

(2005) 04 MAD CK 0177
In the Madras High Court
Case No : S.A. No. 1520 of 1993

Rajamanicka Reddiar, S.S. Rajam and Sri Arunachaleswara
Devasthanam

APPELLANT

Vs

Gopal Gounder and Others

RESPONDENT

Date of Decision : 29-04-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, 9, 92

Citation : (2005) 04 MAD CK 0177

Hon'ble Judges : M. Thanikachalam, J

Bench : Single Bench

Advocate : P.R. Supraja for Mr. T.R. Rajaraman, for the Appellant; V. Raghavachari for Respondent-1, for the Respondent

Judgement

M. Thanikachalam, J.—The plaintiffs in O.S. No. 292/79 on the file of the Sub Court, Thiruvannamalai are the appellants. The plaintiffs/appellants have filed the suit for declaration, that the suit properties are trust properties; for possession; for the removal of the second defendant as trustee from the trusteeship, in respect of the suit properties; for the appointment of the first plaintiff or any male members of the family or others of the Trust as Trustee, vesting the property with him; for framing a scheme for the administration of the Trust and the Trust Properties, to fulfill the object of the Trust, as per the Trust Deed dated 17.12.1913 and for direction to the defendants to render account, for the income from the suit properties to the plaintiffs, on the grounds that the grand father and the father of the plaintiffs 1 to 3 have created a trust, in respect of the suit properties, under a Registered deed dated 17.12.1913, that as per the permanent trust created under the deed, the property must be utilised for the purpose of maintaining the permanent light, which is burning in the Moolasthanam of Shri Arunachaleswarar Temple, Thiruvannamalai, that for the purpose of creating a permanent fund for the above said purpose, Venkatasubba Reddiyar and Seetharama Reddiyar had executed a trust deed, recognising the performance of this religious act, for three generations and the descendants of

the founders of the Trust also should perform the same, that violating the purpose of the Trust, the second defendant had sold the property to the first defendant, thereby failing to perform the obligation, for which the Trust was created, that the continuance of the second defendant as Trustee is not desirable, in view of the sale deed executed by him and that in order to preserve the Trust and its properties, the above said reliefs are necessary and absolute.

2. The defendants 1 & 2 opposed the suit contending, that the plaintiffs are not entitled to institute the suit, either as worshippers of Shri Arunachaleswara Temple, Thiruvannamalai or as the members of the family of Seetharama Reddiar, that there is no valid Trust as known to law, that the only right which the Arunachaleswarar Temple gets under the document is a bare right viz., to maintain permanent light, which is burning in the Moolasthanam of Shri Arunachaleswarar Temple, that the first defendant, while alienating the property had set apart Rs. 5,000/- from the sale consideration, for the fulfillment of the wish of the original founder of the Trust, that the suit is also barred u/s 108 as well as other provisions of the Tamil Nadu Hindu Religious and Charitable Endowments Act (hereinafter called the H.R. & C.E. Act) and if really, the plaintiffs want to impeach the alienation, they must move the Deputy Commissioner, H.R. & C.E. u/s 63 of the H.R. & C.E. Act, who alone had the right to decide, whether the properties in question belong to the endowment, which cannot be decided by the civil court.

3. The learned Subordinate Judge, framing as many as 9 issues, took the case for trial. The learned Subordinate Judge, upon consideration of the materials placed before him, had come to the conclusion, that as per the document dated 17.12.1913, a valid Trust was created, under which the properties are vested with the Trust, dedicating the property itself, that the civil Court had jurisdiction to decide the suit and that the alienation made by the first defendant is not binding upon the Trust, and that the second defendant since had himself managed the Trust, not only a scheme should be framed, but also, he should be directed to submit account, regarding the income of the suit property. Though finding has been given regarding the scheme to be framed while granting decree, that relief was negatived. Taking the above said view, a decree has been granted, as per the judgment dated 17.7.1991, which was under challenge in A.S. No. 248/91 on the file of the Additional District Judge, Vellore.

