
(1973) 07 MAD CK 0003
In the Madras High Court

Chennammal

APPELLANT

Vs

The Commissioner, for Hindu Religious and Charitable
Endowments

RESPONDENT

Date of Decision : 18-07-1973

Acts Referred:

Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 — Section 63

Citation : (1974) ILR (Mad) 358 : (1973) 2 MLJ 442

Hon'ble Judges : M.M. Ismail, J

Bench : Division Bench

Judgement

M.M. Ismail, J.—The second plaintiff in O.S No. 10 of 1966, on the file of the Court of the Subordinate Judge of Sivaganga, who

continued the suit after the death of the first plaintiff, is the appellant herein. One Ambalam Thodda Mallappa Chettiar constructed a temple by

name Pandurangaswami Temple in Aruppukottai. He executed a settlement deed in respect of this temple on 25th November, 1925 and a

registration copy of the same has been marked as Exhibit A-3. This settlement deed was executed not only by Mallappa Chettiar, but also by his

son, who was also known by the same name, as well as his wife Chennammal. This document stated that on the A schedule property the temple

had been constructed and for the purpose of performing neivedyam and other religious rites in the temple, he had constructed a kitchen as well as

other buildings and that they were executing the settlement deed so that the said religious rites might be performed permanently. The document

proceeded to state that the B schedule property of the value of Rs. 7,000 belonged to the said Mallappa Chettiar and that that was being endowed

for the benefit of the temple so that the income from the property could be

utilised for the performance of the religious rites in the temple without the property being alienated in any way. The document expressly provided for the performance of poojas in the temple both in the morning and in the evening according to a thittam and also for the performance of certain festivals and for payment of remuneration to the people who were doing services of archanas and melavathiam. The document covered C schedule property also of the value of Rs. 4,000 and stated that the income from the C schedule property was to be enjoyed by the three executants of the document who were trustees of the temple and its properties and the succeeding trustees without any power of alienation. The settlement deed further provided that Mallappa Chettiar would be in charge of the day to day affairs of the temple. When the Hindu Religious and Charitable Endowments Board acting under the provisions of the Madras Hindu Religious Endowments Act (II of 1927) demanded contribution from the temple in question, Mallappa Chettiar filed an application on 30th November, 1934 purporting to be u/s 84 of that Act requesting the Board to conduct an enquiry and order that the temple was a purely private temple and was exempt from any tax. The Board passed an order purporting to be under Sections 18 and 84 of the Act on 12th March, 1935 and that order has been marked as Exhibit B-3 in these proceedings. The Board held that the temple was a public temple, but was an excepted one, since the trusteeship was hereditary. The son of Mallappa Chettiar predeceased his father and after the death of Mallappa Chettiar, the founder, his widow Chennammal was functioning as the trustee and on her death, the two widows of the son of the founder, started functioning as trustees. They filed an application before the Deputy Commissioner u/s 63 of the Madras Hindu Religious and Charitable Endowments Act, 1959, for a declaration that the suit temple was not a temple coming within the scope of that Act. The said application was returned by the Deputy Commissioner on the ground that the character of the institution had already been decided and as such that application was not maintainable. That application was represented on 27th October, 1963 stating that the plaintiffs in the suit were not parties to the proceedings in which the nature of the institution was decided and therefore that order would not bind them. Notwithstanding this, on 19th December, 1963 the Deputy Commissioner informed the

plaintiffs that there was no valid reason to cancel the order dated 12th October, 1963 and returned the petition. The plaintiffs thereafter preferred an appeal to the Commissioner. Hindu Religious Endowments, in A.P. No. 41 of 1964, as well as a revision in R.P. No. 73 of 1964, against the order of the Deputy Commissioner. The Commissioner, after enquiry dismissed the appeal as well as the revision. It is under these circumstances the plaintiffs instituted the suit for a declaration that the suit temple was a private temple and to set aside the order of the Commissioner dated 13th October, 1965 passed in A.P. No. 41 of 1964 and R. P. No. 73 of 1964 and that of the Deputy Commissioner in O.A. of 1963. Their case was that the temple was a private temple built for the benefit of the founder and his progeny and consequently it would not come within the scope of the definition of the "temple" as contained in the Madras Act XXII of 1959. As against this, the case of the respondent was that the temple was a public temple and therefore came within the scope of the definition of the term "temple" as contained in the Act. The respondent also put forward the further contention that the order of the Board dated 12th March, 1965 under Exhibit B-3 was conclusive on the question and therefore it would not be open to the plaintiffs to re-agitate the question in the present suit. On these pleadings, the trial Court framed the following issues:

