

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 148 OF 2016****ALONGWITH****CIVIL APPLICATION NO. 1914 OF 2015**

Ramanna Amannappa Masare)
Since deceased through legal heirs)

1a. Mallinath Ramanna Masare)
Age : 53 years, Occ : Agriculturist,)

1b. Sunil Ramanna Masare)
Age : 48 years, Occ : Agriculturist,)

1c. Anil Ramanna Masare)
Age : 45 years, Occ : Agriculturist,)

1d. Smt.Prabhavati Ramanna Masare)
Age : 82 years, Occ : Agriculturist,)
All r/o. 896, North Kasba, Solapur,)
District : Solapur)

..... Appellants
(Org.Defendant No.2)

VERSUS

1. Bhanudas Dagadu Patange)
Age : Adult, Occ : Priest)

2. Vishnu Dagadu Patange)
Age : Adult, Occ : Priest)

3. Audumbar Dagadu Patange)
Age : Adult, Occ : Priest)
All r/o. Rupa Bhavani Mandir,)
Bhavani Peth, Solapur)

4. Vijay @ Ambadas Dattatraya Pawar)
Since deceased through legal heirs)

4a. Smt.Kamalabai Ambadas Pawar,)
Age : 70 years, Occ : Household,)
R/o. Sri Rupa Bhavani Mandir Compound)
Bhavani Peth, Solapur)

4b. Smt.Shobha Jayant Salunke)
Age : 50 years, Occ : Household,)
R/o. New Tirhe Gaon, Forest, Solapur)

4c. Pramod Ambadas Pawar,)
Age : 48 years, Occ : Pujari,)
R/o. Sri Rupa Bhavani Mandir Compound)
Bhavani Peth, Solapur)

4d. Smt.Rupdevi Ajitsingh Jagtap,)
Age : 45 years, Occ : Household,)
R/o. At Post Murum, Farande Vasti,)
Tal. Baramati, Dist. Pune)

4e. Shri Raju Ambadas Pawar,)
Age : 43 years, Occ : Pujari,)

4f. Shri Sanju Ambadas Pawar,)
Age : 43 years, Occ : Pujari,)

4g. Shri Sachin Ambadas Pawar)
Age : 38 years, Occ : Pujari,)
Nos. 4e to 4g, R/o. Shri Rupa Bhavani)
Mandir Compound, Bhavani Peth,)
Solapur)

..... Respondents
(Resp.Nos.1 to 3 Org.
Plaintiffs, Resp.No.4 Org.
Dft No.1)

Mr.Vineet B.Naik, Senior Advocate, a/w. Mr.R.S.Alange for the Appellants.

Mr.Rajiv Patil, Senior Advocate, i/b. Mr.A.B.Tajane for the Respondent nos. 1 to 3.

Mr.P.K.Dhakephalkar, Senior Advocate, i/b. Mr.S.R.Bhalekar for Respondent nos. 4(a) to 4(g).

CORAM : R.D. DHANUKA, J.

RESERVED ON : 30th SEPTEMBER, 2016

PRONOUNCED ON : 21st DECEMBER, 2016

JUDGMENT :

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (original defendant nos. 2A to 2D) have impugned the judgment and decree dated 30th September, 2015 passed by the learned Principal District Judge, Solapur allowing the appeal filed by the respondent nos. 1 to 3 (original plaintiffs) and dismissing the cross objections filed by the appellants and setting aside the decree passed by the learned II, Joint Civil Judge, Junior Division, Solapur and decreeing the suit filed by the original plaintiffs. The first appellate court has declared that the plaintiffs have right to take half share in the income before Goddess Shree Rupa Bhavani Deosthan, Bhavani Peth, Solapur by performing Pooja every alternate week for 11½ months and to receive income daily to the extent of half share during the period Navratra Utsav. The appellants (original defendant nos. 2A to 2C) and original defendant no.1 are restrained from interfering the plaintiffs from performing Pooja and receiving the said income as directed in the said judgment and decree. Some of the relevant facts for the purpose of deciding this second appeal are as under :-

2. By consent of parties, the second appeal is heard finally at the admission stage. For the sake of convenience, the original plaintiffs are hereinafter referred to as the Patanges, original defendant no.1 herein is referred to as the Pawars and defendant nos.2A to 2C are hereinafter referred to as the Masares). It was the case

of the plaintiffs that the suit Deosthan i.e. Goddess Shri Rupa Bhavani Devasthan was established about 150 years ago.

3. It was the case of the Patanges that the ancestors of the Pawars had filed a suit bearing Regular Civil Suit No.1660 of 1933 against the great grand-father of the original defendant no.2/Amappa, Ramappa Masare and another in respect of the rights to take the income of the deity Goddess Shree Rupa Bhavani between the plaintiffs and the defendants in the suit property. It was the case of the plaintiffs to the said suit that the plaintiffs therein had 8 Annas share in the income of the said deity and the remaining 8 Annas share income was of the grand-father of the plaintiff nos. 1 to 3 herein. On 5th December, 1934, the said suit bearing Regular Civil Suit No.1660 of 1933 was compromised. It was the case of the Patanges that in the said compromise arrived at between the parties thereto, it was agreed that plaintiff nos. 1 and 2 in that suit were having $\frac{1}{2}$ share i.e. 8 Annas in the income of the said deity and he should enjoy the same and the defendants in that suit should not obstruct the plaintiffs from the same and the income during yearly festival to be taken by the plaintiffs to the extent of their 8 Annas share.

4. It was the case of the Patanges that in view of the compromise decree, the contention of the Pawars in respect of the 8 Annas share of the grand-father of the Patanges was neither challenged nor denied by the great grand-father of the Masares in the present proceedings before the learned trial judge and the defendant no.1 in the said Regular Civil Suit No.1660 of 1933. It is also the case of the Patanges that by the said compromise decree, no right in respect of receiving the income of the said Goddess Shree Rupa Bhavani by the Masares in the said R.C.S.No.1660 of 1933 was established or decreed nor it was claimed by the

Masares in that suit. It is the case of the Patanges that the Masares were not having any right, title and interest or any share in the income of the Goddess Shree Rupa Bhavani during the entire period of one year along with the period of Navaratra Mahotsav commencing from Ashwin Shuddha Pratipada to Kartik Shuddha Pratipada in each year.

5. It was the case of the Patanges that after the death of the mother of the plaintiff no.1 viz. Sulochana Dagadu Pujari, the Patanges opened her private box and found one original document in Modi script dated 1st December, 1919. They obtained translation of the said Modi script in Marathi script and thereafter came to know that their right to take income of the Goddess Shree Rupa Bhavani had been clearly mentioned by way of agreement as such which had been styled as 'Halnama'.

6. It is the case of the Patanges that in view of the said document i.e. Halnama, the Patanges amended their plaint and inserted paragraph 2A in the plaint. The Pawars filed written statement. The Masares filed written statement and additional written statement.

7. It was the case of the Patanges that the defendant no.1 i.e. Vijay alias Ambadas Dattatraya Pawar and the ancestors of the plaintiffs were performing the Pooja and used to take ½ share of the income of the said Goddess Shree Rupa Bhavani for the entire one year period including Navaratra Mahostav period and specifically denied the rights of the Masares in that regard. It is the case of the Patanges that the Pawars also admitted that in the land whereon the temple of Goddess Shree Rupa Bhavani was situated, was originally owned by one Manikchand Shah and the ancestors of the Patanges. The Pawars were the

employee of the said Manikchand Shah and they were doing the agricultural labour work with him. It is the case of the Patanges that the said Manikchand Shah established the said idol of Goddess Shree Rupa Bhavani on his land and constructed a temple thereupon.

8. It is also the case of the Patanges that the Pawars admitted that in October 1988, the Patanges and the Pawars used to perform the Pooja and used to take the income and they were looking after the affairs of the said temple and the Navaratra Mahostav of the said deity. The Masares obstructed to take the said income and the performance of the Pooja during the said Navaratra Mahostav. The Pawars contended that since they had not obstructed or objected the Patanges in respect of the said Pooja and from taking income to the extent of their $\frac{1}{2}$ share, the suit may be dismissed against them.

9. It is the case of the Patanges that the Masares also admitted that except the said Navratra Mahostav, the Patanges and the Pawars had right to perform the Pooja and to take all types of offerings, gifts etc. for the period of 11 $\frac{1}{2}$ months to the extent of 8 Annas share, but challenged the right to take the same and to perform Pooja during the period of the said Navaratra Mahotsav commencing from Ashwin Shuddha Pratipada to Kartik Shuddha Pratipada in each year. The Masares however challenged the document dated 1st December, 1919 i.e. Halnama (Ex.86) which was alleged to have been executed and signed by Shri Manikchand Shah, Shri Ramappa Amanappa Masare, Bhanudas Bhau Patange and Bandu Pirappa Ramanshetti.

10. It was the case of the Masares that he was the sole trustee and manager of the Goddess Shree Rupa Bhavani temple and filed an application under section 18

of the Bombay Public Trust Act, 1950 and now named as Maharashtra Public Trust Act, 1950 (for short 'the said MPT Act') on 30th May, 1952 (Application No.3955 of 1952) for registration of the said Goddess Shree Rupa Bhavani temple as a public trust incorporating therein the rights of the parties and objects of the trust. The Masare described himself as a sole trustee of the said trust and mentioned the mode of succession to Trusteeship and Managership wherein it was pointed out that the male member in the family of the Masares was to act as Vahiwatdar and if there were more than one male member, they were to make the selection of the members succeeding to the post of Trusteeship and Managership. It was also provided that nobody outside the family of the Masares had any right to the temple and that he was the only Vahiwatdar of the temple. In the said application, the Masare had disclosed that there were two Pujaris in the temple having alternate right of worship every week and that the poojaries taking all income before he deity everyday as their personal income in lieu of Pooja and the Masare had nothing to do with the same.

11. It was further mentioned in the application that during the Navratra Mahotsav every year, the Masare had got the right of Pooja as Vahiwatdar and sole trustee and further right of collecting all the offerings before the deity during the said Navratra Mahotsav. In the said application, there was also a reference to the decree passed in Regular Civil Suit No.1660 of 1933 obtained by the poojaries against the sole Vahiwatdar viz. the deceased father and uncle of the Masares.

12. On 15th February, 1953, the learned Assistant Charity Commissioner, Pune Region, Pune held an enquiry in the said application filed by the Masares and after due notices to the two ladies Smt.Indirabai Dattatraya Pawar and Smt.Gangubai Babu Pawar and other interested parties registered the Rupa Bhavani temple as a

public trust vide registration no.A/64. It is the case of the Masares that they have been exercising their rights of performing Pooja and collecting all the offerings during Navratra Mahotsav every year till today. It is their case that during the Navratra Mahotsav of 1988, the original Patanges and the Pawars started denying the right of the Masares of performing Pooja of the said deity and right of collecting the offerings offered to the said deity during the said Navratra Mahotsav. The Masares therefore filed an application on 5th October, 1988 under section 41-E of the Bombay Public Trust Act (Application No.15 of 1988) before the Joint Charity Commissioner, Pune inter alia praying for permanent injunction against the Pawars and Patanges prohibiting them from performing Pooja and collecting offerings to the said deity during Navratra Mahotsav every year.