4. The learned District Judge, Vellore, by going through the judgment of the trial Court, concurred with the findings of the trial Court, regarding the maintainability of the suit, to some extent, holding that the civil Court has jurisdiction to decide the dispute raised in the suit. Further, by going through the Trust Deed and the endowment created therein, the learned District Judge has come to the conclusion, that there was no dedication of the property absolutely in favour of the temple, whereas only a charge was created over the suit property, for the purpose of the charity mentioned in the document, which could be made available otherwise also, even recognising the sale deed executed by the first

defendant in favour of the second defendant. However, for certain relief, the learned Additional District Judge, directed the plaintiffs to approach the Commissioner, H.R. & C.E. u/s 38(1) of the Act. Thus taking the view, the appeal was allowed in part, modifying the decree and judgment of the trial Court, granting limited relief, directing the plaintiffs to approach the Commissioner of H.R. & C.E. u/s 38(1) of the Act, to determine the amount to fulfill the obligation created under the Trust Deed viz., providing expenses every year for oil and wick, that subject to that right, the first defendant has to pay a sum of Rs. 1500/- to the 4th defendant, in order to meet the expenses for burning the light, that the first defendant has to render account, for the enjoyment of the suit property, which is under challenge in this second appeal.

5. this court, while admitting the second appeal, had formulated the following substantial question of law.

Whether the learned District Judge was right in holding that the suit properties were not the trust properties but one burdened with the trust in spite of the absolute dedication of the entire income for the performance of the kattalais under Ex. A1?

6. Heard the Learned Counsel for the appellants, Ms. P.R. Supraja and the Learned Counsel for the respondents, Mr. V. Raghavachari.

7. Though the first defendant had questioned the decree and judgment of the trial Court before the first appellate Court, the entire findings of the trial Court have not been set aside by the first appellate Court. As pointed out supra, limited reliefs have been granted to the plaintiffs, maintaining and sustaining the decree granted by the trial Court, regarding the direction given to the first defendant, to render account. Despite the fact that the first defendant/appellant before the first appellate Court had suffered some decree, he had not challenged the same, by way of separate second appeal. Further, after the second appeal has been filed by the plaintiffs 1 & 3, no cross objection has been filed in this second appeal. However, the Learned Counsel for the first respondent/first defendant submitted, that he is entitled to urge the defence, which were negatived by the first appellate Court, under Order XLI Rule 33 C.P.C. Order XLI Rule 33 C.P.C. gives wide power to the appellate Court to pass an order, which ought to have been passed or made, notwithstanding that the appeal is as to part only of the decree, even in the absence of any independent appeal or cross objections. The above position was not challenged by the other side. Therefore, the Learned Counsel for the first respondent was permitted to argue about the maintainability of the suit, though both the courts have concurrently given a finding against the first defendant, that the suit is maintainable before the civil Court, since it is only a question of law.

8. The Learned Counsel for the appellants submitted, that under Ex. A1 i.e. the Trust Deed executed by Venkatasubba Reddiar and Seetharama Reddiar, there was complete dedication of the property, for the purpose of the religious act or

the endowment, which was properly considered by the trial Court, erroneously set aside by the first appellate Court. It is the further submission of the Learned Counsel for the appellants, that since there was total dedication of the property in favour of the Trust, creating a valid Trust, the manager or Trustee, who was in management of the Trust is not entitled to alienate the property, thereby destroying or extinguishing the Trust itself, and in this way, ignoring the alienation, granting the relief as prayed for, a scheme should be framed, for the maintenance of the Trust, as created by the founder of the Trust. The Learned Counsel for the appellants taking me through the judgments of the first appellate Court and the judicial precedents in this regard, urged that the first appellate Court had committed an error in concluding, that there was no dedication, which should be set aside.

