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Upon this return to the issues sent down the High Court decreed that the decrees of the Lower Appellate Court and Court of First Instance, in so far as they restrained defendant from interfering in the channel which supplied the Dunsandle Estate, and in so far as they awarded Rupees 800 as damages for loss that had accrued to the plaintiff from defendant's use of the channel, be modified by declaring each of the parties herein entitled to a reasonable use of the flowing water, and that defendant, having used the water to an unreasonable extent and thereby caused loss to plaintiff, do pay plaintiff Rupees 800 damages in respect of such loss and that in other respects the decrees appealed against be confirmed, and that each party do bear his own costs of the second appeal.

*Decree modified.*

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## APPELLATE CIVIL.

*Before Mr. Justice Kernan and Mr. Justice Muttusámi Áyyar.*

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October 16.

SABÁPATHI, A MINOR, (BY HIS MOTHER AND GUARDIAN AMURTHAM-  
MÁL) PETITIONER, v. SUBRÁYA AND RÁMANÁDHA, COUNTER-  
PETITIONERS.\*

*Review of judgment—High Court*

The absence of a formal finding on an issue tried and decided by a High Court of First Instance is not an error calling for review of judgment in the High Court.

A party who not only had an opportunity of raising a question, but who did raise it in appeal and on argument abandoned it, cannot, under ordinary circumstances, be allowed to agitate the question on review.

THIS was an application under Section 376 of Act VIII of 1859 for review of the judgment of the High Court (Appellate Side), dated 30th January 1877, confirming the decree of Holloway, J., made in Original Suit No. 430 of 1875.

The original suit was brought for a declaration that certain properties and lands to which the Yagambara Esvara Sámi temple lay claim, be declared to be the property of the said temple.

That an application should be made to a Judge of the High Court in chambers to decide who were fit persons to be appointed Dharmakartas.

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\* Civil Miscellaneous Petition No. 8 of 1877, for review of the judgment of the High Court (Appellate Side) dated 30th January 1877.

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That an account be taken.

Issues were settled, the first of which was "whether the plaintiffs are entitled to maintain this suit without statutory permission." The Court of First Instance declared that the temple in the plaint mentioned was a public and not a private temple, and decreed that C. Allagadi Pillai be appointed Dharmakarta of the said temple, and that the said temple be delivered to him.

Against this decree the eighth defendant, A. Sabápathi Pillai, by his mother and guardian Amurthammál, preferred an appeal to the High Court on the ground, among others, that the Lower Court ought to have given its findings on the first issue.

The Appellate Court confirmed the decree of the Court of First Instance.

A petition for review of judgment was presented on the grounds—

1. That there was error apparent on the record in that it appeared on the record that no application under Act XX of 1863 was made to the Court for leave to institute the suit.
2. Error in that neither the Court of First Instance nor the Appellate Court did try the first issue.

Mr. *Lascelles* for the Petitioner.

Mr. *Johnstone* for the Counter-Petitioners.

The Judgment of the Court was delivered by

KERNAN, J.—A petition of review was presented to this Court, Appellate Side, by the eighth defendant in Original Suit No. 430 of 1875. The petition prayed a review of the decree, on appeal, of this Court, made the 30th day of January 1877 in Regular Appeal 21 of 1876, from the decree of Mr. Justice Holloway made the 3rd day of August 1876.

The only ground of review argued was whether there is not error apparent on the record, in this—1st, that it appears on the record that no application under Act XX of 1863 was made to the Court for leave to institute the suit, and that therefore the suit should not be entertained; 2ndly, it was argued that there was error inasmuch as it appeared on the record that the Court of first instance did not, nor did the Court of Appeal, try

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the first issue, viz., "whether plaintiffs are entitled to maintain this suit without statutory permission?"

To deal with the second ground it is enough to say that although no formal finding on the first issue was recorded in the Court of First Instance, yet it is clear the issue was decided by that Court, as there was a decree for the plaintiffs. The eighth defendant appealed and set out grounds of appeal, but did not allege as grounds of appeal that the Court of First Instance did not decide that issue, though he did allege that the Court ought to have given its finding on that issue amongst others.

We do not consider that the absence of a formal finding on an issue tried and decided by a High Court of First Instance is an error calling for review of judgment in the High Court.

Before going into the first ground of review, it is right to observe that when the case came before the Court of Appeal the first ground of review was not opened, though Counsel or Vakíl for the eighth defendant appeared in support of the appeal. The question was apparently abandoned, and, if upon no other ground we would think that, upon that ground alone, the review asked for should not be granted.

"*Interest reipublice ut sit finis litium.*" A party who not only had an opportunity of raising a question, but who did raise it in appeal and on argument abandoned it, cannot under ordinary circumstances be allowed to agitate the question on review.

The substantial first ground of review argued was that this suit is one of the nature contemplated by section 18 of the Act XX of 1863. Now the suits contemplated by that Act are suits against a "trustee, manager or superintendent or member of committee" in respect of the trusts vested in or confided to them respectively (Section 14).

The Act gives special suit against such person by giving right of suit under section 14, and thereby extends the ordinary remedies against such "trustees, manager, superintendent and committee." The object of the Act was to make special provisions for the due care and safety of endowments for religious purposes in the hands of such persons. Summary special powers are given to the Court against such persons. See section 16 as to arbitration, section 19 as to ordering accounts to be filed, and

section 20 referring to prosecution of such persons for "criminal breach of trust."

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It therefore appears to us that the special sections of the Act as to suits, deal only with such persons for acts by them *while* filling the office of trustee, manager, superintendent or committee. This is also the view expressed by this Court in *Jeyangarulavuru v. Durma Dossji* (1), see also *Agri Sharma Embrandi v. Vistnu Embrandi* (2). Now the defendants in this case are not, nor is any of them, a "trustee, manager, superintendent, &c." They are sued as persons who have without any authority, by election, appointment, or otherwise, intruded themselves into the management of the temple and possession of its properties since the year 1872. Plaintiff's case is "that since 9th October 1872 there has been no *Darmakartha*, and consequently the affairs of the temple are neglected and the income and endowments uncollected." The plaint prays for the appointment of *Darmakarthas*, or wardens, and for accounts against the defendants of the property they received, and delivery up of the property to the *Darmakarthas* when appointed.

The defendants therefore are intruders without authority. As they interfered with trust property knowing it to be such, they might be held liable as trustees, that is, constructive trustees. But the trustees, &c., contemplated by the Act mean duly constituted trustees, &c., *i.e.*, persons legally filling the office, and to whom is "confided" (section 14) the superintendence which the Board of Revenue formerly exercised, and from which the Act intended to relieve them. The statute does not apply to a suit such as this.

Both grounds of review fail, and the petition must be dismissed with costs.

In the above view, it is not necessary to decide a question raised, *viz.*, Whether the Act XX of 1863 is applicable to the temples, &c., within the local limits of the High Court jurisdiction.

*Petition dismissed.*

(1) 4 Mad. H. C. Rep., 2.

(2) 3 Mad. H. C. Rep., 198.