13. Masares applied for interim injunction before the learned Joint Charity Commissioner in the said application which was filed under section 41-E of the Bombay Public Trust Act. The Joint Charity Commissioner, Pune granted ad-interim injunction in favour of the Masares. On 21st August, 1989 the Pawars filed reply to the said application filed under section 41-E. It is the case of the Masares that inspite of the order of temporary injunction dated 5th October, 1988 passed by the learned Joint Charity Commissioner, Pune, Pawars and Patanges continued their illegal activities and started threatening the Masares and disturbing the right of the Vahiwat, management and administration of trust.

14. Masares therefore filed an application under section 41-A of the Bombay Public Trust Act on 3rd August, 1989 seeking administrative directions against the Pawars and Patanges not to collect offerings before the deity by way of donations, subscriptions during Navratra Mahotsav and prayed for directions that the Pawars and Patanges, their servants, agents, relatives should not interfere and disturb the

legal rights of the Masares of performing Pooja of deity during 15 days of Navratra Utsav and praying for consequential directions against the Pawars and Patanges and other poojaries of the deity.

15. On 21st August, 1989, Pawars filed their say in the Application No.14 of 1989. The rest of the respondents i.e. Patanges though appeared, did not file any written statement/reply.

16. On 22nd September, 1989, the learned Joint Charity Commissioner passed a common judgment and order in the Application No.15 of 1988 filed under section 41-E and Application No. 14 of 1989 filed under section 41-A of the Bombay Public Trust Act and issued directions to the effect that the Masares are entitled to perform the annual utsav of Rupa Bhavani temple during the Navratra Mahotsav i.e. Ashwin Shuddha – 1 to Ashwin Shuddha – 15 and that the Masares are entitled to collect the offerings before the deity during the said period. By the said order, the Pawars and Patanges were restrained from obstructing the Masares from Navaratra Mahotsav, in any manner whatsoever insofar as their rights recorded in the said order were concerned.

17. On 26th September, 1989, the Pawars preferred Civil Miscellaneous Appeal (248 of 1989) against the order passed by the Joint Charity Commissioner in Application 15 of 1988 passed under section 41-E of the Bombay Public Trust Act before the District Court at Solapur. The Patanges though appeared in that proceedings, did not contest the said appeal nor supported the Pawars.

18. On 26th September, 1989, the Pawars filed an application (Ex.5) in Civil Miscellaneous Appeal No. 248 of 1989 and applied for stay of the operation of the

judgment and order dated 26th September, 1989 passed by the Joint Charity Commissioner in Application No. 15 of 1988 before the District Court at Solapur.

19. The learned District Judge did not grant any stay of the operation of the judgment and order dated 22nd September, 1989 in that application (Ex.5) filed by the Pawars in Civil Miscellaneous Application No. 248 of 1989. The learned District Judge however appointed Mr.S.B.Lamgunde, an advocate practicing in Solapur as a Court Commissioner with a direction to visit to said temple and to seal the cash collection box in the presence of the parties and to keep the key of the box with himself until further orders. The Court Commissioner was further directed to visit the temple and to ascertain whether the seal was intact or otherwise and report accordingly to the court.

20. On 6th October, 1989, the Pawars filed a writ petition (4203 of 1989) inter alia impugning the common judgment and order dated 22nd September, 1989 passed by the learned Joint Charity Commissioner in Application No.15 of 1988 and Application No.14 of 1989 prayed for an injunction against the Masares, their servants and agents, restraining them from obstructing the Pawars from performing Pooja of and collecting offerings offered to the said deity. Since the judgment in Civil Misc.Application No.248 of 1989 filed by Pawars was then not delivered, the Division Bench of this court initially adjourned the hearing of the said Writ Petition No.4203 of 1989 for one week. By an order dated 5th April, 1990, the Division Bench of this court dismissed the said Writ Petition No.4203 of 1989 filed by the Pawars impugning the common order passed by the Joint Charity Commissioner under section 41-A and 41-E of the Bombay Public Trust Act. The Pawars thereafter filed a Special Leave Petition (11617 of 1990) before the Supreme Court of India and impugned the said order dated 5th April, 1990 passed

by the Division Bench of this court dismissing the writ petition. By an order dated 8th October, 1990, the Supreme Court of India dismissed the said Special Leave Petition filed by the Pawars.

21. On 11th October, 1989, the application (Ex.5) filed by the Pawars for stay in Civil Miscellaneous Application No. 248 of 1989 came to be dismissed by the learned Additional District Judge at Solapur. On 29th November, 1989 the Pawars preferred Writ Petition (1677 of 1990) in this court challenging the final order dated 11th October, 1989 passed by the Second Additional District Judge below Ex.5 in Civil Miscellaneous Application No. 248 of 1989. On 19th February, 1991 this court dismissed the said Writ Petition No.1677 of 1990 filed by the Pawars against the final order passed below Ex.5 in Civil Miscellaneous Application No. 248 of 1989.

22. On 29th September, 1991, the Pawars filed execution application (Regular Darkhast No.287 of 1991 in the court of learned Civil Judge, Senior Division at Solapur inter alia praying for execution of the decree in Civil Suit No.1660 of 1933 and also prayed that the Masares be detained in civil prison for disobeying the decree passed in the Civil Suit No.1660 of 1933 by the Civil Court. The Masares filed their affidavit in the said execution application on 5th October, 1991 before the learned Joint Civil Judge, Junior Division.

23. On 15th October, 1991 the learned Joint Civil Judge Junior Division at Solapur rejected the objections filed by the Masares and directed that the said Regular Darkhast No.287 of 1991 to be proceeded with. Masares filed a writ petition on 2nd May, 1992 (3174 of 1992) in this court impugning the order of the learned Joint Civil Judge Junior Division rejecting the objections filed by the

Masares.

24. On 30th July, 1992, the said writ petition filed by the Masares came to be admitted by this court and further proceeding in Regular Darkhast No.281 of 1991 came to be stayed by this court. The said writ petition is pending.

25. Sometime in the year 1992, the Pawars filed an independent suit (Special Civil Suit No.33 of 1992) in the Court of Civil Judge Senior Division at Solapur inter alia praying for compensation or damages of Rs.1,00,000/- for the alleged loss of income which the Pawars ought to have received during the Navratra Mahotsav of the years 1988 to 1991 and also damages towards the mental injury alleged to have been caused by the Masares to the Pawars. The Masares have filed their written statement in the said proceedings and have resisted the said suit with cost.

26. Sometime in the year 1996, the Pawars filed First Appeal (1081 of 1996) before the learned District Court and impugned the order passed by the learned 2nd Additional District Judge dismissing the application at Ex.5 in Civil Miscellaneous Application No. 248 of 1989. The said first appeal is admitted and is pending for hearing and final disposal.

27. On 7th August, 1996, the learned Joint Civil Judge, Senior Division at Solapur passed a decree in Special Civil Suit No.33 of 1992 in the sum of Rs.48,000/- against Masares together with proportionate costs. The Masares have impugned the said decree dated 7th August, 1996 by filing First Appeal (1158 of 1996) in this court on 11th October, 1996. The said appeal is now transferred to the District Court at Solapur and is numbered as 131 of 2012 which is pending for

hearing and final disposal in that court.

28. On 23rd September, 1997 the Patanges filed a civil Suit (Regular Civil Suit No.849 of 1997) inter alia praying for a declaration and injunction against the Masares and Pawars before the learned Civil Judge, Senior Division at Solapur. On 6th January, 2004 the learned IInd Joint Civil Judge, Junior Division dismissed the said suit filed by the Patanges.

29. On 8th March, 2004 the Patanges preferred an appeal (Regular Civil Appeal No.47 of 2004) and impugned the said judgment and decree dated 6th January, 2004 before the learned District Court at Solapur. On 30th September, 2015, the learned Principal District Judge, Solapur allowed the said Regular Civil Appeal No.47 of 2007 filed by the Patanges and has held that the Patanges have right to receive ½ share in the income before the Goddess Shree Rupa Bhavani Deosthan during the period of Navratra festival.

30. The Masares filed an application (Ex.40) before the learned Principal District Judge on 1st October, 2015 praying for stay of the operation of the judgment and decree dated 7th October, 2015. The learned Principal District Judge allowed the said application (below Ex.40) and directed the Masares to give bank guarantee of Rs.2 lacs. The Patanges filed a writ petition (10121 of 2015) and impugned the said order dated 7th October, 2015 passed by the learned Principal District Judge in this court.

31. By an order dated 14th October, 2015, this court disposed of the said writ petition (10121 of 2015) and granted liberty to Patanges to file an application before the District Court for modification of the order passed by the learned

Principal District Judge below Ex.40. The Patanges filed a Revision Application (3 of 2015) before the learned Principal District Judge at Solapur seeking review of the order dated 7th October, 2015 passed below Ex.40. By an order dated 27th October, 2015, the learned Principal District Judge, Solapur dismissed the said review application (3 of 2015).

32. Being aggrieved by the said judgment and decree passed by the learned Principal District Judge on 30th September, 2015 allowing the appeal filed by the Patanges (Regular Civil Appeal No.47 of 2004), the Masares have filed this second appeal under section 100 of the Code of Civil Procedure, 1908. At the request of the learned senior counsels for parties, this court directed that the second appeal be heard finally at the admission stage.

33. Mr.Naik, learned senior counsel for the Masares tendered a list of the substantial questions of law for consideration of this court. Out of the seven questions suggested by the learned senior counsel for consideration of this court, after hearing the parties, following substantial questions of law are formulated :-

(a) Whether the learned District Court has appreciated Ex.86 i.e. 'Halnama' alleged to have been executed on 1st December, 1919 between the predecessor of the Patanges, Pawars and Masares on one part and the owner Mr.Manikchand Shah in accordance with the provisions of Indian Evidence Act, 1872 or the said document is exhibited in the teeth of Exs.108 and 118 ?

(b) Whether the order dated 22nd September, 1989 passed by the learned Joint Charity Commissioner and confirmed by the order dated 5th April, 1990 passed by this court had merged

with the order dated 8th October, 1990 passed by the Supreme Court and had attained finality and was binding on Patanges also ?

(c) Whether the principles of res judicata were attracted to the civil suit filed by the Patanges in view of the order passed by the Joint Charity Commissioner which has been upheld by the District Court, by this court and by the Supreme Court arising out of the same controversy between the same parties and touching the subject matter of the suit ?

(d) Whether the suit filed by the Patanges was barred by law of limitation and more particularly under Article 58 of the Limitation Act, 1963 ?

34. Mr.Naik, learned senior counsel for the Masares invited my attention to the pleadings, various documents, oral evidence and also various order passed by the Deputy Charity Commissioner and this Court and various proceedings between the parties. He submits that Mr.Bhanudas Dagadu Patange, one of the plaintiffs expired during the pendency of the suit. The plaintiff no.2 did not enter the witness box. The plaintiff no.4 was examined by Patange who expired before commencement of his cross-examination. Legal heirs of the plaintiff no.1 was examined who was 30 years old at the time of recoding his evidence. Patanges had also examined Mr.Vinod Shah, Mr.Pandurang Ukarande who have alleged to have been translated the alleged 'Halnama.' He also invited my attention to the decree passed by the Civil Court in Regular Civil Suit No.1660 of 1933 which was filed by Gangubai Pawar and another against the defendants which decree was based on compromise.