9. Per contra, the Learned Counsel for the first respondent/defendant contended, that the civil court has no jurisdiction, to decide the dispute involved in this case and therefore, the suit itself is not maintainable and if at all, the matter should have been agitated before the Commissioner, H.R. & C.E. It is the further submission of the Learned Counsel for the first respondent/first defendant, that under Ex. A1, there was no complete dedication of the property and the entire reading of the document would reflect only the intention of the founder viz., that they have created a charge over the suit property, for certain religious performance in the temple of the 4th plaintiff in this case viz., providing oil and wick every year and only to give security for that expenses alone, a charge had been created under the document dated 17.12.1993. In this view, the Learned Counsel for the first defendant/first respondent submitted, that the finding of the first appellate Court, regarding the construction of Ex. A1 is perfectly valid, whereas the first appellate Court has committed an error in concluding, that the civil Court has jurisdiction. Therefore, he submitted that the suit is to be dismissed, as not maintainable, since the dispute has to be decided only by the Commissioner, H.R. & C.E., as contemplated u/s 63(c) of the Act and the further fact being, to decide that dispute, there is a bar u/s 108 of the Act. Therefore, we have to see certain provisions of H.R. & C.E. Act, as well as the judicial precedents available in this regard about the maintainability of the suit.

10. The plaint reads that the grand father and the father of the plaintiffs 1 to 3 have created a Trust in respect of the property in Wet Survey No. 254/A1/1 an extent of 2 acres. It is also pleaded that the Trust Deed reveals a religious kariyam of burning the light in the Moolasthanam of Shri Arunachaleswarar Temple, which was performed for three generations and has to be performed by the generations to come. In the written statement, the creation of endowment or dedication of the property in favour of the Trust is in a way admitted, though total dedication is disputed, accepting, that from the income of the suit property, the above said religious kaingariam has to be performed. Having these pleadings, we have to see, what is the religious charity and endowments etc.

11. Section 2(17) of the Act defines "Religious Endowment" or "Endowment" as

follows:

"Religious endowment" or "endowment" means all property belonging to or given or endowed for the support of maths or temples, or given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity; and includes the institution concerned and also the premises thereof, but does not include gifts of property made as personal gifts to the archaka, service holder or other employee of a religious institution.

Then "specific endowment" is defined u/s 2(19) which reads: "specific endowment" means any property or money endowed for the performance of any specific service or charity in a math or temple or for the performance of any other religious charity, but does not include an inam of the nature described in Explanation (1) to clause (17).

12. Section 63 empowers the Joint Commissioner or Deputy Commissioner to decide certain disputes and matters, as catalogued therein. In our case, the dispute is whether the property is a religious endowment or not. As per the submission of the Learned Counsel for the first respondent, u/s 63 (c) of the Act, certainly the Commissioner alone shall have the power to enquire into and decide the dispute, whether any property or money is a religious endowment and this position is not challenged.

13. Section 108 of the Act bars certain kind of suits. Section 108 of the Act reads:

No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding, which provision is made in this Act shall be instituted in any Court of Law, except under, and in conformity with, the provisions of this Act.

(emphasis supplied).

14. The Learned Counsel for the first respondent/defendant submitted, that as contemplated u/s 63(c) of the Act, the Commissioner alone has to decide, whether the property is a religious endowment or not under this Act and therefore, in view of the specific provisions made in the Act, the suit for that purpose, here, is not maintainable. If the suit is one for deciding whether any property is religious endowment alone, then certainly Section 108 of the Act is a bar, since this Section imposes a bar to decide a matter, for which provision is made, in other words, for all the relief sought for in the plaint, if no provision is made in the Act, then the corollary should be Section 108 of the Act cannot be a bar and the civil Court should have the jurisdiction. In this regard, we have to see the prayer,

15. In the plaint, the prayers are:

a) declaring that the suit properties are trust properties created for the purposes envisaged under the Trust Deed dated 17.12.1913, and directing the defendants to deliver possession of the Trust properties to the plaintiffs or anyone of them;

b) removing the second defendant as trustee from the trusteeship in respect of the suit property and in respect of the Trust created by the deed dated 17.12.1913, appointing the first plaintiff or a male member or members of the family of the authors of the Trustees in respect of the said Trust and vesting the property with him and directing the defendants to deliver possession of the suit property to the plaintiff or any of them or to such trustee or trustees or such person that is entitled to it and framing a Scheme for the due administration of the Trust and the Trust property to fulfill the object of the Trust as detailed in the Trust Deed dated 17.12.1913.

c) directing the defendants to render account for the income from the suit property to the plaintiffs or such person that is entitled to it and pay to him the amount found due.

