
(1983) 07 KL CK 0017
In the High Court Of Kerala
Case No : S.A. No. 190 of 1978

Rajasekharan Naicker

APPELLANT

Vs

Govindankutty Naicker and 5 Others

RESPONDENT

Date of Decision : 18-07-1983

Acts Referred:

Trusts Act, 1882 — Section 49

Citation : (1983) KLJ 506

Hon'ble Judges : P. C. Balakrishna Menon, J

Bench : Single Bench

Advocate : C. P. Damodaran Nayar and M. K. Chandramohan Das, for the Appellant; P. N. K. Achan, K. Vijayan and N. N. Sugunapalan, for the Respondent

Judgement

P. C. Balakrishna Menon, J.—In this Second Appeal, the plaintiff complains that in spite of the concurrent findings by the courts below of gross mismanagement of a private religious endowment belonging to the family of himself and defendants 1 to 5, by its manager, the 1st defendant, no relief was granted for the preservation of the endowment and its properties. The plaintiff and defendants 1 to 5 belonged to a common marumakkathayam tarwad. As per Ext. A1 partition of the year 1914, the six items of extensive properties shown in the B schedule to the plaint were dedicated and set apart as a religious endowment for the family dieties installed in item 6. Religious ceremonies, poojas and maintenance of the temple are to be met from out of the income from the B schedule properties. Executent No. 3 in Ext. A1, Kuppa Naicken belonging to the 3rd branch was to manage the schedule properties and administer the private devaswom until his death and after him any branch other than branches 1, 2 and 3 is to manage the devaswom and its properties. There is also a provision in Ext. A1 that if during the lifetime of Kuppa Naiken he gives up management any other member of the third branch is to be in management of the endowment and its properties. There are specific provisions in Ext. A1 that the properties endowed cannot be alienated or encumbered and the manager is interdicted from inducting third parties into possession of the properties. The Maaager is

authorized to cut the requisite number of trees from the endowed properties for the purpose of renovation of the temple. The 1st of defendant, also belonging to the third sakha is the present Manager of the Devaswom. He had been guilty of gross-mismanagement and had created several documents in favor of defendants 6 to 17, in total disregard of the provisions of Ext. A1. The 6th defendant is the wife of the 1st defendant. Even though the plaintiff had prayed for partition of the A schedule properties as belonging to the tarwad, of himself and defendants 1 to 5 that prayer was rejected by the trial court for the reason that the A schedule properties had been partitioned in 1969 as per Ext. A3 to which the plaintiff is also a party. At the appellate stage however the plaintiff had confined relief only with respect to the B schedule properties. In this Second Appeal, therefore, this Court is not concerned with prayer A in the plaint relating to the A schedule properties. Prayer B in the plaint is to terminate the 1st defendant's management of the B schedule immovable properties and of C schedule movables belonging to the Devaswom and to recover the same with future profits. Prayer C in the plaint was for recovery of possession of the B schedule properties from defendants 6 to 17 in case it is found that the 1st defendant had fraudulently or collusively created documents in their names and put them in possession of the properties. The plaintiff later filed I.A. No. 811975 to delete prayer C for the reason that he was not able to pay court-fee as directed by the trial court. In the affidavit in support of I.A. No. 8 of 1975 the plaintiff states that the B schedule properties are in the actual possession and management of the 1st defendant himself and there is no need for prayer C. The trial court by order dated 31-3-1975 allowed the amendment and prayer C was deleted from the plaint. Prayer B requiring the 1st defendant to account for the income and expenses relating to the endowment for the period of his management was renumbered as prayer C. The defendants contended that the plaintiff is not competent to seek the reliefs prayed for in the plaint, he is not entitled to be in management of the Devaswom and its properties and the suit is defective for the non-impleadment of all the members of the tarwad. Defendants 6 to 17 claimed leasehold right in the B schedule properties as having been obtained from the 1st defendant the Manager of the private devaswom. Issue No. 8 in the suit was as to whether defendants 6 to 17 have any leasehold right in the B schedule properties. The trial court in paragraph 32 of its judgment states that the issue does not arise for consideration in view of the amendment of the plaint deleting prayer C. The trial court found that the entire B schedule properties are outstanding in the possession of defendants 6 to 17 and since prayer C had been deleted the plaintiff is not entitled to any relief in the suit. It is also found that the lease Ext B5 in favor of his sons by the 1st defendant and the later assignment of the leasehold right by the sons to the 6th defendant the wife of the 1st defendant under Ext. B6 are sham and nominal and the 1st defendant himself is in possession of Ext. B6 properties. Exts. B5 and B6 were found to be not genuine and that those documents were created by the 1st defendant to defeat the Devaswom and the other members of the tarwad. The 1st defendant was found guilty of mismanagement of the Devaswom and its properties in