1. Whether the suit temple is a private temple ?
2. Whether the order by the Commissioner dated 13th October, 1965 as religious institution is liable to be set aside ?
3. Are plaintiffs estopped by judgment from claiming the suit temple as private temple?
4. To what reliefs are the plaintiffs entitled ?

The learned Subordinate Judge of Sivaganga, by his judgment and decree dated 21st December, 1966 answered all these issues against the plaintiffs and dismissed the suit. He came to the conclusion that the evidence before him established that the suit temple was a public temple and that consequently the order of the Commissioner dated 13th October, 1965 was not liable to be set aside. With reference to the prior order of the Board dated 12th March, 1935 under Exhibit B-3, the learned trial Judge held that that order was conclusive and therefore the plaintiffs were not entitled to re-agitate the character of the institution in the present proceedings. It

is against this judgment and decree, the present appeal has been filed by the surviving plaintiff in the suit.

2. Logically speaking, the first question that has to be considered is, whether the order of the Board dated 12th March, 1935 under Exhibit B-3 is

conclusive as against the appellant herein. Only if we come to the conclusion that that order is not conclusive, the question will arise, whether the

temple in question is a private temple, as contended by the appellant herein, or is a public temple, as alleged by the respondent herein.

Consequently, we shall first consider the question relating to the effect of Exhibit B-3 order dated 12th March, 1935 and thereafter we shall

consider the second question.

3. We may straightaway mention that, as far as the judgment appealed against is concerned, perversity is writ large in every one of the sentences in

the judgment. The judgment is so perverse that Mr. K.S. Bakthavatsalam, appearing for the learned Additional Government Pleader, was put to

the necessity of expressing his inability to sustain the conclusion of the learned trial Judge on merits. In view of this alone, he fell back ultimately on

Exhibit B-3, dated 12th March, 1935 as concluding the question as against the appellant herein thereby preventing the Court from going into the

question whether the suit temple is a private temple or not.

4. With regard to both the questions, the most important piece of material to be considered is the settlement deed executed by Mallappa Chettiar

and two others on 25th November, 1925. We have sufficiently indicated the terms of the settlement deed. The settlement deed makes it clear that

Mallappa Chettiar and his son and his wife were to act as trustees of the temple and its properties, even though Mallappa Chettiar was to be in

management of the day to day affairs of the temple. It is this aspect of the matter, which has been completely missed by the learned Judge when he

came to the conclusion that it was Mallappa Chettiar who was the sole trustee of the temple and that others were to succeed him only after his

death. On the other hand, as we pointed out already, the terms of Exhibit A-3 make it absolutely and abundantly clear that all the three persons

were to act as trustees and, having regard to the categorical language contained in Exhibit A-3, the learned Counsel for the respondent had no

alternative but to concede that all the three were appointed to function as

trustees. On this basis, the question for consideration is whether Exhibit B-3 order can be said to be conclusive. As we have pointed out already, that order was passed on a petition presented by Mallappa Chettiat purporting to be one u/s 84 of Act II of 1927. In the view we have taken as to the binding nature of that order on the appellant herein, we are not expressing any opinion as to whether that application and order can be said to come within the scope of Section 84 of that Act though we have considerable doubts as to their falling within the scope of that section. The argument of Mr. P. Balasubramaniam, the learned Counsel for the appellant, is that under Exhibit A-3 there was a Board of Trustees as it were, consisting of three persons, and those three persons alone were entitled to represent the institution as against the outside world and in the petition preferred on 30th November, 1934 it was only the senior Mallappa Chettiar who was a party and his son and wife, who were co-trustees, were not made parties; therefore the order dated 12th March, 1935 is not binding on the other trustees and consequently on the institution as such. In support of this contention, the learned Counsel relied on a number of decisions of this Court, the first among them being The Commissioner for Hindu Religious and Charitable Endowments Vs. A.P.S. Sethurama Pillai and Others, . A question similar to the one in this case was raised in that case. With reference to the order passed u/s 84 itself the learned Judges pointed out:

A decision in order to bind the institution should be in a dispute between the institution or its accredited representative and another. One of several co-trustees could represent neither the institution nor his co-trustees but only himself. This is particularly so, when the claim is that the institution was a private one belonging to the members of a divided Hindu family, where no divided member can represent the interests of another apart from any power granted by the latter.

This conclusion was rested on the following general principle:

It is well-settled that where there are more trustees than one all would be entitled to act jointly, they would be in the position of joint trustees and form a corporate body. A scheme providing for the management of a private temple by turns amongst the members of a family would be only an arrangement inter se, but outside the family, the co-trustees would form a

corporate entity. The representation of an institution could be valid or effective only if all the trustees jointly act; a fortiori the institution could be bound by an order of the Board under the Act only if all the trustees are impleaded in the proceedings before the Board.

This view of the Bench was affirmed by another Bench of this Court in *M. Angappan and Anr. v. The Deputy Commissioner, Hindu Religious and Charitable Endowments, Madras*, having his office at Nungambakkam High Road, Madras-34 and Anr. (1965) 1 M.L.J. 151. The learned Judges held:

It is well-settled that in the case of co-trustees, the office is a joint one, all of them forming, as it were one collective body. They should therefore execute the duties of their office in their joint capacity. It will undoubtedly be open to them in matters of a routine nature to divide their duties. But so far as their applications to Courts and to public authorities for enforcement of statutory rights or privileges are concerned, they should all figure as a party or apply for the same.

To the same effect is the decision of another Bench of this Court in *Tirumalaisami Naicker Vs. Villagers of Kadambur and Another*, where the learned Judges observed that:

...no doubt, where a religious institution has plurality of trustees the institution cannot be represented unless all the trustees are made parties. If the temples are to be bound by this judgment, all the trustees are necessary parties.

Therefore, the position is well settled that in order to make an order passed u/s 84 of Madras Act II of 1927 binding on the institution, the entire

body of trustees administering the institution as well as the properties should be made parties and that, in the absence of the other trustees being

made parties, the order cannot be said to be binding on those trustees, or on the institution itself. As we pointed out already, in this case, there is

no dispute that at the time when Mallappa Chettiar presented the petition to the Board on 30th November, 1934 his son as well as his wife, who

were co-trustees, were alive and that they were not made parties to the proceedings. Therefore, we do not have any hesitation in holding that the

order dated 12th March, 1935 passed by the Board is not binding on the institution in question, or even on the appellant herein. Consequently,

differing from the view taken by the learned trial Judge, we hold that Exhibit B-3 order is not conclusive and binding on the appellant and therefore

the Court is competent to go into the question whether the suit temple is a private temple or a public temple coming within the scope of Madras

Act XXII of 1959.

5. This takes us to the second question adumbrated by us already. We have already referred to the terms of Exhibit A-3 and only one other term

to which we should draw attention and which has a bearing on this question is that the executants of Exhibit A-3 clearly and categorically stated

that they were constructing the temple and providing for the management and the performance of poojas in the temple only for the spiritual benefit

of the founders and their progeny. In the document itself there is absolutely no reference whatever to the temple being constructed for the benefit of

anybody else other than the founders and the members of their families. It is in this context the question that has to be considered is whether there

is evidence to show that the suit temple is a public temple. A temple has been defined in Madras Act XXII of 1959 in Section 6 (20). According

to this definition,

temple means a place by whatever designation known used as a place of public religious worship, and dedicated to, or for the benefit of, or used

as of right by, the Hindu community or any section thereof, as a place of public religious worship.

