

(1929) 11 MAD CK 0066
In the Madras High Court

Kumaraswamy Asary and Others

APPELLANT

Vs

(Poojari) Lakshmana Goundan and Others

RESPONDENT

Date of Decision : 07-11-1929

Acts Referred:

Citation : AIR 1930 Mad 549 : (1930) ILR (Mad) 608 : (1930) 31 LW 499

Judgement

1. This is an appeal against the judgment and decree of the Subordinate Judge of Salem in O.S. No. 4 of 1916, dated 30th November 1925. The suit relates to the temple of Sri Kandasami in the village of Kalipatti in the Salem District. The temple was founded by one Lakshmana Goundan, the grandfather of defendant 1. He died about the year 1856 or 1857. Defendant 2 who was the son of defendant 1 was added as a party. He has since died and his sons have been added as his legal representatives. The plaintiffs are Hindu worshippers of the temple. They instituted the suit for a scheme of management. Defendant claimed that the temple was a private temple. The Subordinate Judge, Mr. Narayana Ayyar, found it to be a private temple. On appeal to the High Court, Abdur Rahim and Old field, JJ., differed, the former finding that the temple was a public temple and the latter holding it to be a private one. A decree was therefore made dismissing the appeal and from that decree the plaintiffs appealed under the Letters Patent, and three learned Judges who heard the appeal, Sadasiva Ayyar, Seshagiri Ayyar and Burn, JJ., delivered separate but concurring judgments finding that the temple was a public one. Against this an appeal was preferred to the Privy Council who decided that the temple was a public one. The suit was therefore remanded for framing a scheme. It is against the scheme so framed that the present appeal is preferred and the main question at issue is whether the lands which now stand in the name of defendant 1 should be treated as temple property or whether they should be held to belong to defendant 1. The learned Subordinate Judge has held that they belong to defendant 1.

2. That the properties in dispute stand in the name of defendant 1 is not denied. The argument of the learned advocate for the appellants is briefly this: The temple having been found to be a public one, it must be presumed that all

offerings made to the God were the property of the God and that as it is admitted that the suit properties must have come practically entirely out of the offerings to the God, they must be held to be the property of the God of which defendant 1 was only a trustee. It is further argued that the learned Subordinate Judge wrongly threw the onus of proof under these circumstances on to the plaintiffs. For the other side, it is contended that the temple having been admittedly a fairly recent one and there being no written deed of the dedication, usage must determine the nature of the trust and that in fact the gifts were offered on the understanding that, after defraying the expenses of the temple, the remainder should go to the founder and his heirs. It is also contended that the onus of proof that these lands which stand in the name of defendant 1 are temple properties was rightly laid on the plaintiffs. The whole evidence being before us, the question of onus is not very important.

3. The history of this temple has been narrated in several judgments in the case and it may be summed up in the words of their Lordships of the Privy Council:

Lakshmana Goundan" the grandfather of defendant 1" lived in a small house which belonged to him in the village of Kalipatti. He was a devout Hindu and originally a poor man. He maintained in his house an idol of the goddess of Amman, which was the private idol of his family. He was also a devout worshipper at the public temple at Palni at which there was an idol of the God Subramaniaswami, and he made yearly pilgrimage to Palni with offerings to that God. It is said, and probably with truth, that he dreamt that he should install at his house at Kalipatti an idol of the God Subramaniaswami and that the God would come to his house and enable him to foretell events. He did install that idol at his house, adopted the ritual which was followed at Palni, and allowed Brahmins and other Hindus of various castes to worship the idol as if it was a public idol. He acted as the pujari of the idol and received the pujari offerings made to the idol by worshippers and fees which he charged in respect of processions and other religious services. He obtained a great reputation as a holy man and as being; enabled by the God to foretell events.