having created documents to defeat the rights of the family dieties. The suit was however dismissed on the finding that the plaintiff being a member of the third branch is not entitled to be in management of the Devaswom as per Ext. A1 and no effective relief can be granted in the suit for the reason of the deletion of prayer C in the plaint and also for the reason that the suit is defective for the non-impleadment of all the members of the tarwad interested in the Devaswom and its management.

2. In appeal by the plaintiff the lower appellate court found that the third branch of the tarwad is not disqualified to be in management of the devaswom and its properties, the 1st defendant himself is a member of the third branch, he is guilty of mismanagement and the leases granted by him are all improvident and against the interests of the devaswom. The plaintiff was however found not entitled to a decree for the removal of the 1st defendant from management and seek his own appointment as Manager for the reason that it has become impossible for him to furnish security of the entire properties allotted to the third branch as required by paragraph 11 of Ext. A1.. Thus for the sole reason that 1st defendant will not be able to furnish security of the entire properties allotted to the third branch the lower appellate court has confirmed the decree of the trial court dismissing the suit. It is against that the plaintiff has come up in Second Appeal.

3. This Second Appeal is admitted on the following questions of law formulated:

- (i) Whether the 1st defendant is liable to account;
- (ii) Under the circumstances now obtaining, is the plaintiff bound to furnish C security for displacing the 1st defendant from management, and
- (iii) What is the effect of the Joint Hindu Family Abolition Act 1976 on the reliefs claimed regarding the B schedule property.

4. The B schedule properties are the properties belonging to the private devaswom of the Tarwad of the parties is conceded by both parties. It is also clear from Ext. A1 that these properties are dedicated as a private religious endowment and the income from these properties are to be utilized for the expenses of the family dieties installed in item 7 Provision is made in the document for the management of the Devaswom and its properties. The Manager is not entitled to alienate or encumber the properties. The properties cannot also be put in possession of third parties. Kuppa Naicken of the third branch was the Manager for the time being and after his death any branch other than branches 1, 2 and 3 is to take up management. If during the life-time of Kuppa Naicken he vacates management any other member of the third branch is to be the manager of the devaswom. The Manager is empowered to cut trees for the purpose of renovation of the temple in item 6. The endowed properties cannot be partitioned among the members of the tarwad. These provisions in Ext. A1 make it abundantly clear that the B schedule properties constituted a permanent endowment in favor of the family dieties and the Manager for the time being is

only to administer the properties on behalf of the family dieties. He is only a representative of the dieties for the management of the properties.

5. B. K. Mukherjee on Hindu Law of Religious and Charitable Trusts, Fourth Edition, states at page 516:

It has now been decided In a number of authorities that in the case of private charities and religious trusts, the members of the family have the right to move the court for redress, and that it is open to the court in those proceedings to frame a scheme for their administration.

At page 511 of the same book it is stated:

In a private or family debutter, the beneficiaries are a limited and defined class of persons, viz., the members of the family. If the trustee or shebait is guilty of mismanagement, waste, wrongful alienation of debutter property or other neglect of duties, a suit can be instituted for remedying these abuses of trust. The suit could be for the removal of the trustee with a prayer for accounts as ancillary to the removal. It would lie for a declaration that any alienation of the debutter property is not binding on the diety or for recovery of possession of the property thus wrongfully alienated. A suit can also be filed for settlement of a scheme for the purpose of effective carrying out of the trust.