35. It is submitted that under the said compromise decree, Pawars were entitled to perform pooja during 11 and ½ months of the year and was given ½ share in the offerings made to the said deity. He submits that the said compromise decree did not confirm any rights on Patanges. Patanges were not even parties to the said suit. He submits that only in the recital of the said compromise deed, names of Patanges were referred but no rights were given in favour of Patanges. He submits that the said Halnama alleged to have been executed between i) Mr. Manikchand Amichand Shah, ii) Mr. Bhanudas Bhau Patange, iii) Mr. Bandu Pirappa Ramanshetti and iv) Ramappa Amagappa Masare was seriously disputed by Masares. He submits that there were several discrepancies in the translation of the said document. Even sequence of the alleged signatory of the said document was different.

36. It is submitted by the learned senior counsel that Masare was adopted vide Deed of Adoption Exhibit-145. He submits that the witness examined by Patanges in the present suit, had admitted that he was not personally aware of alleged 1988 document. He admitted that since 1988 onwards, Masares were spending the entire amount on management of Goddess Shree Rupa Bhavani temple during Navratra Mahotsav. He had no document to show that prior to 1988, Patanges or Pawars were spending any money during Navratra Mahotsav. He submits that every member of the Patanges family was aware of 1988 document.

37. In so far as the evidence led by Mr. Vinod Shah who was examined by Patanges is concerned, it is submitted by the learned senior counsel that in the year 1945, Mr. Manikchand Shah expired. The said Mr. Vinod Shah was 66 years old when he was examined. In the year 1937, the said witness was about 7 to 8

years old when Mr.Manikchand Shah expired. The said witness in the cross-examination admitted that the said Halnama was not executed in his presence. He had identified the signature because he had alleged to have seen the signature of Mr.Manikchand Shah in the account books. In so far as opinion of the State examiner of the document is concerned, learned senior counsel for Masares submits that the said examiner had opined that ink on 1986 document does not tally with the ink on 1919 document. The State examiner was not examined as witness by Masares. The said document was admitted in evidence. He submits that the document marked as Exhibit-86 could not have been relied upon by the learned Principal District Judge in teeth of opinion of the State examiner of document. He submits that neither Masares nor Pawars could explain as to whether Mr.Ramanshetti who was one of the alleged signatory of the Halnama was entitled to some share under the said document had disappeared and what happened to share of Mr.Ramanshetti in the offerings made to the deity.

38. It is submitted by the learned senior counsel for Masares that on 30th May 1952, an enquiry was properly conducted by the Charity Commissioner under Section 18 of the Maharashtra Public Trust Act, 1950 and the properties including the said Goddess Shree Rupa Bhavani temple vested in the trust. The said properties were entered into the schedule under the provisions of the Maharashtra Public Trust Act. One of the Masares was the sole trustee of the said trust. He submits that the certificate issued by the Charity Commissioner on such enquiry under Section 18 of the Maharashtra Public Trust Act is conclusive and neither Pawars nor Patanges have challenged the said certificate and the schedule and thus the same is binding on all the parties. He submits that the Charity Commissioner had issued notices to all the parties concerned before conducting such enquiry under Section 18 of the Maharashtra Public Trust Act. It is submitted

that according to the said Register of Public Trust (PTR), two poojaries namely Patanges and Pawars were entitled to collect offerings made to the deity during 11 and ½ months in a year whereas it was provided that during the Navratri Festival, Masares alone would be entitled to collect offerings and to incur expenditure of that offerings during the Navratri Festival. He also invited my attention to the objects of the said trust i.e. to maintain and upkeep of temple and more particularly during the Navratri Ustav.

39. Mr.Naik, learned senior counsel for Masares invited my attention to the averments made in the application under Section 41-E of the Maharashtra Public Trust Act filed in the year 1981 by Masares. My attention is also invited to the order passed by the Joint Charity Commissioner in both those applications filed by Masares. In the said proceedings, Patanges were described as Pujaris. He submits that Patanges were though served with the papers and proceedings and the notices in the said proceedings, Patanges were all throughout absent and did not oppose the said two applications filed by Masares. He submits that in the said order dated 22nd September 1989 passed by the Joint Charity Commissioner while disposing of the application under Section 41-A and 41-E of the Maharashtra Public Trust Act, various findings in favour of Masares regarding their rights to worship and collect offerings during the Navratra Mahostav and to incur expenditure out of the said collection came to be made. He submits that the said order dated 22nd September 1989 passed by the Joint Charity Commissioner was though challenged by Pawars by filing a writ petition, admittedly the Patanges did not challenge the said order dated 22nd September 1989.

40. It is submitted by the learned senior counsel that the writ petition filed by Pawars impugning the common order passed by the Joint Charity Commissioner

on 22nd September 1989 in the applications filed under Section 41-A and 41-E of the Maharashtra Public Trust Act came to be dismissed by an order passed by this Court. He submits that the said order passed by this Court dismissing the writ petition was impugned by Pawars by filing Special Leave Petition. Patanges did not challenge the said order passed by the High Court and the Supreme Court. It is submitted that the said Special Leave Petition filed by Pawars came to be dismissed on 5th April 1990. It is submitted that the impugned order passed by the Joint Charity Commissioner granting various reliefs and recording various findings in favour of Masares attained finality upto the Supreme Court. He submits that the order passed by the Joint Charity Commissioner which was upheld by this Court has merged with the order passed by the Supreme Court on 5th April 1990.

41. It is submitted by the learned senior counsel that Pawars had filed a separate appeal against the said order of Joint Charity Commissioner dated 22nd September 1989 in so far as the order under Section 41-E is concerned i.e. Civil Misc. Appeal No.248 of 1989 before the District Court. Though Patanges were parties to the said proceedings, they did not contest the said appeal filed by Pawars. He submits that the District Court also dismissed the said appeal (Civil Misc. Appeal No.248 of 1989). He submits that first appeal (1081 of 1996) filed by Pawars against the said order passed by the District Court in the appeal arising out of under Section 41-A is admitted and is pending in this Court. He submits that no stay of the order passed by the Joint Charity Commissioner or by the District Court is granted by this Court in the said appeal.

42. Learned senior counsel for the Masares invited my attention to the order passed by the District Court including the issues framed and reasons recorded

therein. He submits that since Pawars had challenged both the orders i.e. orders passed under Section 41-A and 41-E of the Maharashtra Public Trust Act by the Joint Charity Commissioner by filing a writ petition in this Court, the said writ petition having been dismissed by this Court, the said appeal filed by Pawars (1081 of 1996) could not have been filed in view of the order passed by the Joint Charity Commissioner under Section 41E having attained finality in view of dismissal of the writ petition filed by Pawars and the Special Leave Petition arising out of the said order also having been dismissed.

43. Learned senior counsel for Masares invited my attention to the order passed by this Court in first appeal (1158 of 1996) and the interim arrangement arrived at between Masares and Pawars in the said proceedings. He submits that the said interim arrangement arrived at between Masares and Pawars is still in operation. It is submitted that though Patanges had filed intervention application in the first appeal filed by Masares in this Court arising out of decree passed by the District Court in favour of the Pawars, this Court has admittedly rejected the said intervention application by an order dated 17th November 1997.

44. It is submitted by the learned senior counsel for Masares that in the writ petition filed by Patanges, no grievance was made against the Masares. Patanges had demanded shares of Pawars.

45. Learned senior counsel for Masares invited my attention to some of the paragraphs of the impugned judgment and decree passed by the learned Principal District Judge and would submit that even if the document which was 30 years or more than 30 years old could be marked as Exhibit under Section 90 of the Indian Evidence Act, 1872, the learned Principal District Judge could not have

considered the contents thereof unless the same were proved. He submits that the contents of a document which was 30 years or more old are not proved automatically under Section 90 of the Indian Evidence Act, 1872. In support of this submission, learned senior counsel for Masares placed reliance on the judgment of the Supreme Court in the case of ***Pavitri Devi and Anr. Vs. Darbari Singh and Ors.***, reported in ***(1993) 4 SCC 392*** and more particularly paragraph 14 thereof.

46. Learned senior counsel for Masares submits that cause of action for filing a suit by Patanges arose on 10th September 1997 as was apparent from the averments made in the plaint by Patanges. He also invited my attention to paragraph 12 of the written statement filed by Pawars in the said suit. He submits that since the suit was for declaration of right, Article 58 of the Limitation Act, 1963 was attracted and the period of limitation was three years. He submits that since the suit was admittedly filed beyond the period of three years from the date of accrual of cause of action, the suit was ex facie barred by law of limitation.

47. Mr. Patil, learned senior counsel for the respondent nos. 1 to 3 (original plaintiffs) i.e. Patanges submits that it was the case of the Patanges that Goddess Shree Rupa Bhavani mandir was established before 150 years. Since beginning the Patanges and ancestors of the Pawars were sharing income equally by conducting the worship of the Goddess Shree Rupa Bhavani. He submits that the said arrangement continued all throughout. Masares or their ancestors did not have any right in the said income. He submits that the Masares were looking after the temple only as a Panch. He submits that even the Masares did not admittedly claim any right of worship or any share in the income/donation received by the said Goddess Shree Rupa Bhavani temple for 11 ½ months. He submits that the

Masares had admitted, all throughout that during those 11 ½ months, the Patanges and Pawars were having exclusive rights to perform worship and to collect income and share out of the donation etc. received by the said temple.

48. It is submitted by the learned senior counsel that under the said arrangement arrived at between the Patanges and Pawars, the Patanges have been conducting the Kakada Aarti and Shej Aarti. The Patanges and Pawars were conducting Madhyam Aarti jointly during the period of 'Ashwin Shuddha Pratipada to Kartik Shuddha Pratipada'. He submits that since the arrangements were going on between the Patanges and Pawars since beginning, Masares did not have any right whatsoever in the income received by the Goddess Shree Rupa Bhavani temple.

49. It is submitted by the learned senior counsel that the Pawars had filed Regular Civil Suit No.1660 of 1933 against the ancestors of the Masares for a declaration and injunction about the income of the said Deosthan. In the said suit, 8 Annas share of the Pawars had been admitted. The suit had been disposed off by a compromise pursis dated 7th December, 1994 in which 8 Annas share of the Patanges was admitted. It is submitted that the entitlement of the Patanges and Pawars of sharing income of the Deosthan has been proved and is implemented for last several decades. He submits that the Masares are however obstructing the Pawars and Patanges from taking income during the Navratra Mahotsav. The Pawars have thus filed a suit for a declaration that they had right to take the income of the Goddess Shree Rupa Bhavani temple in every alternate week in 11 months and they had right to take 50% income every day during the Navratri Mahotsav and applied for a declaration for the same. The Patanges in the said suit had also applied for injunction.

50. It is submitted that the Masares had filed a written statement in the said suit and denied that the Pawars and Patanges were taking 50% income. It was the case of the Masares that the temple was constructed on a private land and right of performing Pooja was with the ancestors of the Masares in the said temple. It was the case of the Masares that for 11 and ½ months the ancestors of the Patanges and Pawars were appointed as Pujaris. However during the period of 15 days, right of Pooja and collection were with the Masares.

51. Learned senior counsel invited my attention to the written statement filed by the Pawars that the said temple was 100 years old and admitted that the ancestors of the Patanges and Pawars used to conduct Pooja of the Goddess Rupa Bhavani and used to share income equally.

52. It is submitted by the learned senior counsel for the Patanges that the Masares were the Manager/Panch of the Goddess Shree Rupa Bhavani temple and if the Pawars did not appoint any person for performing Pooja, the Masares in that event could appoint a person for performing Pooja at the cost of the Pawars. He submitted that in the said suit filed by the Pawars against the Masares, no decree was passed that the Masares should be entitled to remaining 50% share in the income of the said Rupa Bhavani temple during the Navratri festival or during any other period of the year.