16. Prima facie all the above said prayers cannot be granted by the Commissioner of H.R. & C.E. as contemplated u/s 63 of the Act, since no provision is made in the Act for the grant of all the reliefs. The Commissioner of H.R. & C.E. would have jurisdiction, where the provisions are made in the Act and not otherwise, which could be seen from the wordings in Section 108 "... which provision is made in this Act.....". Admittedly, under this Act, there is no provision for ordering accounting, directing delivery of possession of the property and other reliefs prayed for in the plaint, as pointed out supra. If the prayer and the dispute was only, whether the property is a religious endowment or not, then alone as contended by the Learned Counsel for the contesting respondents, it could be said ousting the civil Court jurisdiction is possible u/s 108 of the Act and not otherwise. Both the courts below have elaborately considered the above points, reached, in my considered opinion, an unerring conclusion, which is not liable to be upset by this court.

17. In Palaniswamy Gounder v. A.V.G. Ponnuswami Chettiar (1991 2 L.W. 631), this court while considering the effect of Sections 6(16), 6(17), 6(18), 108 of the Act and Section 92 of C.P.C., has taken the view, that whether any property is religious endowment or religious charity is well within the meaning of the Act and therefore, granting permission u/s 92 of the Code of Civil Procedure, to decide the same by the Civil Court is not maintainable. In the case involved in the above decision, the document indicated that the dominant purpose of the Trust was a religious one, where it provided only the surplus income for the purpose of feeding the pilgrims, who stayed in the chatram. Taking into account the recitals in the document and the definition of religious charity etc and the prayer in that suit, this court has taken such a view, and the same would not be applicable to the case on hand considering other prayers claimed in the suit as well as other predominant views taken by the Division Bench of this court, regarding the maintainability of the suit.

18. Thiru V. Raghavachari, to oust the civil Court jurisdiction further, invited my attention to a decision of this court in N. Tirumalayappa Pillai v. Ramasubramania Pillai (1970 (II) MLJ 282), wherein this court has taken the view that a suit for

declaration that the suit properties are endowed for the performance of certain poojas, certainly will not come within the jurisdiction of the civil Court, in view of the provisions made in the Act and this decision may not come to the aid of the first respondent, in view of a decision rendered by the Division Bench of this court in *Sri Thirupuranthakaswamy Devasthanam v. Sundaresa Mudaliar* (1988 (1) MLJ 26), wherein also, the above decision was considered, not approved to the entire extent.

19. In *Thiruvengada Varadachariar v. Srinivasa Iyengar* (1973 (1) MLJ 266 = 86 L.W. 116), a division bench of this court has taken the view, where there is a dispute regarding the hereditary of the office and claim is made on the basis of appointment as trustees, the case would fall squarely within the ambit of Section 63 of the Act, thereby attracting Section 108 of the Act, barring the civil suit. This kind of situation, factually, is not available in the case on hand and therefore, the above rulings also will not come to the aid of the first respondent, to oust the jurisdiction of the civil Court.

20. In *Vythilinga Pandara Sannadhi v. Ranganatha Mudaliar* (66 MLJ 98), a division bench of this court had an occasion to consider the word "kattalai" and whether the document therein had created a religious endowment or not. The Bench, while giving meaning for kattalai, observed:

A kattalai is a religious endowment within the meaning of S. 9(11) of the Act. By reason of prohibition contained in Clause (2) of Section 73 a suit for removal of the trustee of a kattalai, relating as it does, to the administration or management of religious endowment, is not maintainable.

This kind of situation is not available here. As pointed out supra, in our case, it is not only the question of consideration, regarding the complete dedication of the properties, but also coupled with other reliefs. This being the position, in my view, as concluded by the courts below, certainly civil Court would have jurisdiction, which is supported by the rulings relied on by the Learned Counsel for the appellants also.