6. In the decision of the Supreme Court in *M. V. Ramasubbier and others v. Manicka Narasimachari and others* (AIR 1979 SC 671), relating to a private trust for charity governed by the Indian Trusts Act, the Supreme Court stated at page 673 as follows:

It has in fact been well recognized as. an inflexible rule that a person in a fiduciary position like a trustee is not entitled to make a profit for himself or a member of his family. It can also not be gainsaid that he is not allowed to put himself in any such position in which a conflict may arise between his duty and personal interest, and so the control of the trustee's discretionary power prescribed by Section 49 of the Act and the prohibition contained in Section 51 that the trustee may not use or deal with the trust property for his own profit or for any other purpose unconnected with the trust, and the equally important prohibition in Section 52 that the trustee may not, directly or indirectly, buy the trust property on his own account or as an agent for a third person, cast a heavy responsibility upon him in the matter of discharge of his duties as the trustee. It does not require much argument to proceed to the inevitable further conclusion that the rule prescribed by the aforesaid sections of the Act cannot be evaded by making a sale in the name of the trustee's partner or son, for that would, in fact and substance indirectly benefit the trustee. Where therefore a trustee makes the sale of a property belonging to the trust, without obtaining the permission of the court concerned, it is the duty of the court, in which the sale is challenged, to examine whether the trustee has acted reasonably and in good faith or whether he has committed a breach of the trust by benefitting himself from the transaction in an indirect manner.

Properties once dedicated and a private trust created, it cannot be put an end to or set aside even with the consent of all parties interested in the endowment is now no longer open to doubt. A Division Bench of this court in the decision in *Kunhanandan Nambiar v. Kunhappa Nambiar & Others* (1961 KLJ 1141) held as follows:

11. The next question is, whether the properties of Kalliatt devaswom can be divided in the suit. Under the English Law, the beneficiaries of a private trust, if they are sui juris and of one mind, may at their option modify or put an end to the trust. As pointed out by Mukherjee. one point which is still debatable in Hindu Law, whether this principle can be applied to a private or family, debutter (Hindu Law of Religious and Charitable Trust, page 192), In *Konwar Doorganath Roy v Ram Chunder Sen* (4 Indian Appeals 52) the Privy Council made the following observations;

If the deed of endowment from Rajah Mohanand were satisfactorily proved, and it were an endowment which dedicated this Mahal to the service and worship of a particular idol, then, though the idol were a family idol, the property would be impressed with a trust in favor 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 a family idol the consensus of the whole family might give the estate another direction. No question, however, of that kind arises in the present case.

This obiter dictum came for strong criticism in this country. In *Surendra Krishna Roy v Shree Shree Iswar Bhuvaneshwari Thakurani* (I.L.R. 60 Calcutta 54) Sir George Rankin said:

I am not prepared to hold on the strength of the well known passages in *Konwar Doorganath Roy's* case that there is in Hindu Law any warrant for the proposition that at any particular time by consent of all the parties then interested in the endowment a dedication can be set aside. The passage so much relied upon does not appear to me to be intended as a considered opinion to that effect, and before importing any such doctrine into Hindu Law there is much to be considered.

This case went up to the Privy Council. But the Board in its decision in *Sri Sri Iswari Bhuvaneshwari Thakurani v Brejenath Day* (65 Indian Appeals 203) however left the question undecided.

12. We are in respectful agreement With all that has been said by Sir George Rankin in *Surendra Krishna Roy's* case and would hold, that if there was a valid dedication in favor of the devaswoms concerned, even an unanimous decision among the members of tarwad - whether before or after a severance of status for the termination of the private trust will be or no avail. The observations of the Privy Council in *Konwar Doorganatha Roy's* case were essentially based on the concepts of English Law regarding the right of beneficiaries in a private trust. It has to be noted, that under that law there can be no charitable trust for the benefit of particular individuals or members of a particular family, and that a

trust for the establishment of a private chapel, for example, will not be a charity in the legal sense of the word, and will be hit by the rules against perpetuity and remoteness."

