

(1937) 09 MAD CK 0050
In the Madras High Court

A.K.T.K.M. Narayanan Nambudripad

APPELLANT

Vs

Board of Commissioners for Hindu Religious Endowments

RESPONDENT

Date of Decision : 03-09-1937

Acts Referred:

Citation : AIR 1938 Mad 209

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—By an order dated 3rd February 1936, we directed the trial Court to receive such additional evidence as the parties may tender as we were inclined to think that on account of some misapprehension, the whole available evidence had not been placed before the Court on the previous occasion. The learned District Judge has now admitted such evidence as the petitioner adduced, but as he thought that the additional evidence did not affect the substance of the previous judgment, he has stated that he considers it unnecessary to record a fresh finding. The additional evidence has not carried the petitioner very far. Part of it only serves to establish that the petitioner's family which is now living far away from the temple in question was at one time living within a mile or a mile of the temple. Reliance has been placed on behalf of the petitioner on certain statements in the report of a Commissioner who was appointed by the lower Court to inspect the locality and make a report, It appears from that report that there is no regular foot path from the public road to the temple and there are shops or bazars in the neighbourhood where worshippers can have the usual and ordinary facilities for making purchase for offerings and so on. The situation of the temple and the facilities for approach to the temple may have a bearing on the question whether in fact the public do go and worship at the place or not; but, as the learned Judge has found even on the former occasion on the evidence of the petitioners' witnesses themselves that such public as is available in the locality is in the habit of worshipping in the temple. These remarks in the Commissioner's report about the nature of the locality or the access available to the temple do not help us to come to one

conclusion rather than to another. It must be remembered that the appeal itself is incompetent and that we can deal with the matter only u/s 115, Civil P.C. If the additional evidence had showed that any points of substantial importance were not before the Court on the previous occasion, there might be justification for our setting aside the previous finding and dealing with the case ourselves or asking for a revised finding. We are unable to say that the additional evidence is of such a character.

2. Mr. Ramakrishna Iyer, the learned Counsel for the petitioner, has insisted that the judgment of the learned District Judge contains a number of material errors and as these errors must have vitiated the conclusion then arrived at, it is proper that we should either deal with the evidence ourselves or call for a revised finding. Two errors to which special reference may be made are (1) the statement in para. 4 of the judgment that the temple which adjoins the petitioners' mana in Vadanakurissi is a Siva temple and (2) the statement in para. 9 of the judgment about the contents of a former judgment of 1871. Mr. Ramakrishna Iyer is right in pointing out that the evidence shows that the temple which adjoins the mana is a Vishnu temple and not a Siva temple and there is also some justification for his criticism of the way in which the learned Judge read some of the observations in the judgment of 1871. But we are not satisfied that these errors are so substantial as to justify our getting aside the learned Judge's finding.

3. Mr. Ramakrishna Iyer made a complaint that the learned Judge acted upon a presumption that temples in Malabar are public temples until the contrary is proved and he invited our attention to the judgment of the Privy Council in AIR 1934 230 (Privy Council) as negating such a presumption. We do not think that the learned Judge lays it down as any legal presumption. Having regard to the observations which he quotes from Sadasiva Iyer's judgment in *Subramania Iyer v. Lakshmana Goundan* (1920) 7 AIR Mad 42 he seems to have thought that if a temple possessed certain characteristics it is only fair to presume even in Malabar that it is a public temple till the contrary is proved. Section 9(12), Hindu Religious Endowments Act lays down that a "temple" (for the purpose of the Act) means "a place used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by the Hindu community, or any section thereof as a place of religious worship. According to this definition, the user by the public for the purpose of religious worship has to be proved as a fact. The question of intention to dedicate the place for the use of the public or of the user by the public being an of right is necessarily a matter for inference from the nature of the institution and the nature of the user and the way the institution has been administered. In the case already referred to, their Lordships of the Privy Council, lay stress upon the fact of the temple having been used as a place of public religious worship, though they observe that if there had been sufficient reason for holding that the temple and its endowment were originally dedicated for the temple and were private trusts, their Lordships would have been slow to hold that the admission of the public in later times would affect the private

character of the trusts. This observation suggests that once a long course of user by the public for the purpose of worship is established, and the fact of a separate endowment in trust for the deity is also proved, it is fair to infer that the institution must have been dedicated for user by the public (unless the contrary, is established) - particularly when the character of the temple, its construction, the arrangement of the various parts of the temple and the nature of the deities installed there are similar to what obtains in admittedly public temples. Similarly, when user by the public generally to the extent to which there is a worshipping public in the locality is established, it is not unreasonable to presume that the user by the public was as of right, unless there are circumstances clearly suggesting that the user must have been permissive or that the authorities in charge of the temple have exercised such arbitrary power of exclusion that it can only be ascribed to the private character of the institution.

4. A point was made by Mr. Ramakrishna Iyer that the learned Judge has referred to only one instance of exclusion in this case whereas the evidence establishes two such instances. We are not sure that the evidence as to the other is so clear that the learned Judge was not justified in ignoring it. But even taking it to be otherwise, the exclusion is clearly the result of personal ill-will and can scarcely be regarded as indicating the exercise of a general right of exclusion at the choice of the Uralan. The result is that both the appeal and the revision petition must be dismissed with costs in the appeal including the costs of the additional evidence enquiry.