53. Insofar as Halnama is concerned, it is submitted by the learned senior counsel that role of each of the party to the said Halnama was described in the said document. The Patanges were entitled to perform Pooja in respect of Dasara festival. The Masares had hereditary right to act as Panch all throughout. The Masares were not concerned at all with performing Pooja or for sharing any

income generated by the said Rupa Bhavani Temple throughout the year. He submits that the Masares were to decorate the temple and it was their responsibility to provide extra facilities during the festival for the benefit and convenience of the devotees and in respect of those services rendered by the Masares. The Masares were entitled to take 1/4th of the offerings during the Navratri festival towards the expenditure incurred by the Masares and nothing else and the remaining offerings were to be divided between the Patanges and other pujaris.

54. Insofar as the document Halnama transcribed in Modi language which is relied upon by the Patanges and Pawars is concerned, it is submitted that the endorsement is made by the stamp vendor on the stamp paper on which the said document was transcribed. He submits that the said document was proved by leading oral evidence by the Pawars in the said suit. He submits that the translator of the said document was examined as one of the witness by the Pawars.

55. Learned senior counsel for the Patanges placed reliance on the written statement filed by the Pawars who admitted the arrangement between the Patanges and Pawars as canvassed by the Patanges in the said suit. He submits that there is no inconsistency in the stand taken by the Patanges and Pawars about their mutual right of performing Pooja and for sharing 50% of the income generated by the said Temple all throughout. Reliance is also placed on the evidence of Mr.Pandurang Ukranade who was the translator and it is submitted that the translation of the said document which was in Modi language was correct.

56. Learned senior counsel for the Patanges also placed reliance on the evidence of Deepak Shah who was one of their legal heirs and representative of the original owner of the suit land. He submits that in the said evidence also it was proved that

the Masares had no right of any nature whatsoever in the temple or in the income generated in the said Temple. He also placed reliance on the evidence of Mr.Maruti P.Sawant and Mr.Shahu R.Shinde. Learned senior counsel invited my attention to the written statement filed by the Masares in the suit and would submit that the Masares had clearly admitted that atleast during 11 and ½ months in the year, the Patanges and Pawars were sharing income equally. He submits that even in 1933 decree, the Masares kept silence about the right of Patanges to perform Pooja and to collect 50% of the income.

57. It is submitted by the learned senior counsel that the Patanges have already filed a separate revision application though belatedly in the year December 2015 which is still pending. It is submitted that the Charity Commissioner or any authority under the provisions of Maharashtra Public Trust Act, cannot decide the civil right of the parties. He submits that the civil right of Patanges could be decided only by the civil court and not by the Charity Commissioner or any other authority under section 41A and 41E of the Maharashtra Public Trust Act. He submits that any orders passed by the authority under the provisions of the said Act did not conclude the civil right of the parties and thus those orders would not be binding on the civil court. He placed reliance on the definition of 'court' under section 2(4) of the Maharashtra Public Trust Act, 1950 and also on the judgment of this court in case of **Vithoba B.Ghodke vs. Balkrishna G.Bhalerao, 1967, Mah.L.J.224** and in particular paragraph (7) in support of his submission that though the function performed by the Charity Commissioner or other authority under the provisions of the Maharashtra Public Trust Act are of quasi judicial nature, but they are not courts as defined under section 2(4) of the Maharashtra Public Trust Act.

58. Insofar as submission of the learned senior counsel for the Masares that the findings rendered by the two courts below were contrary to section 11 of the Code of Civil Procedure or the principles analogues thereto is concerned, it is submitted by the learned senior counsel that the findings rendered by the authority under the provisions of Maharashtra Public Trust Act could not be considered as res judicata upon the learned trial judge as well as the first appellate court. He submits that in any event, both the courts below have rightly rejected this plea of the Masares. He submits that the cross objection filed by the Masares is also rightly dismissed by the learned Principal District Judge.

59. Learned senior counsel for the Patanges placed reliance on the order dated 11th September, 2012 passed by this court in Writ Petition 8407 of 2011 arising out of the order passed by the Charity Commissioner and would submit that by the said order, all contentions of the parties are kept open. He placed reliance on the judgment of Supreme Court in case of ***Ugamsingh and Mishrimal vs. Kesrimal and others 1970 (3) SCC 831*** and in particular paragraphs 16 and 17 in support of his submission that the right to worship is a civil right and such civil right can be ascertained and adjudicated upon only by a civil court.

60. Insofar as order of Supreme Court relied upon by the learned senior counsel for the Masares arising out of the writ petition is concerned, it is submitted by the learned senior counsel for the Patanges that by the said order, the Special Leave Petition was simpliciter dismissed in limine and thus the order passed by this court was not merged with the order passed by the Supreme Court. In support of this submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Kunhayammed and others vs. State of Kerala and another (2000) 6 SCC 359*** and in particular paragraphs 27, 40 and 44. Reliance is also

place on judgment of Supreme Court in case of ***Gangadhara Palo vs. Revenue Divisional Officer and another (2011) 4 SCC 602*** and in particular paragraphs 5 to 7 in support of this submission. It is submitted that the judgment and decree passed by the lower appellate court being not perverse, cannot be interfered with by this court in this second appeal.

61. Mr.Dhakephalkar, learned senior counsel for the Pawars submits that the decree passed by the first appellate court holding that his clients are entitled to 50% share in the income of the Goddess Shree Rupa Bhavani Temple is already under execution. The executing court is ceased of the execution application. He submits that the first appeal filed by his clients against the order of the Charity Commissioner is pending in this court. He submits that the decree passed by the learned trial judge in favour of the Pawars has not been set aside by this court so far. He submits that even the public trust register also refers to a decree in favour of the Pawars in Suit No. 1660 of 1933 dated 5th December, 1934. He submits that the Charity Commissioner has no jurisdiction to set aside the said decree passed by the civil court.

62. It is submitted by the learned senior counsel that neither section 11 of the Code of Civil Procedure which provides for res judicata nor the principles analogues thereto applies to the proceedings which were filed by his clients before the learned trial judge or the proceedings before the first appellate court. He submits that the issue between the same parties in the two separate proceedings must be directly and substantially the same and the both the courts should be competent to pass the orders in both the proceedings. He submits that the Charity Commissioner has no jurisdiction to decide in respect of the rights of the Pujaris to take offerings or rights of the Vahivatdar to take the offerings. He submits that the

Masares did not claim any right as trustees. He placed reliance on section 80 of Maharashtra Public Trust Act and submits that there is bar under the said provisions on the authority to decide various disputes. He submits that the decision taken by the authority under Sections 41A to 41E are not final and conclusive and thus question of there being any res judicata or applicability of the principles of res judicata on the civil suit filed before the Civil Court did not arise. He submits that since the Charity Commissioner has no jurisdiction to decide about the civil rights of any party, the question of there being any res judicata in the matter did not arise.

63. Learned senior counsel for the Pawars placed reliance on the judgment of Supreme Court in case of ***Church of North India vs. Lavajibhai Ratanjibhai and others, (2005) 10 SCC 760*** and in particular paragraphs 69 and 70 and it is submitted that the rights of Pujaris to take offerings has to be decided by the civil court only and not by the Charity Commissioner. In support of this submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Sahebgouda (Dead) By Lrs. vs. Ogeppa, 2003 (6) SCC 151*** and in particular paragraphs 6 to 12 thereof.

64. Mr.Naik, learned senior counsel for the Patanges in rejoinder submits that his clients have not contested the rights of the Patanges and Pawars for 11 and ½ months of a year. It is submitted by the learned senior counsel that Bhanudas Patange had died. Vishnu did not enter the witness box. The suit filed in the year 1997 was based on the compromise decree. He submits that the witness examined by Patanges did not prove the documents. He submits that the alleged document of year 1919 was inconsistent with the decree passed by the Civil Court in the year 1933. He submits that there was no reference to the Halnama of 1919 in the

decree passed by the civil court in the year 1933. No rights were conferred in favour of the Patanges under the said decree passed by the civil court in the year 1933. He submits that there were only four parties in the said alleged document executed in the year 1919. He submits that there is no explanation in the suit about the share of Mr. Ramanshetty under the said alleged documents of the year 1919. He submits that the said alleged document of 1919 was not beyond doubt. Learned senior counsel for the Masares invited my attention to the averments made by the Pawars in their written statement and more particularly paragraphs 3 to 8.

65. Insofar as issue of limitation is concerned, it is submitted by the learned senior counsel that the plea of limitation was raised by the Pawars. However no issue was framed on the said plea of limitation by the learned trial judge. He submits that the Pawars had opposed the suit filed by the Patanges on every ground. He submits that the Pawars were not even included in the alleged Halnama of the year 1919. He submits that the party who had alleged to have signed the Ex.-145 was not even born on the date of his alleged signature on the said document.

66. Insofar as issue of res judicata dealt with by learned senior counsel for the Patanges and Pawars jointly is concerned, it is submitted by the learned senior counsel for the Masares that under the Trust Act, the authorities including the Charity Commissioner, Deputy Charity Commissioner and Assistant Charity Commissioner perform various functions as quasi judicial authority. He submits that the issue involved in the proceedings before the authority were directly and substantially the issues and thus the order passed by the Joint Charity Commissioner in the proceedings filed by the Masares having been confirmed right upto Supreme Court were binding all the parties to the civil suit. Learned

senior counsel for the Masares invited my attention to the prayers in the writ petition (4203 of 1989) and the order passed by this court in the said writ petition and submits that common order passed by the Joint Charity Commissioner was impugned by Pawars which writ petition came to be dismissed.

67. Insofar as issue of limitation is concerned, it is submitted by the learned senior counsel that the Patanges were fully aware of and had knowledge about the dismissal of the appeal by the District Court long back and thus the suit was hopelessly barred by law of limitation.

68. Mr.Patil, learned senior counsel for the Patanges in sur-rejoinder submits that in the written statement filed by the Masares before the learned trial judge, no plea of limitation was raised by the Masares. He submits that the issue of limitation was not raised even in the cross objection filed by the Masares before the first appellate court.

REASONS AND CONCLUSIONS

69. A perusal of the record indicates that the Patanges had filed a suit (Regular Civil Suit No.849 of 1997) against Mr.Vijay Dattarya Pawar and Mr.Ramanna Amannappa Masare inter alia praying for declaration and injunction. In the said suit, it was the case of the Patanges that the predecessors of the Patanges and Pawars used to perform Pooja as well as to take offerings equally and that the Masares had no interest of any nature whatsoever in the said income. It was the case of the Patanges that the Pawars were working as management trustees and used to look after the management of the temple.

70. The Patanges had relied upon the compromise decree dated 5th December, 1934 in Regular Civil Suit No.1660 of 1933 which was filed by the predecessors of the Pawars against the Masares for injunction and declaration. It was the case of the Patanges that in the said suit, half share of the Patanges as well as of Pawars was admitted by the Masares.

71. A perusal of the record further indicates that the Pawars in the written statement did not agree to the entire claim of the Patanges. The Pawars admitted that except the Navratri Mahotsav period, the Patanges and Pawars were alternatively performing the Pooja in every week as well as were taking offerings, donations etc. for 11 months in a year. The Pawars however denied that the Pawars and Patanges used to take income of the everyday equally during the Navratri festival. The Pawars also denied that half share of the Patanges were confirmed in the suit (Regular Civil Suit No.1660 of 1933). It was the case of the Pawars that in the year 1933, the predecessors of the Masares had objected to the Pawars taking income or that they were looking after the temple.