4. Their Lordships then proceed to describe how the number of worshippers increased and extensions to the temple were made by Lakshmana Goundan. They proceed:

On certain days in each week the Hindu; public was admitted by him free of charge to worship in the greater part of the temple, to one part only on payment of fees, and to the inner shrine apparently not at all. With the incomes which he derived from offerings and fees at the temple he efficiently maintained the temple as if it were a public temple and discharged all the expenses connected with the temple and the worship of the idol there. That may be assumed from the reputation which the temple acquired against the Hindus.. No accounts have been produced probably he kept none, but it may be assumed that he applied the balance of the income he so obtained"; to the support of himself and his family and in acquiring for his own benefit and that of his family some immovable

property which he, possessed before he died.

5. The only fact that may be added to this is that apparently the date of his bringing the God from Palni was about 1821 and their Lordships find that the temple itself was founded between 1841. and 1856.

6. In dealing with this appeal, it has to be remembered that the sole point decided by the Privy Council was that the temple was a public and not a private one. The remarks beyond this point made by the learned Judges of this Court and which have been sought to be used as arguments, however valuable they may be, are obiter. Now we think: it is clear in a case of this sort where the temple is of comparatively recent foundation and its origin well known, and where there is no deed of gift or dedication the nature of the grant must be determined by the usage. It has to be remembered that the idol was brought by Lakshmana Goundan, from Palni to his house a considerable time, some twenty years or more, before the temple was built. The growth of the temple and of its importance was gradual.. The allegation of the plaintiffs that there was a temple in the place before has been found by all Courts to be untrue, Seshagiri Iyer, J., says at p. 306.

In the absence of any writing and in the absence of any evidence of persons who were alive in 1819, it is not possible to say when the dedication was made. It is the usage in the temple and it is the practice that has been observed that should guide us in determining this point. From this point of view, I have no hesitation in holding that the temple was dedicated at least during the lifetime of Lakshmana Goundan.

7. Burn, J., says;

As might be expected in the circumstances, the progress of the "building was gradual. The main features had, however, been completed by the time of Lakshmana Goundan's death in 1857,

8. It was sought to be argued (1) that the usage could not be held to evidence the nature of the trust and (2) that a trust by which the surplus money after paying for the maintenance of the temple would go to the pujari would not be a legal trust.

9. As regards the first point no satisfactory authority was quoted. The following cases were relied on: Puraviyu Goundan v. Poonachi Goundan [1921] 40 M.L.J. 239. That was a case where there was no image of the goddess in the temple and she was represented by akasa or emptiness. It was nevertheless held that the offerings to the pujari in that case were made to the goddess and that the lands endowed to the temple in that case were the property of the goddess and not that of the pujari. But in that case the lands had been given to the temple by a poligar family. There was an inscription describing the dedication on the ceiling and the lands stood in the inam register in the name of the goddess. The next case is Srinivasacharyulu v. Patyanga Rao AIR 1921 Mad. 467. There the grant

was expressly to the God and the family of the defendants were appointed as archakas. They claimed that the lands belonged to them subject only to the burden of service in the temple. It was held that the grant being clearly to the God, the usage according to the defendants could not be invoked in interpreting the grant. That has no application to a case where the grantor himself founded the temple and there is no written deed of grant. In such cases the only means of determining the nature of grant is by the usage. In *Attorney General v. Sidney Sussex College* [1869] 4 Ch. 722, Lord Hatheley, L.C. says:

I think the appellants are entitled to apply that principle of the Court which says, that if there be any ambiguity, the course of construction and action upon the bequest may be called in aid, as inferring that the persons who are concerned in the trust have not been committing a breach of trust from the commencement downwards to the present time. The reason why the Court relies upon that rule with reference to charties, where there is anything doubtful in the construction of the will, is, that there have been parsons alive who were competent to controvert any such conclusion, and it is not to be assumed that, where many persons were interested in controverting such a conclusion, a course of action has been adopted which has been a plain and clear breach of trust.