21. A Division Bench of this court in *Sri Thirupuranthakaswamy Devasthanam*'s case had considered elaborately about the scope of Section 6(17) of the Act as well as the jurisdiction of the civil Court, considering the effect of Section 63 of the Act as well as other relevant provisions, then deduced the conclusion as follows:

More than one Division Bench decision of the High Court had proceeded on the basis that the entire plaint must be taken as a whole to find out the nature of the suit, and if substantial or main reliefs involved therein would not come within the ambit of power of the Deputy Commissioner under Sec. 63 of the Hindu Religious and Charitable Endowments Act but if incidental issues or reliefs prayed for therein fall within the scope of that section, the Civil Court would have jurisdiction to try the suit, and also decide on these incidental aspects which could be otherwise canvassed before a Deputy Commissioner. It is not the nature

of the words used in the para dealing with reliefs prayed for in the plaint which will be determinative of the character of the suit, but the contents of the plaint in conjunction with the reliefs asked for have to be taken into account. The nature of defence put forth is immaterial. When all these reliefs are taken together in the suit the nature of endowment arises for consideration but it is an incidental aspect in the context of several other larger issues which came up for consideration and which cannot at all be considered by the Deputy Commissioner. Therefore, on a careful reading of the contents in the plaint before the kinds of reliefs asked for could be granted, the mere fact the Deputy Commissioner could decide about the nature of endowment, which is an incidental one and which would come up for consideration in the suit it is not possible to hold that the Civil Court has no jurisdiction to try the suit.

The dictum declared in the above case is squarely applicable to the present case by all force.

22. In *N. Sri Padmanabha Nadar v. P. Ramalinga Nadar and others* (1991 (1) L.W. 495) also, it is held, taking into consideration Section 9 of the CPC as well as other connected provisions, relying upon a previous decision, as follows:

It is further observed that u/s 9 of the Code of Civil Procedure, the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

On the basis of the above decision also, it should be held that the suit filed by the plaintiffs/appellants are well maintainable. For the foregoing reasons, concluding that the civil Court has got jurisdiction to decide the dispute in this suit, now we have to see whether the suit properties were Trust properties, dedicated completely or whether it was burdened with the Trust, creating charge alone for the performance of "kattalai" by going through the recitals in Ex. A.1, coupled with the intention of the founders.

23. The learned trial Judge, taking the entire recitals in Ex. A1 into consideration, the intention of the founders, who had executed the document, the aim in giving the properties, for specific purposes earmarking the entire income and not providing any provision to divert the income whether surplus or otherwise other than the purpose mentioned therein, then assigning valid reasons in para-8 of the Judgment, has come to the conclusion, that the dedication must be an absolute one, and consequentially, the alienation cannot have any effect, which was upset by the learned Additional District Judge, giving different kind of interpretation for the recitals available in the document.

24. As defined under Sections 2(17) and 2(19) of the Act, "religious endowment" means any property or money endowed for the purpose of any specific service or charity in a mutt or temple, cannot be in dispute. The founders of the Trust, under Ex. A1, in order to see that the religious kaingaryams are performed without any disturbance whatsoever as carried out in the past, as well in order to preserve the properties endowed to the entire extent throughout, not to snatch,

has made specific recitals in the document itself. While interpreting this kind of document, it must be always the endeavour of the Court to satisfy and carry out the intention of the testator, by reading the document as a whole, not splitting the sentence, in order to suit the defence, thereby causing abrasion to the purpose and aim of the creation and intention. There is possibility and probability to interpret the document favouring the Trust for preserving the property, that alone should be adopted, otherwise, the purpose of creating the Trust will be frustrated. If any deviation is taken, to benefit the person or individual, who had violated the recitals, that is, the express or implied intention of the founders, certainly that would destroy the purpose and intention of the founders and to preserve the Trust or the endowment, the document should always be read as a whole to favour the trust and needed interpretation should be given.