72. A perusal of the record indicates that the Masares had denied the claim of the Patanges and also denied that the Patanges and Pawars or their predecessors used to perform Pooja as well as used to take income received by way of offerings, donation since beginning Masares also denied that they were working as the management trustee only. They denied that the share of the Patanges was agreed as per decree passed in the said suit (Regular Civil Suit No.1660 of 1933). It was contended by the Masares that except Navratri utsav, the Pawars and Patanges were permitted to perform Pooja and to take offerings for 11 and ½ months. The Masares had placed reliance on the proceedings filed by them before the Charity Commissioner under sections 41A and 41E of the Maharashtra Public Trust Act

and various orders passed therein. They placed reliance on the scheme sanctioned by the Charity Commissioner under the provisions of 21(2) and 22(3) of the Maharashtra Public Trust Act. The Masares contended that the suit filed by the Patanges was not maintainable.

73. The learned trial judge framed seven issues for determination. The Patanges examined the plaintiff no.4 i.e. Mahadeo Patange, Dagadu Patange, Vinod Shah, Pandurang Ukarande, Shahu Shinde, Deepak Shah and Maruti Sawant. The Pawars filed a purnis stating that they were not intending to lead any evidence. The Masares examined Mr. Sunil Masare.

74. In the said proceedings, the Masares had raised an issue of maintainability of the said suit on the ground that the subject matter of the dispute was not of the civil nature. The learned trial judge held that the dispute was related to the right of the Patanges and the Pawars who take the share of income in their individual capacity. The suit filed by the Patanges was thus nothing but the suit to establish right in respect of the income as well as to perform the Pooja in the said Temple and thus the subject matter of the said suit was maintainable before the civil court. It is also held that the subject matter of the suit was not related to the trust property. The offerings before deity was neither income of the trust nor related to the trust property. The trial court held that it was not the case of the Masares that the offerings before the deity are income of the trust. The learned trial judge held that in view of the material placed on record, it was clear that the dispute was in respect of the right as to who was entitled to receive the offerings before the deity during the period of Navratri Mahotsav. The right claimed by the Patanges were connected with their rights. The learned trial judge adverted to and followed the judgment of Supreme Court in case of ***Ugam Singh and another vs. Kesrimal and***

others, AIR 1971 SC 2540 in which it was held that a right to worship is a civil right and any interference with such other right raises a dispute of civil nature and can be adjudicated upon in a civil suit. Learned trial judge also rejected the plea of the Masares that the suit was bad for want of permission of the Charity Commissioner.

75. Insofar as issue of res judicata raised by the Masares is concerned, the learned trial judge had specifically framed issue no.2 in respect of the said contention raised by the Masares. The learned trial judge adverted to and followed the judgment of this Court in case of **Vithoba Babaji Ghodke vs. Balkrishna Ganesh Bhalerao, 1967 Mh.L.J. 224** in which it was held that the Assistant Charity Commissioner or the Deputy Charity Commissioner or the Charity Commissioner, when they function in enquiries under the Act are no doubt authority performing function of a quasi judicial nature, but they are not Court. It is held that the proceedings pending before the authority are strictly not the suits. It is accordingly held that the suit filed by the Patanges was not barred by the principles of res judicata.

76. Insofar as the claim made by the Patanges in respect of their right of worship and collecting half share in the earnings of the deity during the Navratra Mahotsav is concerned, the learned trial judge has dealt with this plea while deciding issue nos. 4 and 5. The learned trial judge held that the Patanges and Pawars were having half share of the income during the Navratra Mahotsav. It is also held that the said aspect was decided in Regular Civil Suit No.1660 of 1933. The Pawars had not disputed the rights claimed by the Patanges.

77. The learned trial judge considered the decree passed in Regular Civil Suit No.1660 of 1933 and held that the said suit was between the ancestors of Pawars against the ancestors of Masares and it was very clear that the ancestors of the Patanges were not party to the said proceedings. The decree was passed between the ancestors of the Pawars and Masares. The learned trial judge held that since there was a compromise in the said suit, one half share was allotted to the ancestors of the Pawars and the remaining share was retained by Masares. It is held that though there were averments made by the ancestors of the Pawars about the share of the Patanges, the Patanges however never proved that in fact they had any share in the earnings of the deity or alleging their right of worship. It is held that the Patanges were required to prove by oral and documentary evidence that in fact they were having one half share since inception and till today and they were enjoying those rights without any interruption. Learned trial judge accordingly held that the claim of the Patanges was not proved or confirmed in the decree passed in Regular Civil Suit No.1660 of 1933.

78. Learned trial judge considered the document at Ex.86 i.e. Halnama which was relied upon by the Patanges. The said document was in Modi script. Mr.Pandurang Ukranade was examined who stated on oath that the translation of the said document was true and correct. It is held by the learned trial court that Bhanudas Patange and Bandu Rama Shetty were having one half share in the income. There was no averment in respect of the right of the Ramanshetty after getting the said document. The learned trial judge considered the evidence of the said Pandurang Ukranade and held that after the end of the Navratra Mahotsav, the persons mentioned in the said document of 1919, Ramanshetty and Bhanudas Patange were counting the offerings and 1/4th share was to be given to the Masares for their expenses incurred by them. The remaining amount was to be divided

between the Patanges and Ramanshetti. It is held that on scrutiny of evidence on record, it appears that the Patanges had not put their case as per the details disclosed from the document being Ex.86. Even after the receipt of the said document, the Patanges had not stated about the entire effect of the said document. The said document did not wholly corroborate the case put up by the Patanges. It is held that since the Patanges or his family members were having knowledge of the said document, it required them to seek relevance by pleading effective details disclosed from the said document. The Patanges had not pleaded averments in respect of right of Ramanshetti, Masares etc. as well as the details of the expenses and sought relief accordingly.

79. Insofar as the plea raised by the Masares that the said document of 1919 was bogus and forged is concerned, learned trial judge held that on further scrutiny of the said document, it appeared that there was overwriting in respect of the purchase of the stamp. The learned trial judge considered the report of the handwriting expert who opined that the word written as 'Solapur' had been altered from the original word written as 'Indapur'. There were traces of alterations and over writings. The learned trial judge accordingly held that it was clear that the case put up by the Patanges was not as per the details of the said alleged document. It is held that it was revealed from the handwriting expert opinion that the writing appears to be a fresh and in these circumstances, the document of 1919 was not a reliable document. The learned trial judge also observed that from the translation of the said document made in Marathi through the said witness Pandurang, it appears that the document was pertaining to the writing of the Bhanudas Patange, Masares and Ramanshetti. The said document appears to have been signed by the said Bhanudas Patange, Masares and Ramanshetti and also by one Manikchand Shah.

80. Learned trial Judge held that on scrutiny of record and evidence it appears that Mr. Ramanshetti never appeared in any proceedings and his ancestral also were never in picture in any proceedings occurring in respect of the said Temple. Patanges had not positively stated about the existence of the said Ramanshetti as well as said Ramanshetti taking half share of income personally. Learned trial Judge also considered the oral evidence of Vinod Hirachand Shah, who was examined by Patanges and held that the said witness did not positively state that the copy of Halnama was in their possession. In the cross-examination of the said witness, he admitted that he did not have any document containing the signatures of Manikchand Shah, who was stated to be the owner of the land on which the said temple was constructed. On the death of Manikchand Shah, the said witness was admittedly 8 years of old, and thus it was not possible that a boy who was 8 years old would be able to remember the signature of the deceased Manikchand Shah. Learned trial Court accordingly held that the testimony of the said witness was not reliable. It is held that it was not proved that the land on which the temple was constructed was owned by Manikchand Shah.

81. Learned trial Judge also considered the submissions of Patanges that the said Halnama being an ancient document, under section 90 of the Evidence Act, existence of the said document was deemed to have been proved. Learned trial Judge however, negatived the contention of the Patanges that since a presumption can be drawn in respect of the document which was more than 30 years old, the contents of the said document also can be considered as proof without separately proving the contents thereof in accordance with the provisions of the Evidence Act. It is also held that Patanges had not even filed the suit initially ascertaining their claim on the basis of the said Halnama. They had neither amended the plaint

as per the alleged details of document and thus the said alleged document could not be considered as reliable one. Learned trial Court held the testimonies of the witnesses, Dipak, Maruti, Shaju did not appear to be relevant as there was no corroborative evidence to their testimonies.

82. Learned trial Judge also considered the fact that the temple was already registered under the provisions of the Bombay Public Trust Act, 1950 and at the time of registration of the said trust, Patanges did not raise any grievance before the authorities under the provisions of the Maharashtra Public Trust Act. Learned trial Judge also considered the fact that there was a litigation between Pawar's and Masare's (Special Suit No.33 of 1992). Masares had preferred First Appeal bearing No.1158 of 1996 against the decree passed in Special Civil suit No.33 of 1992 before this Court. In the said proceedings, an interim arrangement, without prejudice to the rights and contentions of those parties has been arrived at wherein Pawars and Masares have been sharing income equally during the period of Navratra Mahotsav which arrangement is in force. Patanges had applied for impleadment in the said first appeal by filing Civil Application (1158 of 1996) which came to be rejected by this Court. Special Leave petition filed by Patanges arising out of the said order passed in that said civil application also came to be rejected by the Supreme Court.

83. Learned trial Judge also considered the orders passed by the Charity Commissioner and other authorities in various applications filed by Masares under the provisions of the Maharashtra Public Trust Act in which Pawars and Patanges were parties, which orders have attained finality. Learned trial Judge dismissed the said suit filed by Patanges by the said judgment and decree dated 6th January, 2004, holding that in absence of cogent oral and documentary evidence on record, claim

of Patanges was not sustainable. Patanges had failed to prove their claim in respect of the right of alleged shares during Navratra Mahotsav. Learned trial Judge however, made it clear that Patanges were having right to perform Pooja, to take offerings made before deity except during Navratra Mahotsav along with Patanges as per their shares and as per the document which rights were admitted by Pawars as well as by Masares.

84. A perusal of the judgment and decree passed by the learned Principal District Judge, Solapur indicates that the learned Principal District Judge formulated six points for determination. Learned Principal District Judge allowed Civil Appeal (47 of 2004) filed by Patanges and dismissed the cross-objection filed by Masares and was pleased to set aside the judgment and decree dated 6th January, 2004 passed by the learned Civil Judge, Junior Division and decreed the suit filed by Patanges.

85. Insofar as the dispute about the execution of Halnama (Exhibit 86) raised by Masares is concerned, the first appellate Court held that Dagadu Bhanudas Patange, who was examined as one of the witness by Patanges had knowledge as to when the temple was constructed and about prevailing custom that was adopted by Pujaris and Masares. The said witness however, in his cross-examination deposed that he had no personal knowledge about the document at Exhibit 86. He did not produce any documentary evidence to show that since prior to 1988, Patanges had spent amount during Navratra Mahotsav.

86. The first appellate Court held that the parties had admitted that the temple was more than 100 to 150 years ago. It is held that the said document at Exhibit 86 was admittedly more than 30 years old and in view of section 90 of the

Evidence Act, the said document was said to have been proved. It is held that there was no possibility of the persons executing it to be alive and therefore, there was no question of examining such person before the Court. There was thus presumption in respect of execution of the said document. Insofar as the question of proof of contents of the said document is concerned, it is held that the contents of the said document are definitely required to be proved however by what mode the same are required to be proved has to be seen.

