancestors of plaintiff for some time and therefore, ancestors of plaintiff in their private temple held possession as Shebait.

45. If one can consider the controversy from the vantage point of **Debutter *vis-a-vis* Shebait relationship** then also it appears that plaintiff had a good case on merits. As Shebait, ancestors of plaintiff were in possession of temple for more than 100 years and it is settled in law that Shebaitship is like immovable

property, it is hereditary and heritable office and at the same time Shebaitship is having no right to sale the office nor it can be mortgaged or leased **{See: AIR 1978 SC 1393 (Ram Ratan Vs. Bajrang)}**.

46. The most unique aspect of shebaitship is that it is not a mere office, it is also property. The shebait has not only duties and obligations to discharge in respect of debutter, he has also a personal interest in it. As has been pointed out by the Privy Council and the Supreme Court in some of the cases, in almost all debutter endowments, the shebait has a share in the usufruct of the debutter property. A Full Bench of the Calcutta High Court in **Manohar V. Bhupendra, ILR 1960 Cal 432**, after a careful review of practically all authorities, held that shebaitship is property. Even when no emoluments are attached to his office, he enjoys some sort of right or interest in the endowed property which may be called proprietary. In **Profulla Chorone Vs. Satya Chorone, AIR 1979 SC 1682**, the Supreme Court observed:

> "***20***. *Before dealing with these contentions, it will be appropriate to have a clear idea of the concept, the legal character and incidents of Shebaitship. Property dedicated to an idol vests in it in an ideal sense only; ex-necessitas, the possession and management has to be entrusted to some human agent. Such an agent of the idol is known as Shebait in Northern India. The legal*

character of a Shebait cannot be defined with precision and exactitude. Broadly described, he is the human ministrant and custodian of the idol, its earthly spokesman, its authorised representative entitled to deal with all its temporal affairs and to manage its property. As regards the administration of the debutter, his position is analogous to that of a Trustee, yet, he is not precisely in the position of a Trustee in the English sense, because under Hindu Law, property absolutely dedicated to an idol, vests in the idol, and not in the Shebait. Although the debutter never vests in the Shebait, yet, peculiarly enough, almost in every case, the Shebait has a right to a part of the usufruct, the mode of enjoyment, and the amount of the usufruct depending again on usage and custom, if not devised by the founder.

***21**. As regards the service of the temple and the duties that appertain to it, is rather in the position of the holder of an office, but even so, it will not be quite correct to describe shebaitship as mere office. Office and property are both blended in the conception of shebaitship. Apart from the obligations and duties resting on him in connection with the endowment, the shebait has a personal interest in the endowed property. He has to some extent the rights of a limited owner.*

***22**. Shebaitship being property, it devolves like any other species of heritable property. It follows that, where the founder does not dispose of the shebaiti rights in the endowment created by him,*

the Shebaitship devolves on the heirs of the founder according to Hindu Law, if no usage or custom of a different nature is shown to exist Gossamee Shree Greedharejee v. Rumanlaljee, (ibid.).

***23**. Then, there is a distinction between a public and private debutter. In a public debutter or endowment, the dedication is for the use or benefit of the public. But in a private endowment, when property is set apart for the worship of a family idol, the public are not interested. The present case is one of a private debutter. The distinction is important, because the results logically following therefrom have been given effect to by Courts, differently."*

47. Shebaitship being property it devolves like any other species of heritable property. In the office of Shebait, both elements of office and properties, of duties and personal interest, are blended and mixed together though duties of a Shebait are the primary thing and emoluments or beneficial interest enjoyed by him are only appurtenant to the said duties. Shebaitship is like immovable property which is hereditary and heritable office **{See: AIR 1978 SC 1393 (Ram Ratan Vs. Bajrang)}.**

48. Although it is equally true that even when shebaitship is regarded as property the shebait has no right to sale of office nor can the office be mortgaged or leased.

49. **Chapter XVII Endowments, Hindu Law, Second Edition of Dr. Paras Diwan (Orient Publishing Company)** deals

extensively in respect of Endowments, Debutter, Shebaitship and its different facets and including legal position of Shebait.

50. In the words of **Mayne in Hindu Law and Usages** "Shebait is one who serves and sustains the deity whose image is installed in the shrine. The duties and privileges of shebait are primarily those of one who fills a sacred office. Shebaitship in its true conception, therefore, involves two ideas ministrant of the deity and its manager, it is not a bare office but an office together with certain right attached to it".

51. Therefore, it is well established proposition of law that shebait relationship with the debutter property is not that of trustees of trust property as under English Law. If this proposition of law as discussed above is seen in juxtaposition to Section 110 of Indian Evidence Act read with Section 27 and Article 65 of Indian Limitation Act, case of plaintiff gets strength further. **Section 110 of Indian Evidence Act give effect to a well known principle of law, common to all system of jurisprudence, that possession is prima facie evidence of title**. A long, peaceful and lawful possession of the plaintiff lends presumption of title **{AIR 1990 SC 2220 (State of Gujarat Vs. Allauddin Babumiya Shaikh)}**.

