

(1968) 12 MAD CK 0033
In the Madras High Court

K.M. Senthivel Pillai and Others

APPELLANT

Vs

Kulandaivel Pillai and Others

RESPONDENT

Date of Decision : 02-12-1968

Acts Referred:

Citation : (1970) ILR (Mad) 95 : (1970) 83 LW 472 : (1970) 2 MLJ 555

Hon'ble Judges : K. Srinivasan, J

Bench : Division Bench

Judgement

K. Srinivasan, J.—One Ammani Ammal is said to have founded a trust. The purposes for which the trust was created as at its inception are not known. But, in 1871, she executed what is called a deed of agreement, Exhibit, A-1. It set out that certain properties mentioned in the document which had been acquired by her and which were in her enjoyment at that time were to be looked after by the other party to the agreement, one Sankaran Servai. The properties consisted of what is described as a Mutt. Sankaran Servai was to live in the Mutt and he was to attend to her last rites, manage the affairs pertaining to the Mutt and effect improvements thereto. It finally stated that Sankaran Servai should perform the charities of the abovesaid Mutt and that he should not alienate the properties in any manner. This is the earliest document which gives any indication of the nature of the properties covered thereby. In the year 1874 Sankaran Servai executed a release deed, Exhibit A-2. It stated that he had been entrusted with certain properties which had been set apart by Ammani Ammal for the purpose of charities, that he had been performing these charities since the date of Exhibit A-1 and that as she was not satisfied with his administration of the properties, he was surrendering the properties and executing the release deed. Even this document did not mention what the charities were. In 1880, another document came into existence. This was an agreement executed by Ammani Ammal in favour of her three sons: Sundaram Pillai, Kandaswami Pillai and Guruswami Pillai. Once again, the recitals in the document purported to effect an entrustment of the properties in these three persons, who were directed to look after the said properties and the charitable matters attached to the same. It set

out the earlier incidents regarding Sankaran Servai's management and the release executed by him. The power of appointment of other persons to carry on the purposes of the trust was conferred upon these persons, as also the hereditary right of management of the properties. It is not known when this Ammani Ammal died. But, of her three sons, the eldest Sundaram Pillai died in 1900 leaving no issues. The youngest son, Guruswami Pillai, died in 1893, and after his death, an agreement was entered into between the surviving son, Kandaswami Pillai and the heirs of Guruswami Pillai. For the first time, it was this document that specified the purposes for which the properties were allegedly set apart. The recitals in this document show that a Mandapam had been built in North Masi Street for the purpose of Dhigvijayam thirukkam to be performed in that Mandapam to Sri Meenakshisunda-reswarar Swami. The other objects of the trust were the performance of Maheswara Guru Pooja to Sri Dhakshinamoorthi Swami, accompanied by poor feeding on the full moon day in Chitrai in Ammani Ammal Matam, and also the performance of guru pooja for Ammani Ammal on the full moon day in Karthikai, accompanied by the feeding of the poor. Kandaswami undertook under this document to perform the said three Kainkaryams, by leasing out the coconut trees surrounding the Mutt and with the income by way of house rent and the yield from lands. It appears from this document as also from the pleadings in the suit that the properties consisted of a matam, known as the Ammani Ammal matam, which yielded some income by way of house rents from the houses surrounding it and a mandapam where the thirukkam was being performed for Sri Meenakashisundareswarar, on one day in the year, and this Mandapam was also yielding some income.

2. Kandaswami died in 1911. The plaintiffs, who are the descendants of this Kandaswami, brought the suit in forma pauperis for the framing of a scheme for those trust properties. The principal defendant is the first defendant, who is the son of Guruswami, the youngest of the three sons of Ammani Ammal. It was alleged by the plaintiff's that the first defendant was managing the properties and performing the charities even during the lifetime of the sons of Kandaswami, and that laterly, though he had been collecting the rents and profits from the properties, he had not been rendering any accounts and had not been carrying out the objects of the trust. It was on this charge of breach of trust on the part of the first defendant the suit was filed for framing a scheme.