87. The first appellate Court thereafter considered the evidence of Pandurang Ukrande, who claimed that he could read and write Modi script and was able to translate Marathi into Modi. The evidence of the said witness was disputed by Masares on the ground that the said witness had not produced any document to show that he had obtained any decree in Modi language. He had no knowledge about the said document and was not able to show whether the said document was real or fake. The first appellate Court however, held that there was no reason to disbelieve the said witness because it was only question of transcription. Masares did not produce any translation from any other person who had obtained the decree in Modi script or he was acquainted with such script. It is held that insofar as question as to whether the translation would be sufficient proof of the contents of the document or not. It is held that if the translation of Exhibit 86 is compared with the compromise decree, which was passed in Regular Civil Suit No.1660 of 1933 and also with the written statement of Masares, it could be seen that the major portion of Exhibit 86 was observed by the parties. It is held that since the major portion of Exhibit 86 is proved, it could not be thrown away for rest of the period of Navratra Mahotsav.

88. The first appellate Court considered the evidence of Vinod Shah, who was examined by Patanges, who was relative of the original owner Manikchand Shah, who had expired in the year 1945. It is held that the said witness was acquainted with the said Manikchand Shah and was residing with him during his young days and he had seen the signature of Manikchand Shah, who used to sign in Modi language. He had identified the signature of Manikchand Shah and thus it could be said that the said document (Exhibit 86) had been proved with identification of signature of Manikchand Shah. It is held in his cross-examination that nothing contradictory had been found and therefore the contents of the said document in the form of examination that has been observed could be said to have been proved.

89. Insofar as the alleged interpolation of the word “Indapur” to “Solapur” in Exhibit 86 is concerned, it is held that twice the said Exhibit 86 was sent for the opinion of the Handwriting Expert and the reports had been produced on record as Exhibits 108 and 118. It is held that the alleged Exhibit 108 came to be exhibited is a question because the opinion had been given by the State Examiner of Document, CID, M.S. Pune. This opinion could not be taken into consideration in view of either sections 293 or 294 of the Code of Criminal Procedure as an opinion of expert. The said document could not be said to be a public document in view of section 74 of the Evidence Act. In the said opinion (Exhibit 108), it was stated that existing word “Solapur” had been altered from the original word “Indapur”. The said expert had found traces of alterations over wirings. It is held that the said expert had been brought on record as to who and where as well as when those alterations were done.

90. Learned Principal District Judge held that supplementary opinion Exhibit 118 appeared to have been admitted by Patanges, who had stated that the writings

and the signatures marked Q 2 and Q 3 at Exhibit 86 when examined *inter-se* revealed that some handwriting features, which are occurring in the signatures were similarly executed in the body writings. It is held that the said opinion at Exhibit 108 says that the alleged interpolated words appeared to be fresh and even after considering those documents, the Court could not say that the entire document was false. It is held that if Masares were challenging the execution of the document, then they ought to have sent this stamp to the Stamp Examiner. The first appellate Court reversed the finding of the learned trial Judge that the document (Exhibit 86) had not been properly proved. It is held by the learned Principal District Judge that though Patanges were not the parties to Regular Civil Suit No.1660 of 1933, which suit was compromised in the year 1934, both the parties to the said suit i.e. Pawars and Masares had admitted the rights of Patanges and their predecessors to the extent of half share. It is held that the writing in the compromise decree and the plaint that was filed in that suit is supporting Exhibit 86. The parties were deriving their rights from the said document.

91. Insofar as the issue of *res-judicata* or principles analogues to *res-judicata* raised by Masares before the first appellate Court is concerned, the Principal District Judge held that the scope of section 41(E) of the Maharashtra Public Trust Act was limited and was with an intent to protect the rights of the parties to the worship and the trust property and therefore, those orders could not be taken into consideration in favour of Masares. It is held by the learned Principal District Judge that since the nature of the proceedings before the Joint Charity Commissioner were different, the rights those have been agitated in those proceedings were different and since the suit is maintainable, it cannot be said that the decisions of the Joint Charity Commissioner in the said proceedings approved by the Courts could be said to be barred by principles of *res-judicata*. Learned

Principal District Judge rejected the said plea of Masares also on the ground that when the larger interest or right had been agitated in the suit whereas, the proceedings before the Joint Charity Commissioner in respect of the dispute was for 15 days only, in these circumstances, it could not be stated that there was bar of *res-judicata*.

92. Insofar as the issue as to whether the suit was bad for want of permission from the Charity Commissioner under section 50 of the Maharashtra Public Trust Act is concerned, it is held that since the suit was filed by Patanges based on the personal right, which was totally different from the trust property, permission of the Charity Commissioner under section 50 of the Maharashtra Public Trust Act was not at all necessary.

93. Learned Principal District Judge held that Patanges were having right over Pooja for 11 ½ months alternate week, with Pawars and to take half share in the income derived from the offerings, donations etc. During the period of Navratra Mahotsav they have right to take half share in the income of daily offerings, donations with Pawars. It is held that it was proved that Masares had no right to perform Pooja and take income. Learned Principal District Judge also held that the defendant no.2 (Masares) himself did not enter in witness box who had executed the power of attorney in favour of his son. It is held that from the power of attorney executed in favour of his son by the defendant no.2, it could be seen that there was absolutely no reason mentioned in the power of attorney as to why the defendant no.2 himself was unable to attend the Court. The son of the defendant no.2 also could not state as to why it was not possible for his father to depose. His age at the time of deposition was 34 years and it was thus difficult for the Court to believe that he would have had any personal knowledge. The said witness in his

cross-examination admitted about the compromise between his predecessors and the predecessors of Pawars. He also admitted that Special Civil Suit No.33 of 1992 was decreed against them and temporary arrangement was made by this Court in First Appeal No.1158 of 1996. It is held that since the said witness did not have personal knowledge, his evidence could not be considered. It is held that adverse inference is required to be drawn against Masares under section 114 of the Evidence Act. It is held that the evidence adduced by Patanges is probable and on touch stone of preponderance of probabilities, it has to be accepted.

94. Insofar as the cross-objection filed by Masares is concerned, the learned Principal District Judge rejected the said cross-objection on the ground that since Patanges had intended to establish their civil right to worship, the same could be agitated by the Civil Court and thus they were not required to approach the Charity Commissioner. It is held that the suit for recovery of offerings placed by the devotees before Idol is also a suit of civil nature within the meaning of section 9 of the Code of Civil Procedure and even for the said relief, Patanges were not required to approach the Charity Commissioner for permission.

95. In the concluding paragraph, learned Principal District Judge held that the findings on issue nos.1 to 3 were properly given by the learned trial Judge, however, the findings on issue nos.4 to 6 were wrongly given. Learned trial Judge did not appreciate the evidence properly and had not taken into consideration the effect of 30 years document and the fact that almost all things were admitted what was mentioned in the document (Exhibit 86). Learned Principal District Judge accordingly allowed the appeal filed by Patanges and dismissed the cross-objection filed by Masares and decreed the suit filed by Patanges by setting aside the decree passed by the learned trial Judge dated 6th January, 2004.

96. This Court will now decide whether the civil suit filed by Pawars inter-alia praying for a declaration that they were entitled to receive 50% of the offerings received by Goddess Shree Rupa Bhavani Temple was itself maintainable or not. Learned counsel for the parties addressed this Court on this issue in great detail. It was the case of Pawars and Patanges that the suit was filed by Pawars for a declaration and for recovery of the share in the offerings made to the temple which amounted to a civil right and thus the civil suit for seeking such relief was maintainable. It was also their case that since it was not the case of Masares that the relief was in respect of any of the property of the trust registered under the provisions of the Maharashtra Public Trust Act, 1950, the provisions of the Maharashtra Public Trust Act, 1950 were not attracted to the civil suit filed by Pawars.

97. A perusal of the prayers in the suit filed by Patanges clearly indicates that Patanges had applied for a declaration and injunction against Masares and Pawars and more particularly a declaration that Patanges were entitled to worship and receive 50% share of the offerings made to the temple during Navratra Mahotsav.

98. Learned trial Judge has considered the issue of maintainability of the civil suit filed by Patanges and has held that the dispute was related in respect of the right of Patanges, Pawars and Masares in their individual capacity. They were propounding their rights since ancestors .The claim was in respect of their right to take their share of income as well as to perform Pooja in temple.

99. The first appellate Court has dealt with this issue in the impugned judgment and decree and after adverting to the judgment of the Supreme Court in case of

Ugam Singh & Anr. vs. Kesrimal & Ors., AIR 1971 SC 2540, in which it had been held that the right of worship is a civil right, interference with which raises a dispute of civil nature has held that the suit filed by Patanges was maintainable.

100. The Supreme Court in case of ***Church of North India*** (supra) has held that the civil Court's jurisdiction is excluded if there is adequate remedy to do what the Civil Courts would normally do in a civil suit. In that case it was held that the Court was not concerned with the question as regards creation of any right by trust in a third party which would be otherwise beyond the jurisdiction of the Charity Commissioner. The Supreme Court considered section 31 of the Maharashtra Public Trust Act which bars a suit to enforce a right on behalf of the public trust. The Supreme Court in case of ***Sahebgouda vs. Ogeppa*** (supra) has considered section 80 of the Maharashtra Public Trust Act, 1950 and section 9 of the Code of Civil Procedure, 1908 and has held that the civil Court has jurisdiction to try all these suits of civil nature and exclusion of the jurisdiction of the civil Court is not to be rightly inferred. A provision of law ousting the jurisdiction of a civil Court must be strictly construed and the onus lies on the party seeking to oust the jurisdiction to establish his rights to do so. In the said matter, the plaintiff had claimed a declaration that he was Vahivatdar- Pujaris and thus had the Pujariki rights of performing Pooja in the temple at all times and also prayed for a decree of injunction restraining the defendants from interfering in any manner whatsoever with the right of Pooja of the plaintiff. The plaintiff had not claimed himself to be a trustee of any trust. No declaration regarding existing or otherwise of a trust or that any particular property was the property of such trust had been claimed.

101. Considering these facts, the Supreme Court held that the decision on the controversies raised in the suit did not at all required adjudication of any such

matter which may have to be done by the authorities under the provisions of the Maharashtra Public Trust Act, 1950. The Supreme Court accordingly held that the civil suit for such relief was maintainable. The judgments of the Supreme Court referred above are applicable to the facts of this case. I am respectfully bound by the same. In my view, there is thus no substance in the objection initially raised by the learned senior counsel for Masares that the suit for claiming such reliefs referred to aforesaid itself was not maintainable and thus no relief of any nature whatsoever could be granted by any of the Courts below in favour of Patanges (original plaintiffs) in view of the Court not having jurisdiction.

102. The next question however, for the consideration of this Court is whether the principles of *res-judicata* were attracted to the civil suit filed by Patanges in view of the order passed by the Joint Charity Commissioner in the application filed by Masares and rendering various findings on the right of the parties thereto, i.e. Patanges, Pawars and Masares which findings have been upheld by the District Court, by this Court and by the Supreme Court. Learned senior counsel appearing for the parties have addressed this Court at length on this issue.

103. Learned trial Judge has rejected the plea of Masares while dealing with issue no.2 and has held that the decision of the authorities under the provisions of the Maharashtra Public Trust Act, 1950, were not the decisions of the competent Court. It is held that the authorities under the provisions of the said Act though performed the functioning of *quasi* judicial nature, they are not Court. It is accordingly held that the suit filed by Patanges was not barred by the principles of *res-judicata*. It is held that the proceedings before the Joint Charity Commissioner are not strictly the decisions of the Court. The principles of *res-judicata* applies only when the Court decision is cited as *res-judicata*.