Consequently, before a temple can come within the scope of this definition, two conditions must be cumulatively satisfied. One is it must be a place

of public religious worship. Secondly it must have been dedicated for the benefit of the Hindu community or any section thereof. Alternatively, it

must have been used as of right as a place of public religious worship by the Hindu community or any section thereof. Unless both these conditions

are jointly satisfied, a temple will not come within the scope of the definition contained in this Act. It is against this background we shall now

examine the materials available in this case.

6. The first piece of evidence, as we have pointed out already, is the deed of settlement itself. That deed of settlement undoubtedly contemplates

the temple as a place of religious worship. Equally indisputably it does not contemplate the place as a place of public religious worship. Secondly,

as we pointed out already, there is absolutely nothing in the document itself to show that the temple was intended for the benefit of the Hindu

community or any section thereof. Therefore, it is clear that the temple in question has not been dedicated as a place of public religious worship to

or for the benefit of the Hindu community or any section thereof. Then we should consider the question whether the temple is used as a matter of

fact, as a place of public religious worship and whether it is being so used as of right by the Hindu community or any section thereof. In this case,

the appellant had let in oral evidence by examining three witnesses as P.Ws. 1 to 3. P.W. 1 is no other than the second plaintiff, the appellant

herself. She has stated in her evidence that on the north, south and west, their houses are situate and they can enter the temple from their houses.

She has further stated that in the pillar of the temple her husband's grand-father and grand-mother's statues have been carved and pictures of their

family members are hung on the walls of the temple and that the temple is under their lock and key. As regards the worship, her version is that the

pooja is being performed in the morning and in the evening daily, that no outsider will visit the temple and only the members of the family worship

the deity in the temple and that they employ their own poojari for the performance of poojas, However, she has stated in cross-examination that

the street itself is known as Panduranganathaswami Street, that daily neivedyam is done and that Vaikunda Ekadasi Uthsavam also would be

conducted but that the public would not attend the poojas or the uthsavam, but only family members. As regards the physical features of the

temple, her further evidence is that there are prakarams on the four sides, that there is a garbagraham and a mandapam in front of the garbagraham

and that there is a dwajasthambam. P.W. 2 is a tenant of the plaintiffs and he was examined to speak that the public would not visit the temple on

Vaikunda Ekadasi day and Purattasi Saturdays. P.W. 3 is an employee in P.W. 1's house and he has stated that he is daily doing pooja from 10

a.m. to 10.30 a.m. and from 8 p.m. to 8.30 p.m. and that he lit the light of the temple. In Purattasi Saturdays and Vaikunda Ekadasi days, he is

doing Abishekam. But he stated that the public would not attend the festival. This is all the oral evidence on the side of the appellant.

7. On the side of the respondent only one person by name Somasundaram Chettiar, belonging to the same community to which the plaintiffs

belonged was examined. According to him, daily poojas will be conducted and he used to attend the daily poojas. Archanas and neivedyam will

be daily performed and all community people will join in the celebration of the festivals. To his knowledge for the past forty years the festival was

being conducted in the temple. He has stated that the suit temple does not exclusively belong to the plaintiffs, that P.W. 3 is not the archaka and

that a different man is doing poojas in the suit temple.

8. The learned trial Judge rejected the evidence of P.W. 2 on the ground that he was a tenant of the plaintiffs and so he was interested. He rejected

the evidence of P.W. 3 on the ground that he admitted that he did not know to recite the mantras and that D.W. 1 had stated that P.W. 3 was not

the poojari, but some other person. The learned Judge proceeded to accept the evidence of P.W. 1 and D.W. 1 and held that the temple was a

public temple. We are clearly of the opinion that the conclusion of the learned Subordinate Judge is patently erroneous in this behalf. We may

immediately mention that a reading of the evidence of D.W. 1 clearly shows that he was not speaking the truth. A suggestion was made to him that

he was inimically disposed towards the family of the plaintiffs. Though he denied the suggestion, we are of the opinion that there is considerable

substance in the suggestion and that is the reason why he was deposing against the plaintiffs. It would not have been impossible for the respondent,

if the temple is a public temple and the public are attending the poojas in the temple, to produce a few more respectable witnesses to speak to the

public character of the temple and to the festivals and poojas performed there. Therefore, we are of the opinion that it is absolutely unsafe to base