3. The contention of the first defendant was, that the dedication, if at all any existed, was an invalid one, that the sons of Ammani Ammal took the properties as their private properties ; and that shortly before the death of Kandaswami, the second son of Ammani Ammal, it was agreed that the properties should be divided among the heirs. Items 1 to 17 were taken by the first defendant and item 18 was taken by Kandaswami. It was contended in the written statement of the first defendant that this being a private trust, it was put an end to by the consent of all the living members of the family and that from about 1911, the members of the two branches were in separate possession of the properties so divided as their private properties. It was claimed that the heirs of Kandaswami

were in fact leasing out the mandapam which fell to Kandaswami's share and appropriating that income for their private purposes. The first defendant was also doing likewise with regard to items 1 to 17 which fell to his share. The first defendant accordingly claimed that he was in adverse possession of the items which he took over in 1911.

4. The questions that arose before the Court were whether there was a valid trust created by Ammani Ammal and whether it was put an end to in the manner stated by the first defendant.

5. The learned Subordinate Judge held that whatever might have been intended by Ammani Ammal, no dharmam of any description was being conducted during the past 20 or 25 years. He held also that the creation of a trust for the performance of guru pooja is under the law invalid. He declined to accept the claim of the plaintiffs that pooja was offered for an idol located in the premises of the matam. In the light of the evidence before him, he concluded that this Dhakshinamurthi really referred to the father of Ammani Ammal, and that it was not the worship of an idol that was contemplated but the performance of guru pooja for the father of Ammani Ammal. None of the documents referred to set out what the charities were. It is only from the last of these documents, Exhibit A-7, that any clue is available in this regard. The learned Subordinate Judge held that a trust founded for the performance of Dharmam in general is invalid for vagueness, that it is equally invalid for the reason that the performance of guru pooja is provided for. He accepted the claim of the first defendant that the trust for whatever purposes it was created, was a private trust, and was put an end to by the consensus of the members of the family and that thereafter each branch was in possession of separate portions of the properties in assertion of its right and that therefore the first defendant had perfected his title by adverse possession.

6. The plaintiffs appeal and the question that has been canvassed before us is whether the trust was validly put an end to.

[After discussing the evidence the Court proceeded:]

7. There appears to be no room for doubt that the dedication in the present case, if it can be called such, was in the nature of a private trust and that position is not seriously controverted by Mr. M.R. Narayanaswami, learned Counsel for the plaintiff-appellants. He contended however that though a valid trust cannot be brought into existence for the purpose of guru poojas for deceased persons, the trust, insofar as it relates to the performance of dhigvijayam thirukkam for Meenakshisunderaswarar at the mandapam, must be held to be a valid one. It is not quite clear what this dhigvijayam thirukkam consisted of. According to the evidence, a Mandagapadi used to be performed at this Mandapam in item 18. During the Chitrai festival, the deity Sri Meenakshisundareswarar while being taken in procession was stopped at this Mandapam and worship offered. Even assuming that a trust created for this purpose would be a valid trust we feel

exceedingly doubtful whether the trust can be regarded as a public trust. Mr. Narayanaswami referred to the decision of the Supreme Court in *Saraswathi Ammal and Another Vs. Rajagopal Ammal*, , where it was held that it is the dominant purpose of a dedication that ought to be looked to in ascertaining its validity or otherwise. But insofar as we are able to gather from the documents, where guru poojas for Ammaniammal, and for her father, Dhakshinamurthi are provided for, as also the worship of Meenakshisundareswarar at the Mandapam on a particular day in the year, it seems to us that the dominant purpose is really guru pooja. The vague statement that poor feeding used to be done does not advance the argument insofar as it serves to establish the creation of a public trust. We accordingly hold that the learned Subordinate Judge was right in his conclusion that this was only a private trust. We may also emphasise that there is no contemporaneous document which establishes the intention of Ammani Ammal, the founder of the trust, or outlines the purpose for which she proceeded to create the trust. We have only the document executed (long after the founding of the trust) by her heirs, Kandaswami and others, setting out the purpose for which the trust was allegedly created. Except for the fact that there was a mandapam, which suggests that a mandagapadi might have been performed, there is nothing to show that that was one of the objects which led to the founding of the trust. Taking all the circumstances together, we agree with the learned Subordinate Judge that only a private trust, principally for the performance of the guru poojas was founded.