25. Under Ex. A1, two kinds of kaingaryam to be performed and they are, to meet the expenses, for uninterrupted lighting in the sanctum of Arunachaleswara Temple, providing oil and wick, as well as to meet the expenses regarding the charitable activities in Poonthottam. Nowhere in the document, the expenses are limited or restricted or it is said that after meeting the expenses for the above said two kaingaryams, the successors of the founders are entitled to divert the fund or make use of the excess, for their own. This being the position, in my considered opinion, the first appellate Court has unnecessarily laboured in paragraph-16 of the Judgment to go into detail about the actual or needed expenses regarding the charitable activities and the income from the properties. When the founders of the Trust had not intended or aimed to restrict the expenses or taken into account the income of the property, whether it is sufficient for expenses or not, in my opinion, it is not for the Court to interpret the document, on the basis of the expenses to be incurred and the income to be derived. The creation of fund mentioned in the document is for the continuous performance of both charitable purposes. To have the funds for ever, protection of the properties is a must and in this view to preserve the properties for ever, for continuous flow of funds, it was felt, the properties should not go out of the hands of the family, and to achieve this aim, a provision is made in the document, which should be honoured. Line of succession is also contemplated in the document preventing the successors from alienation and encumbrance, which would go to show, the founders created the Trust, dedicating the entire property for the purpose. Therefore, in my view, it cannot be said, creation of fund would mean, making some provision for dharma kaingaryam, swallowing the corpus itself, thereby one day extinguishing the Trust itself, and taking the property out of the reach of the endowments. In this view, if the alienation is recognised, certainly that will offend the purpose of the document, for which dominant purpose it was created, with good intention, having much feelings and sentiments.

26. In Sri Thirupuranthakaswamy's case also, a property was gifted to temple and the purpose was to carry out Shri Deepa Kaingaryam, making provision that the lands should be managed by the Trustee appointed, for carrying out the said

purpose. While considering the recitals in the said document, a division bench of this court has taken the view that the property has been dedicated only to the temple and not to the trustee. Applying this dictum, if interpretation is given to Ex. A1, the irresistible conclusion that should be drawn must be a total dedication, not creating any charge for the expenses as claimed by the respondents. The relevant recitals in the document reads:

The document says, when the question of management comes, the management of the properties should be detained in the family. If the founders had thought of not divesting the property in favour of the temple, they would not have stated in the description of the properties that the properties should not be alienated or encumbered. As claimed by the Learned Counsel for the first respondent, if a charge alone had been created over the properties, they should have mentioned the amount also, making provision for the surplus income, such as how the surplus income should be diverted or enjoyed, as the case may be. There is no such recital available in the document. A division bench of this court in *M.G. Narayaswami v. Balasundaram* (AIR 1953 Madras 750 = 65 (1952) L.W. 368) has considered a case of similar nature on hand and has taken the view relying upon number of decisions, that when the surplus income, if any, was not ear marked for any purpose, it is to be held, the entire property was dedicated as trust, following the decision reported in AIR 1952 Madras 650, wherein it is held "that the entire income from two shops and from the bungalow should be utilised for the purpose of Mandagapadi and that these properties were dedicated in trust for the purpose of Mandagapadi pooja". Here also, to meet the expenses of two dharma kaingarayam, a trust has been created dedicating the properties, not contemplating any diversion of income, thereby making it a complete dedication, not warranting to take any other view. In view of the absence of provision of surplus income and in view of the fact, that the lands were dedicated only for the above said kaingaryams, as rightly held by the trial Court, the alienation will not bind the Trust, which is not properly considered by the first appellate Court. Therefore, the observation of the first appellate Court in para-26 of the Judgment that the restriction imposed for encumbrance in Ex. A1 will not affect A-2 appears to be erroneous one, liable to be set aside. The observation of the first appellate Court in para-28 that if the executants of Ex. A1 had the intention of giving the properties to the temple, they would have executed the document in favour of the temple, is not acceptable to me, since the parties having created a Trust, thought fit to detain the management of properties in the family, for the limited purpose, that is, as far as the management is concerned with them, generation to come, which will not take away the complete dedication of the properties in favour of the temple already conferred, as recited in the document itself.

The first appellate Court instead of interpreting the document to give effect, to the purpose and to satisfy the wish of the founders, considered some other extraneous matter, such as expenses for the darma kaingaryam and the income from the properties and in this view alone, in my opinion, it landed in an

erroneous conclusion, giving a contrary interpretation, as if there was no total dedication. For the foregoing reasons, the Judgment of the first appellate Court as far as it had upset the finding of the trial Court has to be set aside, by allowing this appeal. For the foregoing reasons, the appeal is allowed setting aside the decree and Judgment of the first appellate Court as far as it had upset the findings of the trial Court restoring the decree and Judgment of the trial Court dated 17.7.1991 made in O.S. No. 292 of 1979 on the file of the Subordinate Judge, Tiruvannamalai, with costs throughout.