
(1987) 08 MAD CK 0050
In the Madras High Court
Case No : A.S. No. 263 of 1984

S. Krishnan

APPELLANT

Vs

The Commissioner, H.R and C.E., Admin Department, Madras
34, and D. Subramaniam

RESPONDENT

Date of Decision : 14-08-1987

Acts Referred:

Citation : (1987) 08 MAD CK 0050

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : S.V. Jayaraman, for the Appellant; P.M. Murugappan, Additional Government Pleader and Mr. M.V. Krishnan, for the Respondent

Final Decision : Allowed

Judgement

Srinivasan, J.—The only question that arises for consideration in this appeal is, whether Sri Santhana Vinayagar Temple situated in New Street, Madurai, is a Temple within the meaning of the Tamil Nadu Hindu Religious and Charitable Endowments Act 22 of 1959? The plaintiff who is the grandson of the founder of the Temple, filed O.A. No. 40 of 1979 on the file of the Deputy Commissioner, H.R. & C.E., Administration, Madurai under S. 63 (a) of the Act for a declaration that the temple is not one covered by the Act. The Deputy Commissioner, by his order dt. 28-2-1981, granted the relief and declared that the institution does not come under the purview of the Act and that it is a private Temple. The Deputy Commissioner also declared that two mandagapadies to be performed in this Temple for Sri Selliamman and Sri Navaneethakrishnan, deities of two other Temples were religious charities. Against that order, the second respondent filed an appeal before the Commissioner. The Commissioner observed that the issue whether it was a Temple governed by the Act was decided by an order in an earlier proceeding in OA No. 19 of 1956 and held against the plaintiff's contention. Consequently, the Commissioner allowed the appeal and declared the Temple to be governed by the Act.

2. The plaintiff filed the present suit for setting aside the order of the Commissioner. The suit was contested by the Commissioner as well as the second defendant who claimed to be a person related to the founder of the Temple. The Trial Court negatives the contention of the plaintiff and upheld the correctness of the order of the Commissioner, thereby dismissing the suit.

3. In this appeal, it is contended by learned counsel for the appellant that the Temple is a private Temple and not one covered by the Act. He relies upon the terms of Ex.A1 dt. 28-8-1982 executed by the grandfather of the appellant, whereby the trust was founded. In that document, it is stated that the executant of the document built the Temple for Sri Vinayagar Perumal and a granite mandapam. The document provides for daily pooja for the presiding deity and offering of cooked rice of 1-1/2 measures. After the offering is made to the Lord, the prasadam should be distributed to six devotees besides the poojari. Provision is made for mandagapadi for Sri Navaneetha Krishnaswami Deity of North Masi Street, Madurai as well as Sri Sellathamman Deity of Sellatharnman Koil Street, Madurai. The document reads that the trust should be performed continuously for ever and for that purpose the properties described in Schedule A which belonged to the executant of the deed absolutely have been dedicated. In schedule B the various poojas and festivals which have to be performed are also set out. As regards the management of the Temple, the document provides that the executant should manage during his life time and after his life time, of he leaves any male issue, such male issue should manage the same and thereafter his male successors-in-interest. It is also provided that if the executant makes an adoption such adopted son will be the trustee after his lifetime. Clause 25 of the deed states that if the executant dies without making adoption and without any issues, then the trustees named in the deed should take over the management. The document provides that if any of the trustees does not run the trust properly, then the Hindu residents of Madurai should take proceedings for removal of such trustees and appoint other trustees. As regards the income from the properties, it is provided that after spending the income for the various poojas and festivals mentioned in the document, if there is any balance, that should be invested in other properties and they should be added to the corpus of the trust.

4. The learned counsel for the appellant contends that the terms of the document make it clear that the Temple is intended for the worship of the members of the family of the executant and that the provision for management with the members of the family indicates that it is only a private trust and not a public Temple, as defined by the Act. Learned counsel relies upon a decision of the Supreme Court in *Radhakanta Deb v. Commissioner*, (1981) 2 SCR 826 . According to learned counsel, the facts of the said case are ad item with the present case on hand and the decision of the Supreme Court is an all fours to the present case. On the question of *res judicata* found by the Commissioner, learned Counsel submits that the order in O.A. No. 19 of 1956, which is relied on by the Commissioner has not even been exhibited in the proceedings.