Items 1 and 2 of the B schedule constitute an extensive area of over 10 acres of double crop paddy land. These lands were in the direct possession of the 1st defendant as Manager of the Devaswom. As per Ext. B5 dated 3-12-1958 he granted a lease of these items, to his sons Thankappan Nair and Chandrasekharan on an annual rent of 200 paras of paddy and Rs. 5/-. The document itself recites that the Devaswom had obtained possession of the properties in execution of the decree in O.S. No. 7 of 1945. Thus a large extent of property in the direct possession of the Devaswom was demised by the 1st defendant to his own sons on a low rent of 200 paras of paddy and Rs. 5/-. The leasehold right in the property was later assigned by the sons of the 1st defendant to his wife, the 6th defendant as per Ext. B6 dated 2-5-1966 for Rs. 1,000/-. The trial court in paragraph 13 of its judgment has found that Exts. B5 and B6 are sham and nominal and that the 1st defendant himself is in possession of the properties. It is also found that Exts. B5 and B6 are fraudulent and collusive and created for the purposes of personal gain defeating the tarwad and its devaswom. The 1st defendant is thus found guilty of gross breach of trust in defrauding the Devaswom. The lower appellate court in paragraph 8 of its judgment held that the leases granted by the 1st defendant are improvident, and the 1st defendant is guilty of mismanagement of the devaswom and its properties. The 1st defendant examined as D.W. 1 has admitted at page 8 of his deposition that he is fully aware that the properties, cannot be encumbered or leased out to third parties. He is deposing on behalf also of his wife, the 6th defendant. The reason the lease Ext. B5 is stated to be the indisposition of the 1st defendant, but in cross-examination D.W. 1 admits that he is quite healthy and had not been suffering from any serious illness. The lower appellate court has rightly held that the third branch of the tarwad is not disqualified: from managing the devaswom and its properties. The only reason given by the lower appellate court to confirm the decree of the trial court is that the plaintiff is not in a position to furnish security of the entire properties allotted to the third branch, and he cannot therefore be put in management of the Devaswom and its properties. The reasons given by the courts below are not sufficient to non-suit the plaintiff especially when gross mismanagement of the devaswom and its properties by the 1st defendant had been proved and found. The grant of Ext. B5 lease by the 1st defendant to his sons and later obtaining an assignment of the leasehold in the name of the his wife the 6th defendant are acts of the 1st defendant in breach of trust, and he is unfit to be the manager of the trust and its properties. His interest was in conflict with his duties as the trustee of the devaswom. Under these circumstances, I have no hesitation to hold that the 1st defendant should be removed from management of the Devaswom and its properties.

7. The trial court has found that the 1st defendant has created leases of the

entire B schedule properties in favor of defendants 6 to 17. The properties covered by Exts. B5 and B6 are found to be in possession of the 1st defendant himself. Prayer C in the plaint for recovery of possession of the B schedule properties happened to be deleted for the reason that the plaintiff was not able to pay the requisite court-fee. He has now filed an application-C.M P. No. 16787/1983 for amendment of the plaint to incorporate prayer C as it originally stood. Even though the endowment of the B schedule properties is as a private religious trust this Court has a duty to see that the trust properties are not squandered away and lost once and for all. Any member of the family is entitled to maintain a suit for the removal of a trustee of a private endowment found guilty of mismanagement and dereliction of duty. The suit cannot therefore be dismissed for the reasons mentioned by the courts below. I am of the view that in the best interests of the trust, and for the preservation of its properties, it is necessary to frame a scheme for the proper management of the devaswom and its properties after notice to all persons interested in the trust. I therefore set aside the judgments and decrees of the courts below and remand the case to the trial court, for framing a scheme for the proper management and administration of the trust and its properties. Notice of the proceedings for the framing of a scheme to all interested parties will be published in two issues of a newspaper having wide circulation in the local area. The 1st defendant, who is at present in management, of the trust will meet the expenses for publication of the notice. If the 1st defendant fails to meet the expenses the plaintiff will be directed to pay the cost of publication and a provision will be made in the fresh decree to be passed by the trial court for recovery of such costs from the 1st defendant. C.M.P. No. 16787 of 1983 for amendment of the plaint to incorporate prayer C as it originally stood is allowed and the question whether the trust is entitled to recover possession of the properties from defendants 6 to 17 will also be decided by the trial court. The 1st defendant is liable to render accounts of his management of the trust and its properties. Defendants 6 to 17 will be given an opportunity to prove that the leases in their favor are valid and binding on the trust. On question Nos. 1 and 2 formulated on admission of the Second Appeal, my answer is that the 1st defendant is liable to render accounts of his management of the endowment and the plaintiff is not bound to furnish security for the removal of the 1st defendant from management. Question No. 3 does not arise for decision in this Second Appeal, and no arguments were advanced by Counsel on either side on the application of the Joint Hindu Family Abolition Act 1976. The Second Appeal is allowed as indicated above. The 1st defendant will pay the costs of the plaintiff so far incurred in all the three costs. The court-fee paid on the memorandum of Second Appeal will be refunded to the Counsel for the appellant. The parties will appear before the trial court on 1-9-1983.