104. The first appellate Court has considered this issue while deciding point no.4 and has held that the nature of the proceedings before the authorities under the provisions of the Maharashtra Public Trust Act, 1950 were different, the rights which were agitated in those proceedings were different. It is held that since the suit is maintainable, it cannot be said to be barred by the principles of *res-judicata*. It is held that the scope of the proceedings under the provisions of the Maharashtra Public Trust Act, 1950 which were undertaken by Masares was limited and was in respect of only 15 days, whereas larger interest or right of Patanges in the civil suit was agitated and under these circumstances it could not be stated that the suit was barred by the principles of *res-judicata*.

105. A perusal of the record indicates that it was the case of Masares that the original defendant no.2 was the sole trustee and the Manager of Goddess Shree Rupa Bhavani Temple and had filed an application under the said Act for registration of the said temple as a public trust incorporating therein the rights of the parties and objects of the trust. The mode of succession of trusteeship and managership was prescribed in the trust deed. There is no dispute that Masares had filed an application under section 41-E of the Maharashtra Public Trust Act, 1950 (Application No.15 of 1988) *inter-alia* praying for permanent injunction against Pawars and Patanges prohibiting them from performing Pooja and collecting offerings from deity during Navratra Mahotsav every year. Masares had filed separate application under section 41-A of the Maharashtra Public Trust Act, 1950 on 3rd August, 1989 *inter-alia* seeking administrative direction against Pawars and Patanges not to collect offerings from the said deity by way of donation, subscription during Navratra Mahotsav and had also prayed for a direction against them, their servants, agents and relatives not to interfere and disturb the legal

rights of Masares of performing Pooja of deity during 15 days of Navratra Mahotsav. It is not in dispute that Pawars and Patanges were the parties to the said application. Though Pawars had filed their say in those two applications filed by Masares, it is an admitted position that though Patanges had appeared initially, did not file any written statement / reply in those proceedings.

106. It is not in dispute that the learned Joint Charity Commissioner had passed a common judgment and order on 22nd September, 1989 in those two applications and had issued the directions to the effect that Masares were entitled to perform Pooja in Rupa Bhavani Temple during Navratra Mahotsav and that Masares were entitled to collect offerings from the deity during the said period. The learned Joint Charity Commissioner also restrained Pawars and Patanges from disturbing Masares from performing Pooja and collecting offerings during the Navratra Mahotsav in any manner whatsoever.

107. It is not in dispute that though Pawars had preferred Civil Miscellaneous Appeal (248 of 1989) against the said order dated 22nd September, 1989 passed in the Application No.15 of 1988 under section 41-E before the learned District Court at Solapur, Patanges did not challenge the said order dated 22nd September, 1989. Patanges though appeared in the said proceedings, did not contest the said appeal nor did they even supported Pawars. There is no dispute that the said appeal filed by Pawars (248 of 1989) before the learned District Court came to be dismissed.

108. Being aggrieved by the said order passed by the District Court, Patanges did not file any proceedings. First appeal filed by Pawars is pending in this Court. Pawars however, filed a writ petition (4203 of 1989) in this Court *inter-alia* challenging the common order passed by the Joint Charity Commissioner. It is not

in dispute that by an order dated 5th April, 1990, the Division Bench of this Court dismissed the said writ petition filed by Pawars impugning the common order passed by the learned Joint Charity Commissioner under sections 41-A and 41-E of the Maharashtra Public Trust Act, 1950. It is not in dispute that Patanges were parties to the said writ petition, however, Patanges did not file any separate proceedings in the High Court or before the Supreme Court. Special Leave Petition (11617 of 1990) filed by Pawars came to be dismissed by the Supreme Court on 8th October, 1990.

109. During the course of argument, the learned senior counsel for Patanges have disclosed that his clients have now filed a Civil Revision Application against the order passed by the learned Joint Charity Commissioner, which is pending. It is not in dispute that the order passed by the learned Joint Charity Commissioner is not stayed or set aside in the said proceedings filed by Patanges in this Court.

110. It is also not in dispute that Writ Petition No.1677 of 1990 filed by Pawars against the order passed below Exhibit – 5 in Miscellaneous Civil Application No.248 of 1989 is dismissed. It is also not in dispute that the further proceedings in the said execution application filed by Patanges for executing the decree in the Civil Suit No.1660 of 1933 is stayed by this Court in the writ petition filed by Masares. The said writ petition filed by Masares is pending in this Court.

111. The question that arise for consideration of this Court is whether various findings rendered by the authorities under the provisions of the Maharashtra Public Trust Act, 1950 on the issue whether the parties to those proceedings were entitled to right of worship and to the offerings made in the temple or not, would be binding on the civil Court in respect of the same relief or at least the principles

of *res-judicata* would be attracted to the civil suit filed by Patanges relating to the same subject matter or not.

112. A perusal of proceedings filed by the Masares before the learned Joint Charity Commissioner i.e. the Application no.15 of 1988 and Application no.14 of 1989 clearly indicates that Pawars as well as Patanges were parties to the said proceedings. Though Patanges had appeared before the learned Joint Charity Commissioner in those proceedings, neither any reply was filed by Patanges nor they participated in the proceedings. The learned Joint Charity Commissioner after considering the original record and proceedings of Application no.3955 of 1942, which was filed by Masares for registration of the trust and also annextures to the said application and after considering the decree passed by the Civil Court in Civil Suit No.1660 of 1933 has held that in Navratra Mahotsav offering before deity were to be collected by Vahivatdar and all expenses of the Navratra Mahotsav were to be made out from out of the said offerings. It is held that Masares had got right of Pooja during the Navratra Mahotsav as Vahivatdar.

113. After considering the compromise decree, it is held that no rights were vested in Patanges and Pawars pertaining to 15 days period of Navratra Mahotsav. It is held that the compromise decree in the said civil suit itself would show that the ancestors of Masares were admittedly recommended to be the Panch Vahivatdar of the said Goddess Shree Rupa Bhavani Temple. It is held that the findings recorded in the enquiry proceedings under section 19 of the Bombay Public Trust Act must prevail. The learned Joint Charity Commissioner accordingly passed an order that Masares were entitled to collect the offering before deity during Navratra Mahotsav and shall make necessary expenses therefrom required for the Navratra Mahotsav and had right to perform Pooja of

deity in Navratra Mahotsav in his capacity of trustee and Vahivatdar. The learned Joint Charity Commissioner has held that Patanges and Pawars were Pujaris and deity having alternate right of worship every week and shall take all income before deity every day except 15 days of Navratra Mahotsav as their personal income in lieu of Pooja. It is held that Masares will have no right over the said income during the period of 11 and half months. The said order is admittedly not challenged by Patanges.

114. The District Court heard Civil Miscellaneous Appeal No.248 of 1989 filed by Pawars against the said order passed by the learned Joint Charity Commissioner under section 41-E of the Maharashtra Public Trust Act. The matter was argued at great length by Masares and Pawars before the learned District Judge. Several, issues were raised by Pawars regarding their alleged rights of worship during Navratra Mahotsav. Though Patanges were parties to the said proceedings, they did not participate in the said proceedings before the District Court.

115. The District Court recorded that Patanges were not contesting the said appeal. The District Court formulated various points for consideration and rendered a detailed judgment. The District Court held that Masares were having right to accept the offerings before deity during the period of Navratra Mahotsav and Pawars and Patanges could not interfere with that right of Masares. Masare was the sole trustee and Vahivatdar of the said temple and it was his responsibility to maintain the temple and to perform Pooja during Navratra Mahotsav. The District Judge dismissed the said appeal filed by Pawars. It is not in dispute that Pawars had filed a writ petition in this Court (Writ Petition No.4203 of 1989) impugning the common order passed by the learned Joint Charity Commissioner. Patanges did not file any writ petition against the said order passed by the learned

Joint Charity Commissioner.

116. By an order dated 5th April, 1990, the Division Bench of this Court dismissed the said writ petition summarily filed by Pawars having found no merit in the said writ petition. It is not in dispute that Patanges did not appear before this Court even in the said writ petition and did not challenge the said order passed by this Court by filing any Special Leave petition. The Special Leave petition against the said order passed by this Court upholding the orders passed by the learned Joint Charity Commissioner in Application Nos.15 of 1988 and 14 of 1989 dated 22nd September, 1999 attained finality.

117. A perusal of the prayers in the suit filed by Patanges and the judgment and decree passed by the learned trial Judge clearly indicates that the issue before the learned trial Judge was also as to whether there was arrangement between Patanges and Pawars in respect of the income received by the temple during Navratra Mahotsav. Admittedly Masares were also impleaded as party defendant no.2 in the said Civil Suit No.849 of 1997. In the said suit, Masares had brought to the notice of the Civil Court, various orders passed by the learned Joint Charity Commissioner, order passed by the District Court and also this Court. Masares had also urged that principles of *res-judicata* were applicable to the Civil Court and various findings and conclusions drawn by the learned Joint Charity Commissioner in the proceedings filed by Masares which were upheld by the District Court, this Court and the Supreme Court were binding on the parties to the said suit.

118. A perusal of the order passed by the first appellate Court indicates that the learned first appellate Court has dealt with the issue of *res-judicata* in paragraph

27 of the impugned judgment and decree and has held that the nature of the proceedings before the learned Joint Charity Commissioner and before the Civil Court were different, the rights agitated by the parties in both those proceedings were different.

119. In my view though section 11 of the Code of Civil Procedure, 1908 would not be strictly applicable in these circumstances, principles of *res-judicata* would be attracted. The issue before the learned Joint Charity Commissioner between the same parties was in respect of the same property and was in respect of the same subject matter which was the subject matter of the suit filed by the Patanges. The learned Joint Charity Commissioner as well as the Civil Court, both have decided the rival claims of the parties for their individual rights of worship and to collect the share in the offerings made to the said deity during Navratra Mahotsav. The order passed by the learned Joint Charity Commissioner had been upheld right upto the Supreme Court. Patanges admittedly did not participate in those proceedings though were parties in all the proceedings right upto Supreme Court. The first appellate Court in my view, thus could not have simplicitor brushed aside the findings rendered by the learned Joint Charity Commissioner in the proceedings filed under sections 41-E and 41-A which findings were recorded by the learned Joint Charity Commissioner while performing *quasi* judicial function and which findings were upheld right upto Supreme Court.

120. Gujarat High Court in case of ***Alimiya Mahmadiya & Anr. vs. Sayed Mohomed Baquir Eledroos***, reported in ***AIR 1968, Gujarat 257*** has dealt with similar issue and has held that it is well settled that where section 11 of the Code of Civil Procedure, 1908 in terms may not apply, the principles contemplated therein governed subsequent proceedings provided conditions set out therein are

fulfilled. It is held that the nature of former proceedings is immaterial. Gujarat High Court in that matter had considered the proceedings filed by one of the parties under the provisions of the Bombay Public Trust Act. I am in respectful agreement with the views expressed by Gujarat High Court in case of ***Alimiya Mahmadiya & Anr.*** (supra).

121. In my view, Patanges and Pawars having lost in the proceedings before the learned Joint Charity Commissioner in respect of the same subject matter and in respect of the same property in the dispute between the same parties, which order was upheld by the learned District Court, this Court and the Supreme Court and which order has attained finality, the Civil Court in the suit filed by Patanges could not have taken a different view in the matter. In my view, principles of *res-judicata* in these circumstances would stand attracted in the facts of this case and the orders passed by the *quasi* judicial authority between the same parties, which orders were upheld by the Courts, could not be brushed aside by the Civil Court.