any conclusion on this unsatisfactory evidence of D.W. I. That leaves us with the evidence of P.W. i. The learned Judge himself has not rejected

the evidence of P.W. 1. On the other hand, he purported to act on the evidence of P.W. 1, particularly her version with regard to the physical

features of the temple and came to the conclusion that the temple was a public temple. We have already referred to the fact that P.W. 1. has

admitted that there are prakarams on the four sides, that there is a garbagraham and a mandapam in front of the garbagraham and that there is a

dwajasthambam. The learned Judge was of the view that these physical features were indicative of the temple being a public temple. The learned

Judge also proceeded on the basis that the evidence of P.W. 2 that whenever he was passing the road, he used to worship the deity from the road,

clearly showed that the temple was a public temple. As a matter of fact, we find the following curious statement in the judgment of the learned

Judge in this behalf:

Thus, it is clear that general public even without going into the temple can worship the deity from outside the temple and that being so, the fact that

the people do not throng daily into the temple for worship, will not take away the public character of the suit temple.

We do not want to say anything more on this statement except to characterise it as the height of perversity.

9. The law is well-settled that, when the origin of the temple is known as a private temple, then the clearest possible evidence is necessary for

converting that temple into a public temple and we are clearly of the opinion that, in this particular case, no such evidence is available. As early as

1934, in AIR 1934 230 (Privy Council) the Privy Council dealing with a temple in Malabar where the presumption was that a temple was a private

one, pointed out that if there had been evidence to show that the temples and their endowment were originally dedicated for the tarwad, and so

were private trusts, the Court would have been slow to hold that the admission of the public in later times, possibly owing to altered conditions,

would affect the private character of the trusts. This view of the Privy Council was reiterated by them in a latter decision namely in AIR 1940 7

(Privy Council) In that case, the Privy Council pointed out:

In these circumstances, it is not enough in their Lordships' opinion, to deprive the family of their private property to show that Hindus willing to

worship have never been turned away, or even that the deity has acquired considerable popularity among Hindus of the locality or among persons

resorting to the annual mela. Worshippers are naturally welcome at a temple because of the offerings they bring and the repute they give to the idol;

they do not have to be turned away on pain of forfeiture of the temple property as having become property belonging to a public trust. Facts and

circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting

in such a case as the present; and dedication to the public is not to be readily

inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference, if made from the fact of user by the public, is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away; and, as worship generally implies offerings of some kind, it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity.

A Bench of this Court had to consider this question in *Madras Hindu Religious Endowments Board Vs. V.N. Deivanai Ammal by Power of*

Attorney agent T.V. Mahalinga Aiyar, . In that case, an argument was advanced that the temple should be held to be a public temple in view of the

following broad features, namely : (i) that when the temple was built in 1919, Kumbabhishekam was performed on a grand scale, (2) that the

respondent also made utsavamurthis and built chaprams and the deities were also taken in procession on some special occasions, (3) that a

gurukkal had been engaged to perform the puja regularly and (4) that the temple had a gopuram and other features which were usually found in a

public temple. Dealing with this argument, this Court pointed out thus:

It must be noted that there is no deed of dedication and as has been observed by the Privy Council it is essential that it should be clearly proved

that the institution was dedicated to the public. In the case of an old temple, such dedication might be presumed from long user by the public as of

right. But in this case the temple was built only in the year 1919, and in the absence of a deed of dedication it is difficult to hold that there has been

dedication to the public. It is true that the facts that there is an utsava idol and there are processions are generally indicative of the fact that it is a

public temple. But then no property has been dedicated for the upkeep of the temple. The worship is maintained and the expenses are met from

out of the private funds of the respondent. In the absence of any property being dedicated for the maintenance of worship in the temple, it is

difficult to hold that the temple has been dedicated to the public.