5. Before the Deputy Commissions, several documents were filed by both the parties and the order in O.A. No. 19 of 1906 was not filed. Before the Commissioner learned counsel for the appellant submitted only written arguments and did not even attend the hearing. One of the points which would appear to have been raised in the written argument was that of res judicata. Learned Commissioner without marking the order in O.A. No. 19 of 1956, or giving an opportunity to the plaintiff to make his submissions with regard to that point, has taken the view that the present proceedings were barred by res judicata. Even in the suit, the order in O.A. No. 19 of 1956 has not been marked as an exhibit. No issue was raised with regard to that question. In fact, the Trial Court did not rely upon the bar of res judicata for coming to the conclusion against the plaintiff. It is, therefore, submitted by learned counsel for the appellant that the plea of res judicata should not be allowed to be taken.

6. Learned counsel appearing for the Commissioner and also learned counsel appearing for the second respondent submit that the clauses found in Ex. A1 are clearly indicative of the fact that the founder of the trust wanted the members of the public to take part in the worship of the Temple and that there was no restriction with regard to the right of the public to come and worship in the Temple. My attention is drawn to the different clauses, the substance of which I have already referred to. It is submitted that those clauses indicate that it is a public Temple. Reliance is placed upon the fact that members of different communities are chosen as trustees by the founder in the event of his dying without any heir. Reliance is also placed upon the fact that a 16 pillar stone mandapam was constructed by the founder which would indicate that it is a public Temple and not a private Temple. It is also submitted by learned counsel that the order in O A. No. 19 of 1956, holding that the Temple was a public Temple, is conclusive as against the appellant and that the appellant is not entitled to raise the question once again in these proceedings.

7. Taking the question whether the terms of Ex. A1 indicate that it is a public Temple, it is necessary to refer to the decision of the Supreme Court relied on by learned counsel for the appellant. In that case, there were two documents, the recitals of which are extracted in the judgment of the Supreme Court. In the earlier document, the relevant portions read thus:

That I, Gopinath Pani, my father Bhagyarathi Pani, Alekha Pani, father of Dinabandhu Pani and father's brother of Basudeb Pani and Narasinha Pani father of Balabhadra Pani-minor, having made the image of our family deity Sri Radhakanta Deb installed it in a temple which was built by them in Depur Sasan in Pipli Division and they endowed the Tanki Bajyapati, Tanki Baheli and Kharida Swata Properties given below from the usufruct of which day-to-day Sivapuja and Janijatra of the deity was managed by them as the Sebait and Marfatdar and we are also managing in the same way. For the proper management of the deity's property and the Sebapuja of the deity in future, we lay down the following directions out of our own accord. (2). From this day the said Babaji will

manage all the immovable and movable properties of the deity as the Sebait and Tatwabhadhark. He will realise the usufructs of the property and after giving the rent of the lands, he will manage the day-to-day Bhog and the festivities of the deity well according to the previous customs and rules and in the way we were doing and till keep the surplus amount in the store of the deity (3). The day-to-day bhoga and the festivities of the deity will be done according to the income of the properties of the deity and will never exceed the said income.

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(15) If in future there be no fit men in our family, any of the Baisnab Sampraday and any Hindu of reputation of the village and of the locality is entitled to take such action we have no objection to this.

In the later document the following portions will be relevant:

Our forefathers for the good of our family by making the family deity Sri Radhakanta Deb Thakur, erecting a temple befitting. His installation, installing Him therein and endowing the landed properties as described in the schedule below, used to carry out all the Sebapuja work of the deity in orderly manner by meeting the expenses from out of the income and yield of the said properties As the said Lalit Charan Das and Raghunath Pani a person of our family together misappropriated by utilising the income and yield of the properties of the deity in illegal expenditures and without carrying on the Sebapuja work in proper manner caused heavy damages to the movable and immovable properties of the deity in different unfair means, we have removed them from Sebapuja work of the deity and also from management and custody of the deity's properties .If the work of the deity is carried on for some time more in the manner in which the work is being managed now, then the temple established by our forefathers as a mark of pride of our family and all the debtor properties of the deity will be destroyed in toto and the noble glory of the forefathers will perish We by this deed of trustee order determination appointed you as trustee for the Sebapuja appointed you as trustee for the Sebapuja work of our family deity Shri Radhakanta Deb Thakur and for the work of looking after his properties, according to the following conditions and terms, so that from today onwards on the strength of this deed of trustee order determination by you from chela to bara chela by carrying on the Sebapuja, offerings, religious ceremonies and festivals and by preserving and looking after all the debtor properties, realise the income and yield therefrom according to convenience If we or anybody amongst us misappropriate any money or property by taking secretly from the tenants or borrowers, we and our successors will be liable for punishment according to criminal law and you can realise any compensation you intend to take either mutually or with the help of the Court. We and our sons and grandsons shall be bound and liable to pay. But if you might have obtained, any amount on loan against the income of the debtor property and anything that you might have spent from your own pocket for the improvement of the deity of the math and to save the property, we will be found and liable to repay the said amounts along with just and prescribed rate of

interest, and we shall repay. If we do not repay voluntarily you and your successors will realise from us and from our son's and grandson's existing and to be acquired movable and immovable properties and from the existing and to be acquired debtor properties of the deity according of law.

8. The Supreme Court, after considering the two documents, together, summarised the fundamental features from the recitals thereof in the following terms:

(1) That the deity was installed in the temple purely as a family deity and the dedication was made only for a group of individuals who may be connected with the family of the Panis who were the founders of the deity. This clearly establishes that the intention of the founders was to dedicate their properties and install the deity in the temple only for purposes of the Pani family, and their descendants. A perusal of the recitals extracted above would unmistakably show that there can be no two opinions on this question (2) Extensive private properties belonging (sic) the Pani family alone were dedicated for the maintenance of the temple and the deity and there is nothing to show that any contribution was called for from members of the public nor is there any averment in the deed to show that there was any stipulation for taking offerings from the members of the public to worship in the temple. (3) There was no provision for framing any scheme by associating the members of the public or consulting them. In fact, Ex.A-1 shows that even after the descendants of the founders had fallen on evil days and were not in a position to provide sufficient funds for the maintenance of the temple yet (hey appointed Udayanath Pattanayak to manage the affairs of the deity and bound themselves personally to reimburse the manager for any out-of-pocket expenses incurred in connection with the maintenance of the temple. This circumstance manifestly proves that the endowment was of a purely private nature right from the time it was created till 1932 when the management was changed and continued to be of the same nature. Indeed, the personal undertaking contained in Ex. A1 clearly shows that there was never any intention to treat the temple as a public one but the intention was, if actually to continue if in the name of the family so long as family continued (4) There is no recital in any of the documents to show that the members of the public or the will lagers of the place where the temple was situated were entitled to worship as of right.

9. The Supreme Court had laid down after considering the earlier authorities, the following propositions of law:

(1) Where the origin of the endowment cannot be ascertained, the question whether the user of the temple by members of the public is as of right. (2) The fact that the control and management vests either in the large body of persons or in the members of the public and the founder does not retain any control over the management allied to this may be a circumstance where the evidence shows that there is provision for a scheme to be framed in associating the members of the public at large (3) Where, however, a document is available to prove the

nature and origin of the endowment and the recitals of the document show that the control and management of the temple is retained with founder or his descendants, and that extensive property are dedicated for the purpose of the maintenance the temple belonging to the founder himself, the will be a conclusive proof to show that the endowment was of a private nature (4). Where the evidence shows that the founder of the endowment did not make any stimulator for offerings or contributions to be made by members of the public to the temple, this would be important intrinsic circumstances to indicate the pervade nature of the endowment.

10. A reading of the passages extracted above would show that the terms of Ex.A1 in the present case are almost identical with the terms of the documents of trust considered by the Supreme Court in the reported case. On those recitals, the Supreme Court took the view that the temple was not a public Temple. It is also made clear by the 3rd and 4th propositions of law extracted above, what is necessary for making it to be a private endowment is that the control and management of the Temple are retained with the founder or his descendants and that extensive properties are dedicated for the purpose of the maintenance of the Temple belonging to the founder himself. The fact that no contribution or offering was sought from any member of the public was also relied upon as an important circumstance. In the present case also, there was no public contribution or offering for the maintenance of the Temple or the pooja therein. There is no hundial in the Temple and the properties of the founder have been dedicated to the Temple. They are admittedly the exclusive properties of the founder.