122. Insofar as the findings of the first appellate Court in favour of Patanges based on Halnama alleged to have been executed on 1st December, 1919 and the documents which were exhibited as Exhibits 108 and 118 is concerned, the learned senior counsel for the parties have addressed this Court at great length. Patanges and Pawars strongly relied upon Halnama which was strongly disputed by Masares. It is not in dispute that Bhanudas Patange, one of the plaintiffs expired during the pendency of the suit. The plaintiff no.2 did not enter the witness box. The plaintiff no.4 expired before commencement of his cross-examination. One of the legal heirs of the original plaintiff no.1, who was examined as his witness, was 30 years old at the time of recording his evidence. Patanges had also examined Vinod Shah and Pandurang Ukrande, who had alleged to have translated the

alleged Halnama.

123. The said Halnama was alleged to have been executed between Manikchand A. Shah, Bhanudas Patange, Bandu P. Ramanshetti and Ramappa A. Masare. The said document was in Modi script. Pandurang Ukrande, who had alleged to have translated the said document, did not have any authorized degree or certificate to translate the document in Modi script. There were various discrepancies in the translation of the said alleged Halnama made by the said Pandurang Ukrande. The said Pandurang Ukrande had not seen any of the parties to the said document while executing the said document. The learned trial Judge has after considering the oral evidence held that the said document was not a reliable document. It is held that the said document was pertaining to the rights of those four persons. There was probability that the other persons i.e. Ramanshetti and others may have possessed a copy of the said document. The said Ramanshetti never appeared in any proceedings. His ancestors never came forward in any of the proceedings occurred in respect of the said Goddess Shree Rupa Bhavani Temple. Patanges could not positively state about the existence of the said Ramanshetti as well as about his half share of income whether taken by the said Ramanshetti or not.

124. Vinod Shah, who was examined as one of the witness, who was the relative of Manikchand Shah, admitted in his cross-examination that he was not having any document pertaining to the signatures of the said Manikchand Shah. He was hardly 8 years old when Manikchand Shah died. The said witness however, deposed that he could identify the signature of Manikchand shah because he had seen his signature in the account books. In these circumstances, in my view the trial Court had rightly held that it was not possible that a boy of the age of 8 years would be able to remember the signature of the deceased Manikchand Shah. His evidence

was thus rightly discarded as not reliable. The first appellate Court however, placed heavy reliance on the evidence of Mr.Vinod Shah, who was eight years old on the day of death of Mr.Mnikchand Shah. The first appellate Court however, disbelieved the evidence of son of one of the Masare (defendant no.2) on the ground that he was 34 years old on the date of recording evidence and thus may not have personal knowledge.

125. Learned trial Judge in my view, had rightly held that even if the said alleged Halnama was 30 years old document, in view of section 90 of the Evidence Act, the document ought to have been exhibited on the presumption that the document must have been existed, no presumption could be drawn that the contents of the said document were deemed to have been proved. None of the parties to the said Halnama produced the said document.

126. A perusal of the judgment and decree rendered by the first appellate Court on this issue however, indicates that the first appellate Court has rejected this contention raised by Masares on the ground that since the said document was old and since the people were not available to prove the contents thereof, and since the major portion of the said document was observed by the parties, the said document cannot be thrown away for rest of the period of Navratra Mahotsav. It is held by the first appellate Court that the contents of the said document in the form of custom that has been observed can be said to have been proved.

127. In my view, even if the document being 30 years old, existence thereof is deemed to have been proved and such document can be marked as exhibit in evidence, the contents of the document cannot be considered as automatically proved. In my view, the presumption drawn by the first appellate Court that since

some part of the contents of the said document were observed by the parties, other part of the contents of the said alleged document could be said to have been proved, is contrary to section 90 of the Evidence Act and principles of law laid down by the Supreme Court.

128. In my view, the contents of a document cannot be considered as automatically proved merely because the document is marked as exhibit either by virtue of section 90 of the Evidence Act or otherwise. Masares had strongly objected to the contents of the said alleged document on various grounds. The first appellate Court thus could not have rendered a finding on the issue of proof of the contents by drawing inference in the impugned judgment and decree. Mere marking of a document as exhibit does not dispense with its proof. There was no reference to Halnama in compromise decree. Patanges were not even parties to that suit.

129. Learned senior counsel for Patanges and Pawars could not explain before this Court about the whereabouts of Ramanshetti or about the alleged share of Ramanshetti in the income received by the temple under the said alleged Halnama. Learned senior counsel for Patanges and Pawars also could not justify the discrepancies pointed out in the translation of the said document by Pandurang Ukrande. In my view the evidence of Mr. Pandurang Ukrande thus could not be accepted as reliable.

130. A perusal of the order passed by the first appellate Court indicates that the first appellate Court has also totally over looked the evidence of the State Examiner, who had pointed that there were interpolation in the document, which appeared to be fresh. The first appellate Court though has referred to the said

report of the State Examiner, has held that even if considering the said document, the Court could not say that the entire document was false. In my view, the first appellate Court has totally overlooked and has not appreciated the oral evidence led by Masares and the said State Examiner and has accepted the authenticity of the said doubtful document which was not proved beyond reasonable doubt by Patanges or by Pawars. There was vast difference in the contents of the said Halnama and the compromise decree. In the compromise decree, though the name of Patanges were mentioned, no rights to recover any amount or to worship in the said temple were set out. The entire suit filed by Patanges on the basis of compromise decree thus deserves to be dismissed.

131. A perusal of the order passed by the first appellate Court indicates that the first appellate Court has rendered a finding that Patanges and Pawars were entitled to do worship during Navratra Mahotsav i.e. for a period of 15 days merely on the premise that there was no dispute in respect of performing Pooja and for recovery of offerings by Patanges and Pawars during the balance period of 11 and half months. There was no dispute in respect of the right of Patanges and Pawars to perform Pooja in the said temple during 11 and half months period and to recover the offerings equally. Even according to Patanges and Pawars, Masares were entitled to 1/4th share from the offerings received by temple during Navratra Mahotsav as pancha for the purpose of expenses incurred for maintaining the said temple. In my view, the impugned judgment and decree passed by the first appellate Court is passed totally overlooking the evidence led by the parties and is based on the presumption and surmises. In my view, the impugned judgment and decree passed by the first appellate Court based on the alleged Halnama is not in accordance with the provisions of the Indian Evidence Act, 1872 and is in teeth of Exhibits 108 and 118.

132. Insofar as the issue of limitation raised by Masares in view of Article 58 to the schedule of Limitation Act, 1963 is concerned, it is not in dispute that Pawars had raised an issue of limitation before the learned trial Judge in their written statement. A perusal of the impugned judgment and decree passed by the learned trial Court however, indicates that no such issue was framed by the learned trial Judge. A perusal of the judgment and decree passed by the first appellate Court also indicates that no issue of limitation was framed by the first appellate Court. Mr. Patil, the learned senior counsel for the Patanges is right in his submission that no cross-objection was filed by Masares before the first appellate Court contending that the issue of limitation was not framed by the learned trial Judge through was raised by Pawars.

133. However, in view of section 3 of the Limitation Act, 1963, even if Masares had not set up the defence of limitation before the learned trial Judge or before the first appellate Court, the learned trial Judge ought to have decided the issue of limitation in the said suit filed by Patanges. Pawars have already raised an issue of limitation. Patanges were fully aware of the findings rendered by the Joint Charity Commissioner to the effect that Masares were entitled to perform the Pooja during Navratra Mahotsav and to recover the offerings made to the said deity in the year 1989 itself being parties to the said proceedings, whereas the suit came to be filed by Patanges in the year 1997, which was *ex-facie* beyond the period of three years and the suit itself was thus liable to be dismissed in view of Article 58 to the schedule of Limitation Act, 1963.

134. A perusal of the judgment and decree passed by the first appellate Court clearly indicates that Masares had heavily placed reliance on the proceedings filed

before the Joint Charity Commissioner and also the registration certificate issued by the Charity Commissioner after conducting a detailed enquiry under the provisions of the Maharashtra Public Trust Act, 1950 after issuing notice to all persons concerned including Pawars and Patanges. It was recorded that the said trust was created in respect of the said Goddess Shree Rupa Bhavani Temple and one of Masare was the sole trustee thereof and had right to perform Pooja and recover offerings made to the said deity during Navratra Mahotsav. It is not in dispute that the said certificate was not challenged by Pawars or Patanges and the same was binding on all the parties. The first appellate Court totally overlooked the binding effect of such certificate of registration of trust issued by the Charity Commissioner under section 19 of the Maharashtra Public Trust Act, 1950. In my view, the first appellate Court has totally overlooked this crucial document in the impugned judgment and decree which would have gone to the root of the matter. In my view, the first appellate Court has not appreciated the evidence led by the parties in right perspective and thus deserves to be set aside.

135. Insofar as substantial question of law at serial no.(a) is concerned, for the reasons recorded aforesaid, in my view, the learned District Court has not appreciated Halnama in accordance with the provisions of the Indian Evidence Act, 1872 and the said document is exhibited in the teeth of Exhibits 108 and 118. The said question is answered accordingly.

136. Insofar as substantial question of law at serial no.(b) is concerned, in my view, the order dated 22nd September, 1989 passed by the learned Joint Charity Commissioner, which is confirmed by the order of this Court and the order passed by the Supreme Court, has attained finality and was binding on Patanges and Pawars also. Though the order passed by the Supreme Court was passed

dismissing Special Leave Petition filed by Pawars in *limine* and the order passed by this Court could not have been said to have merged in the order of the Supreme Court, the order passed by this Court dismissing the writ petition and upholding the findings and conclusions drawn by the Joint Charity Commissioner was binding having attained finality. The said substantial question of law is answered accordingly. Principles of *res-judicata* were applicable.

137. Insofar as substantial question of law at serial no.(c) is concerned, in my view for the reasons recorded aforesaid, the said question is answered in affirmative. Insofar as substantial question of law at serial no.(d) is concerned, the same is answered in affirmative.

138. I therefore, pass the following order :-

- a). The impugned judgment and decree dated 30th November, 2015 passed by the first appellate Court, Solapur allowing Civil Appeal No.47 of 2004 and dismissing the cross-objection filed by Masares is set aside.
- b). Civil Appeal No.47 of 2004 filed by Patanges is dismissed. Cross-objection filed by Masares is allowed. The decree passed by the Second Joint Civil Judge, Junior Division, Solapur in Regular Civil suit No.849 of 1997 dated 6th January, 2004 is upheld.
- c). Regular Civil Suit No.849 of 1997 filed by Patanges is dismissed.

- d). There shall be no order as to costs.
- e). In view of disposal of Second Appeal No.148 of 2016, Civil Application No.1914 of 2015 does not survive and is accordingly disposed of.

[R.D. DHANUKA, J.]

139. Mr.Tajane, learned counsel appearing for the respondent nos.1 to 3 seeks stay of operation of this order for a period of eight weeks from today.

140. The operation of the order passed by this Court today is stayed for a period of eight weeks from today. If any Special Leave Petition is filed by the respondent nos.1 to 3, the papers and proceedings in Special Leave Petition along with notice shall be served upon the appellants and other respondents in advance.

[R.D. DHANUKA, J.]