8. The next question that has been argued at length by the learned Counsel, Mr. Narayanaswami, is that even so, the private trust cannot be put an end to as claimed. The extinction of a private trust is, according to the arguments, totally impermissible under the law. In *Manomohan v. Siddheswar* AIR 1923 Cal. 177, it was held that shebait's cannot by their dealings give the trust properties a different turn but the members of the family interested can by their consent convert the debutter property into secular property. It is not the dealings but the family consent that changes the character of the properties. In laying down that proposition, the learned Judges were following the dictum of the Privy Council, *Dooganath Roy's case* (1876) 4 I.A. 52, though some doubt was cast upon the principle. In *Chandi Charan Das and Another Vs. Dulal Paik*, , also the principle that debutter property can be converted into secular property by the consensus of the whole family and that consensus should be by all the members, both male and female, who are interested in the worship of the deity, was laid down. The learned Judges were following the proposition that in the case of a family idol, the consensus of the whole family might give the estate another direction, an observation from the Privy Council decision in *Doorganath Roy v. Ramchunder Sen* (1876) 4 I.A. 52. No doubt, here also, it was pointed out that this observation was more or less obiter and that the question did not arise in the case dealt with by the Privy Council.

9. A more pointed criticism of the Privy Council's observation in *Doorganath Roy v. Ramchunder Sen* (1876) 4 I.A. 52, was made in a later decision of the Calcutta

High Court in Sukumar Bose and Others Vs. Abani Kumar Haldar and Others, . The learned Judges were dealing in that case with a dedication of property to an idol and held that if there is an absolute dedication, the properties ceased to be those of the family and become the properties of the idol. Obviously, then once that result has been reached, the doctrine that the consensus of the family can give another direction to the properties could not apply. The learned Judges observe that the members of the family cannot put an end to the installed idol, nor can they deprive it of property of which it had become the absolute. owner. Proceeding from the proposition that where an absolute dedication in favour of an idol had taken place, it becomes a juristic personality whose interests have to be protected by other persons and that the right of the deity cannot be negated by the members of the family purporting to divest the deity of its property, the learned Judges finally held that the observation of the Privy Council in Doorganath Roy v. Ramchunder Sen (1876) 4 I.A. 52, cannot be taken any longer to be good law.

10. Pursuing this line of argument, Mr. Narayanaswami next referred to "Hindu Law of Religious and Charitable Trusts" by Mukherjee. At page 175 of the second Edition, the learned author observes that in Hindu Law, the institution of a family idol is regarded as a valid religious trust and that it would be a religious or charitable trust in the legal and technical sense, even though the persons benefited are members of a particular family. Next, referring to the principle of English law the learned author observes:

These is another principle of English law according to which the persons interested in a private trust have the power and authority to use the trust fund for any purpose and divert it from its original object. In other words, the beneficiaries if they are sui juris and are of one mind may, by their option, modify or put an end to the trust. One point which is still debatable in Hindu law is whether this principle can be applied to a private or a family debutter.

11. Next, the learned author refers to the decision of the Judicial Committee in Doorganath Roy v. Ramchunder Sen (1876) 4 I.A. 52, The case before the Privy Council arose out of the suit to set aside certain alienations of an ancestral mahal on the ground that the mahal had been dedicated to the worship of an idol. On the evidence, it was found that the estate was not dedicated. The suit failed on that ground alone. But the Judicial Committee proceeded to observe that if the deed of endowment had been satisfactorily proved and it was an endowment which dedicated the estate to the service and worship of a particular idol, then though the idol might be a family idol, the property would be impressed with a trust in favour of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it, but in the case of the family idol, the consensus of the whole family might give the estate another direction. They, however, notice that no such question arose in the case before them.... The learned author deals with this observation and points out that it was an obiter dictum pure and simple, and that while it has been regarded as an