10. In *Attorney General v. Bristol* 37 E.R. 640, Lord Chancellor Eldon, remarks:

The construction in these cases I take it, must be considered to go upon intention, and the different rules furnished by the cases I have mentioned, are to be considered as indicia of the intention. Was it then the intention of the donor that Bristol should be a trustee.... As far as I have read these ancient cases, they state it to depend upon the intention of the donor, and that one way of finding out that intention, is to enquire, whether the whole of the annual value of the property was, at the time of the foundation of the charity, distributed amongst the objects of the charity.

11. In *Attorney General v. Corporation of Rochester* 43 E.R. 1079, Lord Turner, J.. says:

Undoubtedly, if an instrument be doubtful in its terms contemporaneous usage may be referred to and if there had been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument, but which may not be warranted upon another construction of the instrument the Court will lean to that construction of the instrument provided it be doubtful which will best correspond with the mode in which the funds have been so long a period applied.

12. In *Attorney-General v. Skinner's Company* 58 E.R. 463, Vice Chancellor Sir L. Shadwell quoted Lord Holt to the following effect:

I do agree there is no statute of limitation shall bar a charity, but in a thing that is obscure and dark, and there had been an enjoyment for a long time, I think an enjoyment for a long time, without interruption is a great evidence of a right; for

quiet enjoyment for a long time does presume a rightful enjoyment,

13. Turning to the Indian cases, in *Abhiram Goswami v. Shyama Charan Nandi* [1909] 36 Cal. 1003 it was held that:

though the mere fact of the proceeds of any land being used for the support of an idol may not be proof that land formed an endowment for the purpose, yet it was a fact that might well be taken into consideration, when, as in this case, the intention of the founder had to be gathered from an ancient document expressed in ambiguous language.

14. The rule therefore is quite clear that in the absence of a written grant or where the terms of the written grant are ambiguous or where there is no direct evidence of the terms usage can be looked to determine the nature of the grant.

15. As regards the second contention that such a grant as is contended for by the defendants in the present case is not a legal one, no authority has been quoted. Reliance is placed on certain remarks of Seshagiri Iyer, J. to the following effect;

It would undoubtedly be regarded as a fraud practised upon the public that the income derived with reference to the sanctity and holiness of a shrine should be regarded as the perquisites of the parsons in charge.

and

that it would strike at the very root of religion in India to hold that the person who is permitted by the worshippers to receive the offerings is the owner, and not simply the trustee of the income.

16. These must be considered as obiter dicta and in *Puraviya Goundan v. Poonachi Goundan* [1921] 40 M.L.J. 239, Oldfield, J. criticises them by saying that on this basis:

it is difficult to see how the existence of any private temple at all can claim legal recognition.

17. There are many temples where the archakas after performing puja and maintaining the temple are entitled to the surplus. On the abstract question of law, we may quote Tudor on Charities, Ch. 5, 4th Edn. p. 115:

The surplus income, and the benefit of any subsequent increase, which the charities do not take, may be specifically disposed of either by the devisees being directed to retain it for their own benefit or by its being directed to be applied in other directions

18. In *Rambrama Chatterjee Vs. Kedar Nath Banerjee and Others*, , it was laid down that a charitable corporation in so far as it is charitable, is the creature of the founder, and that the proof of intention of the founder, of a religious institution becomes almost conclusive, where the usage is immemorial, though the intention may be presumed from a number of instances extending over a

limited period provided only that the existence of an invariable practice is made out by clear and unambiguous evidence; and that the Court will be slow to draw an inference which will defeat a right that has been exercised without question during a long period; and unless such inference is irresistible the Court will presume everything that is reasonably possible to presume, in favour of such a right. In *Chinnatha Rowther Vs. Karunji Andi and Another*, it was held that a member of a family of pujaries entitled to the surplus income of the suit properties belonging to a temple after meeting the puja and other expenses of the temple is entitled to maintain a suit to set aside certain alienations made by certain members of the family as not binding on the temple and to recover the properties on behalf of the trust.