On behalf of the respondent reliance was placed on the decision of this Court in *Commissioner, Hindu Religious and Charitable Endowments Vs.*

S. Kalayanasundara Mudaliar, . Such reliance was for two purposes. One was that the evidence in that case was similar to the one in this case and

following that decision, we should hold that the suit temple is a public temple. Secondly it was contended that in the absence of any declaration in

the deed about the exclusive character of the institution, it must be held that the temple is a public temple. We are of the opinion that the said

decision does not support the respondent with reference to any of these positions. That decision dealt with a case where an individual constructed

a temple and endowed properties for the maintenance of, and performance of poojas in the temple. The provisions of the deed have been

elaborately set out in the judgment in question and it makes two or three things absolutely clear. One is the founder built a Subramaniaswami

Temple for the village itself. Secondly the founder appointed one Kalyanasundara Mudaliar, son of his brother-in-law as the succeeding trustee. He

also constituted a committee to advise and inspect and supervise the performance of the trust. That committee consisted of members belonging to

different castes, as well as people living in the village and in Madras. The third feature is the provision contained in the deed as to the temple

honours. The actual recital is:

As regards honours due from the temple, the Dharmakartha shall receive the honours first and other honours shall be done according to the usage

of the village.

The provision that ""other honours shall be done according to the usage of the village"" makes it indisputably clear that the temple was meant to be a

public temple for the benefit of the village as a whole and was not intended to be a private temple for the benefit of the founder and the members of

his family. It is these special features present in that case that were relied on by this Court for coming to the conclusion that the intention of the

founder was to construct the temple as a public temple. Having come to that conclusion, the learned Judges pointed out:

...learned Counsel for the respondent relied firstly on the fact that the deed of endowment did not expressly say that the temple was intended for

the public. To our minds, it appears unreasonable to find any statement in a deed of endowment expressly declaring that the temple is intended for

the public. On the other hand, it is natural, when the founder intends the temple to be purely a family temple, that he should make it clear by

expressing his intention to that effect. In the absence of any such declaration

about the exclusive character of the institution, we think it reasonable to infer that the dedication is for the benefit of the worshipping public and not only for the benefit of the members of the family.

The above statement contained in the judgment has to be understood against the facts found by the learned Judges. As we pointed out already, the deed of dedication in that case made it absolutely and abundantly clear that the temple was intended for the benefit of the entire villagers. If so, if that general character was to be cut down and the temple was to be held to be a private one, there must be a specific recital in the deed itself to that effect. It is that characteristic feature which the learned Judges pointed out in that case. On the other hand, there is express recital in the present case that the temple was being constructed only for the spiritual benefit of the founders and their family. Therefore, in the face of and notwithstanding, such a recital, if an intention on the part of the founders to dedicate the temple for the benefit of the public is to be inferred, it can be done, if at all, only on the basis of a clearest possible statement to that effect in the document and there is absolutely no such statement in Exhibit A-3. We are therefore of the opinion that the above decision does not in any way support the case of the respondent. We may also point out that this decision has been referred to by the learned trial Judge himself. But he completely missed the special features present in the deed of dedication in that case, to which we have already drawn attention, and he proceeded as if the facts were identical. The learned Judge therefore felt that following that decision he would be justified in holding that the suit temple also is a public temple.

10. The distinction between a public and a private trust and temple has been elaborately considered by the Supreme Court in *Deoki Nandan Vs. Murlidhar*, . It was held in that decision that the distinction between a private and a public trust was that whereas in the former the beneficiaries were specific individuals, in the latter they were the general public, or a class thereof and that the true beneficiaries of a religious endowment were the worshippers and the test to decide whether an endowment was public or private was to ascertain whether it was the intention of the founder that specified individuals were to have the right of worship at the shrine or the general public or any section thereof. The main characteristic of a

public temple is that it is intended for the use of the public or a section thereof. On the other hand private temples are intended for the worship by

the members of the family of the donor exclusively. In the case of a public temple the public would be entitled to worship therein as a matter of

right, while in the case of a private temple such worship by persons other than the founder's family would be by the sufferance of the latter. The

mere fact that outsiders are allowed to worship in a temple cannot necessarily mean that the temple was dedicated to the public, as no Hindu will

ever prohibit strangers from offering worship to the deity enshrined in his private temple. In all such cases worship by outsiders is referable to the

leave and licence granted by the owner and cannot be indicative of any dedication to the public. The latest decision of the Supreme Court on this

point is T.D. Gopalan Vs. The Commissioner of Hindu Religious and Charitable Endowments, Madras, . In that case, the facts were much

stronger than in the present case. Notwithstanding this, the Supreme Court reversed the conclusion of this Court and held that the temple was not a

public temple. The Supreme Court pointed out:

In short the origin of the temple, the manner in which its affairs were managed, the nature and extent of the gifts received by it, rights exercised by

devotees in regard to worship therein, the consciousness of the manager and the consciousness of the devotees themselves as to the public

character of the temple were factors that went to establish whether a temple was public or private.

With reference to the facts of that case, the Supreme Court further pointed out:

It is true that the suit temple had some physical characteristics and features which are generally to be found in public temple. It was also established

that persons who were outsiders in the sense that they did not belong to the Thoguluva family used to come and worship at the temple and made

offerings there. There were also some jewels and other articles in the temple. But the determination of the question whether the temple was public

or private did not depend on some facts or set of facts alone. The entire evidence, both documentary and oral, had to be considered as a whole

keeping in view the principles already noticed by us.

Applying the above general principles laid down by the Courts, in this case, we do not have the slightest doubt in holding that the suit temple was

intended to be a private temple and continues to be a private temple. We have already referred to the evidence of P. W. 1, which has been accepted by the learned Subordinate Judge. It makes it abundantly clear that the temple was under the lock and key of the plaintiffs. The learned Judge completely missed this aspect of the question and proceeded to hold that simply because the deity was visible from the street and any passerby could worship the deity from the street, the temple can be said to be a public temple. He has forgotten the statutory requirement that the place must be used as a place of public religious worship as of right by the Hindu community or any section thereof. The mere fact that any passerby on the street turns towards the deity, which is visible from the street, and bows or worships the deity will not convert a private temple into a public one. There is the further fact in this case that the temple had been managed and was intended to be managed by the founder's family and nobody else. As a matter of fact, for the remuneration for the performance of the duties of the trustees, the income from the "C schedule property referred to in Exhibit A-3 was set apart and that is the clearest possible indication that barring the members of the family of the founder, nobody else can be trustees and they alone can enjoy the income from the property. There is also the fact that in addition to the income from the properties mentioned in Exhibit A-3, there is no other income for the temple. It is no doubt true that D. W. 1 stated in his evidence that Kanikai would be collected from the bajanai party. It is not clear what he exactly meant by saying that Kanikai would be collected from bajanai party. We have already held that he is an unreliable witness. We, therefore, hold that the temple is a private temple in origin and it has been treated and continued to be treated as a private temple, that the trustees in charge of the institution are conscious of the fact that the institution is a private temple, that the expenses connected with the temple are met only out of the income from the properties dedicated under Exhibit A-3 and that nobody other than the members of the family of the founder are entitled to worship in the temple. As a matter of fact, the Hindu Religious Endowments Board which passed the order Exhibit B-3 was conscious of this fact. All that they have stated in that order was:

P.W. 2 who has been examined as a witness is the agent of the petitioner and he deposes that the temple abuts the public street and the public can

worship the deity from the street itself. Though he is unwilling to say that public are freely resorting to worship in the temple it is easy to conclude

that the trustee is only too willing to welcome the public to come and worship in the temple.

This observation, even if it is held to correctly represent the facts, is not sufficient to hold that the temple is a public temple coming within the scope

of the Act because in the absence of an express dedication for the benefit of the public, user by the public as of right must be established and such

user as of right is far different from the trustees being willing to welcome the public to come and worship in the temple. Under these circumstances,

we are clearly of the opinion that the conclusion of the learned Subordinate Judge is erroneous and that the materials on record clearly and

categorically establish that the suit temple is only a private temple and therefore it does not come within the scope of Madras Act XXII of 1959.

11. The appeal is, therefore, allowed, the judgment and decree of the learned Subordinate Judge are set aside and the suit instituted by the

appellant herein will stand decreed as prayed for. The appellant will be entitled to her costs both in this Court, as well as in the trial Court.