authoritative pronouncement of the law in some cases, its correctness had been questioned in other decisions. The criticism was made by the learned author that even if the property had been dedicated only to a family deity and the endowment is a religious or charitable trust, there is no reason why the other incidents of a private trust as obtain under the English law should be applied to it. Further the deity itself is a juridical person in Hindu Law and the dedicated property would vest in it absolutely and that the property cannot be taken away from the deity without the consent of the idol and that the consent of the beneficiaries is really immaterial and cannot make revocable a gift which is irrevocable in law. It will be noticed that both in the above passages setting out the criticism by the learned author and in the decision of the Calcutta High Court cited earlier in *Sukumar Bose and Others Vs. Abani Kumar Haldar and Others*, , the question has been considered in the light of an installed idol in favour of which certain properties are dedicated, with the consequent result that the idol becoming a juristic personality acquires an absolute right to the property and it is from that perspective the question has been asked whether a trust of that description can be put an end to. We are in entire agreement with these propositions, viz., that where an idol has been installed, even if it happens to be a private family idol, and the family endows property for the upkeep of the idol and for the performance of poojas and the like, the result contemplated in the above decision must be deemed to follow, viz., that the idol as a distinct entity becomes the owner of the property and thereafter the donors the members of the family, may have no surviving power to take back the property from the idol, but the question would be, whether such a result can follow in the case of trust of the kind which we have in the case before us. In so far as the present trust contemplates setting apart of the property for guru poojas, it is undoubtedly invalid—There is no evidence of an initial foundation for the purpose of performing the mandagapadi at the mandapam. We shall presently consider whether that can be regarded as a public trust. We have already referred to the evidence that there used to be a Dhakshinamoorthi temple in which poojas have been offered to an idol of that name. The Court below has not accepted the evidence and has held that the Dhakshinamurthy referred to is really the father of Ammani Ammal, the founder of the trust, and what was contemplated was only guru pooja for that Dhakshinamurthi. In the present case, therefore, there was no installed idol and no dedication of the property in favour of any such idol. Leaving side the two guru poojas referred to we may for the purpose of argument take it that the property was set apart also for the purpose of performing mandagapadi on one day in the year during Chitra festival for Sri Meenakshisundareswarar. The question we have to consider is whether it can be said that there was a dedication for any deity in so far as the performance of that mandagapadi is concerned and whether the owner of the property divested themselves of their rights and vested the property in any other juristic personality.

12. The broad distinction between public and private trusts appears to be that public trusts are trusts constituted for the benefit of either the public at large or

of some considerable part of it answering to a public description, while private trusts-are trusts wherein the beneficial interest is vested absolutely in one or more individuals, who are or who may be definitely ascertained. In Perry on "Trusts " it is stated that private trusts concern only individuals or families for private convenience and support, while public trusts are for public charities or for the general public good. Lewin while stating that public trusts are those constituted for the benefit of either the public at large or some considerable portion of it, would include even that category of trusts for charitable purposes, and in fact, equates charitable trusts to public trusts. Ganapathi Iyer in his "Hindu and Mohammadan endowments" deals with instances of what have been held to be public and private trusts. He refers in particular to the case Sathappa Iyer v. Periaswami ILR (1891) Mad. 1, where a Zamindar founded an institution which became known as Sathappa Iyer's mutt and made a charity grant in its favour. A suit was brought to remove the appellant who was in charge of the mutt and to recover possession of the properties. The original document of grant showed that the then Zamindar gave some properties to his then guru for the construction of a mutt, for offering worship and prayers, for meeting the expenses of the establishment, as well as for the performance of annual guru pooja and deva pooja. The document also provided for the distribution of food among paradesis when guru pooja was performed. Mutuswami Iyer, J., dealing with certain aspects of the case, pointed out,

The contention regarding jurisdiction is that under Act XX of 1863, the District Court is the proper forum. This would be so if the institution is endowed and dedicated to any section of the public, either as a place of worship, such as temple, or a religious establishment where religious instruction is to be had, like a mutt....But, the grant in the case before us discloses no-intention to confer a benefit either upon the people in general or upon any class of sectarians. On the other hand, the grantor desired only to perpetuate the spiritual memory of his guru. Neither the general public for any section of the people had an interest either in the erection or maintenance of the mutt or in the performance of the prescribed religious duties....The motive for the grant being...an act of religious charity which would ensure the prosperity of his family. The original grantor and his descendants are the only persons interested in seeing that the institution is kept up for their benefit in accordance with the intention of the grantor....

13. The learned Judge accordingly held it to be in the nature of a private trust. Ganapathi Iyer further points out that the user by or benefit to the public is a test for determining whether a trust is a public trust or not. The learned author further sets out several distinctions between private and public trusts. He treats-the power of persons interested in a private trust to use the fund for any other purpose or to divert the fund from the original object as one of the indicia of a. private trust, pointing out that in contrast it cannot be done in the case of a public charitable trust.