19. In the present case it is not denied that the temple had been maintained and greatly improved by the founder and defendant 1. These improvements were made at a cost of between Rs. 50,000 and Rs. 1,00,000. We are quite clear that there would have been nothing illegal in the founder of the temple having created a trust to the effect that the temple should be maintained out of the offerings to the idol and that the balance should go to himself and his family, provided this did not offend against the law of perpetuities or such other provisions with which we are not concerned. Their Lordships of the Privy Council say as quoted above:

It may be assumed that he applied that balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immovable property which he possessed before he died,

20. They do not appear to think that this would be any violation of the trust merely because the temple is found to be a public one. In fact the scheme now provides in Section 24:

The pujari shall not ordinarily be paid any salary for his work and duties from temple funds but if after the temple liabilities are discharged in full at the end of any year after audit it be found that there is a balance of Income over expenditure the pujari will be paid 50 per cent, of that balance amount as his honorarium for that year.

21. This according to the contention of the learned advocate for the appellants would be an illegal breach of the trust as he contends that all the money belongs to the deity. It is difficult to see on his argument how the pujari could even maintain himself out of such gifts.

22. The origin of the temple has been recounted and we have to try and determine what was the intention of the original founder. Lakshmana Goundan was probably a very pious man but the evidence is perfectly clear that he did not regard all the offerings made or money taken as the property of the deity. It has to be remembered that besides his position as a pujari he was also considered as a seer. Their Lordships of the Privy Council say as quoted above;

it may be assumed that he applied the balance of the income he SO obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immovable property which he possessed before he died.

23. This is not only an assumption but it is proved to the hilt by evidence. (Their Lordships then discussed the evidence on this point and proceeded). Although admittedly the bulk of the money used to purchase the properties in dispute must have come out of the temple offerings, still it appears from the evidence of D.W. 10 that abhishekam money went to defendant 1. He says:

10 annas should be given for abhishekam. Without that it will not be done.

24. The witness was quoted to us as saying that neither neivedyam nor abhishekam money was paid to the pujari, but as regards abhishekam this does not appear to be correct. However, the matter is not really material as this is not a case of mixing trust money with private money. For this reason we think that the cases quoted to us with regard to mahants or matathipathis or of trustees who mix private money with trust money have no bearing on the present question and it is not necessary to refer to them. We see no reason to suppose that the trust was not one by which the founder maintained the idol and later on the temple and detained the surplus offerings. He not only founded the temple but admittedly he and his successors have greatly enriched and enlarged it. There is no question of breach of trust on the score. We see no reason to hold that the lands in dispute were bought from trust money or in breach of any trust.

25. That being so, it is not necessary to go into the second ground urged on behalf of the respondents that even if there was a breach of trust, it would amount to back accounting to enforce restoration of these lands and that this should not be done where the breach of trust had been due to a bona fide mistake. In this connexion the *Attorney-General v. The Master, Wardens etc. of the Wax Chandlers Company* [1873] 6 H.L. 1 and *Kelu Achan v. Sivarama Pattar* AIR 1923 Mad. 970, are quoted but we consider it unnecessary to discuss the point.

26. Turning to the scheme itself, the appellants did not ask for the removal of defendant 1. Whatever may be his character otherwise, he had done a great deal for the temple and the remarks passed about him in various judgments show that the institution will probably suffer if he is not retained. It is, however, argued that owing to his conduct since he has been appointed as receiver, two co-trustees should be added. We think on the whole that this would not conduce to the smooth administration of the temple and that paras. 14 and 21. of the scheme will operate as a sufficient check upon the conduct of defendant 1. Para 25 which provides for the modification of the scheme must be deleted as it has been held that such an order is ultra vires. In other respects, we see no reason to modify the scheme.

27. The memorandum of cross-objections as regards jewels is not pressed.

28. In the result the appeal is dismissed and the judgment and decree of the lower Court with the modification noted above are confirmed. The Privy Council allowed the costs of the suit from the temple funds. We think in the circumstances the costs of this appeal on both sides also should be met from the temple funds.