11. The Learned Counsel for the second respondent invites my attention to the latest pronouncement of the Supreme Court in *Heir of Deceased Maharaj Purshottam-lalji Maharaj, Junagad Vs. Collector of Junagad District and Others*, .., and submits that the said decision will govern the facts of the present case. I find that there is an ocean of difference between the facts of that case and the present case. In that case the land on which the temple was built was donated by the ruler of the State. Secondly sumptuous provisions were made by the State for the upkeep of the Temple. Thirdly, large contributions were made by the members of the public for repairs and extension of the Temple. Fourthly, the State had interfered with the management when a minor succeeded the trusteeship. Fifthly, the members of the public had free darshan or worship without hindrance from any body. Hence, that decision will not apply to the facts of the present case. It is next submitted by the learned counsel for the second respondent that the appointment of a poojari for the Temple by the founder himself is a circumstance indicating that it is a public Temple. I do not agree with him. Even in private houses people appoint some strangers to perform poojas in their houses. That will not in any way indicate that it is a public Temple.

12. It is significant to note that no member of the public has come forward to give evidence that the members of the public are worshipping in this Temple as

of right. In a big city like Madurai, it would have been very easy for the defendants to get witnesses to prove that members of the public worship in the Temple as of right. In the absence of such evidence, it has to be held that the Temple is not a public Temple.

13. In *Thanumalayaperumal Mudaliar v. Commissioner H.R. & C.E.* 88 L.W. 649=19/5-11-M.L.J 310 a Division Bench of this Court has considered, in detail, the matter and laid down the relevant tests for deciding the question, whether a Temple is a public Temple or a private Temple. The tests laid down in that decision, if applied to this case, will only lead to the conclusion that the Temple in question is a private Temple and not a public Temple.

14. The learned counsel for the second respondent relies upon Ex. B1, a statement stated to have been given by the plaintiff to the Inspector of the Endowments. I do not find anything in the said statement to support the contention of the defendants that it is a public Temple. It is not stated by the plaintiff that the members of the public are worshipping in this Temple as of right. Learned counsel for the Commissioner H.R. & C.E., Department draws my attention to the decision of the Supreme Court in *Devki Nandan v. Muralidhar and others* 1957 S.C.J. 75. He relies on the following passage in that judgment:

The distinction between a private and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment.

The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers."

15. The above passage was expressly considered by the learned Judges of the Supreme Court in *Radhakanta Deb v. Commissioner*, (1981) 2 SCR 826 Their Lordships have also considered the other subsequent decisions of the Supreme Court and culled out the various propositions of law to which I have already made a reference. In view of the clear later pronouncement of the Supreme Court, and culled out the various propositions of law to which I have already made a reference. In view of the clear later pronouncement of the Supreme Court, the passage in *Devki Nandan v. Muralidhar and others* 1957 S.C.J. 75. relied upon by learned counsel for the Commissioner, H.R. & C.E., Department will not help him. Hence, I hold that the suit Temple is a private Temple and not

a public Temple within the meaning of the Act.

16. As regards the question of res judicata, I am surprised that the Commissioner holds that the proceedings are barred by res judicata even without marking the order in the earlier proceedings. It is seen from the Deputy Commissioner's order that a number of documents were filed by both sides, but the order in the earlier proceedings was not filed. In fact, the plea was not even raised before the Deputy Commissioner. It is only for the first time before the Commissioner, in the written arguments, the point seems to have been raised. The Commissioner ought to have given an opportunity to the plaintiff before concluding that the proceedings were barred by res judicata. In the absence of the order in O.A. No. 19 of 1956, it is not possible to accept the plea of res judicata. Even in this suit in the trial Court that order was not marked as an exhibit and no issue was raised in the trial Court regarding the same. Hence, I am unable to accept the plea of res judicata raised by learned counsel for the respondents. In the result, the appeal is allowed the judgment and Decree of the Subordinate Judge. Madurai, are set aside and the suit O.S. No. 352 of 1982, will stand decreed as prayed for. The parties will bear their respective costs throughout.