52. Presumption under Section 110 of Indian Evidence Act would apply only if two conditions are specified viz. that possession of plaintiff is not *prima facie* wrongful and secondary title of

defendants is not proved and this presumption under Section 110 can be availed of even against the Government.

53. In the case of **Chief Conservator of Forests (supra)**, the Supreme Court given guidance in following words:

> **"19.** *It embodies the principle that possession of a property furnishes prima facie proof of ownership of the possessor and casts burden of proof on the party who denies his ownership. The presumption, which is rebuttable, is attracted when the possession is prima facie lawful and when the contesting party has no title.*
>
> ***20.*** *This Court in Nair Service Society Limited v. K.C. Alexander and Ors., A.I.R. (1968) S.C. 1165 observed,*
>
> > *"the possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known, when the facts disclose no title in either party, possession alone decides."*
> >
> > ***21.*** *The pattedars proved their possession of the lands in question from 1312 Fasli (1902 A.D.) as pattedars. There is long and peaceful enjoyment of the lands in question but no proof of conferment of patta on the late Raja and the facts relating to acquisition of title are not known. The appellant- State could not prove its title to the lands. On these facts, the presumption under Section 110 of the Evidence Act applies and the appellants have to prove that the pattedars are not the owners. The appellants placed no evidence on record to*

rebut the presumption. Consequently, the pattedars, title to the land in question has to be upheld."

54. In the case of **State of Andhra Pradesh and others Vs. Star Bone Mill and Fertiliser Company, (2013) 9 SCC 319**, this principle has been reiterated by the Apex Court and declared the principle enshrined in Section 110 of Evidence Act on the anvil of Public Policy:

"*The principle enshrined in Section 110 of the Evidence Act, is based on public policy with the object of preventing persons from committing breach of peace by taking law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of Section 6 of the Specific Relief Act, 1963, Section 145 of Code of Criminal Procedure, 1973, and Sections 154 and 158 of the Penal Code, 1860, were enacted. All the aforesaid provisions have the same object. The said presumption is read under Section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of waste lands, or where nothing is known about possession one-way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. Possession of the*

plaintiff is not prima facie wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It in fact means, that if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass/encroachment etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under Section 110 of the Evidence Act."

55. Later on, in the case of **M. Siddiq (Dead) Through Legal Representatives (Ram Janmabhumi Temple Case) Vs. Mahant Suresh Das and others, (2020) 1 SCC 1** the Apex Court held as under:

"***1193***. *Section 110 of the Evidence Act, 1872 provides thus:*

110. Burden of proof as to ownership.—*When the*

question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Section 110 deals with the burden of proof. Where the provision applies, the burden of proving that another person who is in possession is not the owner lies on the person who affirms against the ownership of that other person. But, for Section 110 to be attracted, there must be a question as to whether any person is the owner of anything and the ownership claimed must be that of which he is shown to be in possession. Section 110 is based on the principle that title follows possession. That is why the provision postulates that where a person is shown to be in possession, and a question arises as to whether that person is shown to be in possession, and a question arises as to whether that person is the owner, the law casts the burden of disproving ownership on the individual who affirms that the person in possession is not the owner."

56. Here, even if ancestors of plaintiff as Shebait are managing the temple and offering Pooja for more than 100 years and are discharging the duties and sharing responsibility of Shebait uninterruptedly and they are in lawful possession, then in that condition State as defendant which had no title cannot invade his possession. As discussed above, defendants nowhere pleaded and proved or discharged the presumption that temple

in question is a State temple. Defendants pleaded that it is a public temple and they stopped then and there only. If public offers Pooja and come for Darshan of deities then also nature of property does not alter and it remains private property. On this count also case of defendants pales into insignificance and oblivion.

57. Prior to 1935 some gazette notification in 1913 or 1920 regulated the grant of religious places. Thereafter, in 1930 **Nigrani Ka Kanoon Gwalior Rajya** was implemented under which Devsthani Nemnuk has been disbursed to all the temples irrespective of their status and apparently ancestors of plaintiff also received the same purportedly as shebait. In 1935 new Act **कवाअद माफीदारान जुज्वे आराजी व नक्दी, रियासत ग्वालियर, सम्वत 1991** came into existence (hereafter referred to as "the Act of Samvat, 1991"). As per Section 3(1) of the Act of Samvat, 1991 definition of Muafi was given and as per that definition Muafi means cash or land (आराजी). Instant case is a case of Muafi cash which was given to the ancestors of plaintiff and therefore, in some records, name of ancestors of plaintiff and their temple might have been figured.

58. The said cash grant was given as Muafi Devsthani as per Section 4(4) of the Act of Samvat, 1991. Defence witness Mohanlal Daultani (DW-1) admits this fact that ancestors of plaintiff were given *nemnuk* for offering prayer and to serve the

deities and therefore, it cannot be assumed through the Act that by way of grant of Muafi Devsthani or *nemnuk* intention of the Act or native State was to call the temple as Government temple.

59. Perusal of Sections 6 and 8 of the Act of Samvat, 1991 reflects successor/heir of Muafidar meaning thereby that after the death of Muafidar his successor would receive the grant.