14. It is not denied that the principle laid down in Doorganath Roy v. Ramchuder

Sen (1876) 4 I.A. 52, has been followed in several Courts in India. We have already referred to the Calcutta decisions wherein that principle has been criticised. To our minds,, however valid the criticism might be in cases where there is an installed idol, though private in character, for the purpose of maintenance of which properties are dedicated by a family, in which event it might be held that the idol as the owner of the property cannot be deprived of it by the family, the case of a private trust of the kind we are concerned with falls into a different category to which the observations of the Privy Council in Doorganath Roy v. Ramchunder Sen (1876) 4 I.A. 52, can still apply. In. Govindakumar Roy Chowdry v. Debendrakumar Roy Chowdry 12 C.W.N. 98, the learned Judges of the Calcutta High Court refer to Mayne's Hindu Law and Usage, 7th Edition where Mayne was of the same opinion, viz., that " the distinction between a private and a public endowment is an important point, for in the case of a family idol, the consensus of the whole family might give the estate another direction." in Appu Pattar and Another Vs. Sri Kurumba Bhagavati Devaswom Uttama Panampalli Kurumba Umma and Others, , a Bench of this High Court accepted the principle that the members of a family may unanimously put an end to a private endowment such as a temple of a family. An early decision of the Calcutta High Court in Tulsidas v. Sidhanath (1911) 9 I.C. 650, has accepted that principle as valid. Two decisions of the Orissa High Court AIR 1949 1 (Orissa) , and Narayan Behera and Others Vs. Ch. Narasing Charan Mohapatra and Another, , have also accepted the principle laid down by the Privy Council in relation to private trusts.

15. The result of the above discussion is accordingly that in so far as a valid trust of any description created by Ammani Ammal in the present case is concerned, it is essentially a private trust and that it is open to the members of the the family, all of them acting together to put an end to the trust. There is no evidence of an absolute dedication of the properties, nor is there any evidence that the entire income from the properties was being devoted to any valid charitable purpose.

16. It is the contention of the first defendant that all the members agreed to put an end of the trust and divided the properties among themselves. The only question that remains to be considered is whether there was in fact such a consensual determination of the trust.

17. We agree with the learned Subordinate Judge that there was. It is true that the evidence in this regard is not of a large volume. The witnesses on the side of the plaintiffs are persons who are unable to say anything out of their own personal knowledge. Virtually, the first defendant is the only person who can speak to it. But in proof of the fact that that should have been so done, we have clear evidence in the shape of the actions of the members of the family. It is not denied that the plaintiffs themselves were in possession of a portion of properties and were deriving income therefrom, and if they at all performed mandagapadi, they did so on very infrequent occasions and not as if they were performing a duty which was cast upon them by a trust in existence. Indeed, D.W. 2, who is

herself the third defendant and the mother of the second plaintiff, admitted that her husband, Shanmugam a son of Kandaswami, died over 25 years ago, and she did not perform this mandagapadi for several years. For one or two years immediately after the death of her husband, both she and the first defendant performed it. Thereafter, it was not done. No member of the family, including the first plaintiff, appears to have questioned the conduct of the parties during the past several years or disputed their enjoyment of the income from these properties. We can therefore take note of this circumstance as indicating that the members were fully aware that the properties had lawfully passed to the different branches, and from this circumstance we can deduce that the members of the family should have acted in concert in so dividing the family properties and put an end to the trust. This conduct on the part of the member of the family gives ample support to the evidence of the first defendant that in putting an end to the trust, the members of the family acted together. Mr. Narayanaswami, learned Counsel urges that this conduct is really the conduct of a defaulting trustee and that cannot be relied upon to lend validity to the claim that there was a lawful determination of the trust. But when it is not denied that the members of the family alone were beneficiaries and this was in the nature of a private trust, we see no reason why the conduct of the members of this family should be looked at with suspicious eyes. That conduct is to our minds in conformity with the position that the members no longer felt themselves to be under the inhibition of any trust. The natural inference to be made from such conduct is that the trust was to the knowledge of all the members of the family no longer in existence, a result that could and should have been brought about only by the consensus of the members of the family.

18. We are accordingly satisfied that the decision of the Court below is correct and dismiss this appeal with costs. The appellants will pay the Court-fee on the memorandum of appeal.