60. Section 12 of the Act of Samvat, 1991 deals in respect of possession wherein after receiving Muafi Devsthani and enrollment of Devsthan in Muafi Register, name of the Muafidar (one who receives grant) shall be registered as Pujari, therefore, even if document vide Ex-D/1, D/2 and D/3 or Ex-P/32 which are registers of Muafi Department refer the ancestors of plaintiff as Pujari, it does not connote or indicate that they were not owner of the temple or were Pujaris only. In fact their names were registered as per Section 12 of the Act of Samvat, 1991 and understandably so because same section further provides that if any person is incapable of performing Pooja of deity, then his near relative who is capable would be registered in the Muafi Register as Pujari.

61. This aspect is further supported by Section 16A of the Act of Samvat, 1991 in which it has been referred that cash grant/Nakdi Muafi Devsthani would be maintained generation to generation meaning thereby that ownership of temple or

Devsthan would be of Muafidar and it would be hereditary.

62. Section 30 of the Act of Samvat, 1991 provides for an exigency wherein if Muafidar does not receive grant for one year then grant would be forfeited unless Muafidar explained that he managed the provisions for offering and maintenance to the deities and in absence of Muafidar the person who performed Pooja, would be entitled for Muafi grant. Section 34 of the Act of Samvat, 1991 provides for a situation wherein Muafidar for the reasons assigned into it is incapable of performing the deities then he shall get Pooja/Service performed through his near relative or through his agent.

63. Therefore, perusal of different provisions of the Act of Samvat, 1991 reveals that even if Gwalior State gave some amount as cash grant (nemnuk) some 70-80 years back to the temple then it does not give any right, title or authority to the State to lay claim over temple. Since the temple is of ownership of ancestors of plaintiff and is a private property, therefore, State Government has no right to constitute any public trust under the provisions of M.P. Public Trust Act, 1951.

64. Besides that, in cross-examination, witness Ramdas Patil (PW-1) pleaded ignorance about whether temple was public temple or not. Plaintiff himself appeared in the dock and he denied the suggestion that there is no taxation imposed on temple and explained that tax is levied over temple. Counsel for

the appellant raised the point that as per Section 136 of M.P. Municipal Corporation Act, 1961 Government properties are exempted from taxation but through different receipts Ex-P/22 to 24 he explained that every year he is paying property tax and house tax over the temple.

65. Plaintiff's witnesses namely Baikunthnath Chaturvedi (PW-3), Prabhudayal Gupta (PW-4) and Harinarayan Sharma (PW-5) deposed before the trial Court that in temple Shiv Panchayat was anointed in 1951-52 and ceremony was attended by them but no cross-examination over these witnesses was made by the respondents/defendants, which may bring home case of plaintiff as false. This material fact has not been taken into consideration by the trial Court thus committed jurisdictional error of law.

Regarding application under Order XLI Rule 27 of CPC

I.A.No.10704/2007

66. Appellant has preferred this application bringing additional documents on record which were earlier not in the knowledge and possession of plaintiff and being public documents they were in the possession of the defendants. Through these documents, appellant has tried to place the judgment of 1903 of Court and some documents of different department to demonstrate that appellate Court vide judgment dated 21-09-1903 found that ancestors of the plaintiff did not receive any donation in cash (Keshavdev disciple of Mangilal Vs. Girvar

s/o Keshav Brahmin) and the judgment of the then High Court of Gwalior State. Since findings and conclusions arrived at by this Court are not based upon the documents filed by the appellant through this application and looking to the age old matter pending for last 44 years, it would be futile exercise to remand the matter back to the trial Court. Therefore, application preferred under Order XLI Rule 27 of CPC by the appellant is hereby disposed, albeit conclusions remained intact. Therefore, I.A.No.10704/2007 stands disposed of accordingly.

Conclusion

67. After considering the pleadings, evidence led by the parties, legal position and the submissions advanced by the counsel for the parties this Court finds preponderant circumstances and over whelming material to accept the case of the appellant. Trial Court did not appreciate the facts and evidence led by the plaintiff and caused jurisdictional error and illegality in not considering those pieces of evidence surfaced on record. Legal position as discussed above is not subject matter of discussion in the judgment of trial Court, therefore it suffers from illegality and perversity. In the cumulative analysis, judgment of the trial Court cannot be allowed to sustain and therefore, is hereby set aside.

68. *Resultantly*, the appeal stands allowed and consequently suit preferred by the plaintiff seeking declaration and permanent

injunction stands decreed. Proclamation made by the defendants regarding appointment of Pujari and for taking the temple into the trust stands quashed. Defendants/State of Madhya Pradesh are injuncted to interfere into the peaceful possession of the plaintiff/appellant.

69. Before parting as discussed above, it is hereby directed that plaintiff shall maintain the temple with utmost care and undertake renovations and maintenance regularly by personal means and if volunteered by public then by public offerings and no commercial use/sale/mortgage is permitted. Public shall offer Pooja regularly during the time of temple uninterruptedly.

70. **Appeal stands allowed and disposed of**. No costs. Office to prepare decree accordingly.

(Anand Pathak)
Judge

Anil*