
(1994) 10 MAD CK 0011
In the Madras High Court
Case No : A.S. No. 158 of 1984

The Commissioner, H.R. and C.E.(A) Department, Madras-34	APPELLANT
Vs	
K. S. Krishnaswamy Mudaliar	RESPONDENT

Date of Decision : 27-10-1994

Acts Referred:

Citation : (1994) 10 MAD CK 0011

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : P.M. Baskaran and Mr. M. Prakash Kumar for Government Pleader, for the Appellant;

Judgement

K. Ramamoorthy, J.—The suit which was instituted on 15.2.1963, by the respondent herein, on the file of Subordinate Judge, East

Thanjavur, Nagapattinam that has come up before me now in appeal after an order of remand by this Court. The relief claimed in the suit was for

setting aside the order of the Commissioner, Hindu Religious and Charitable Endowments Department dated 31.10.1962 in Appeal No. 22 of

1962 and for a declaration that suit temple is a private temple of the respondent/ plaintiffs family.

2. The plaintiff's case is that the plaintiffs father Ramalinga Mudaliar was a very religious person and was a Sanskrit scholar, owning very extensive

properties in Tiruthuraipoondi and Mannargudi taluks, Thanjavur District. Owing to his religious disposition, he built a private temple for the

exclusive worship of his family and endowed about 7 velies of land. This is found in the will dated 3.9.1885. But he died without completing the

construction of the temple. He had only a daughter. He adopted the younger son of his younger brother Chokkappa Mudaliar. Chokkappa

Mudaliar and his first son Samiyappa Mudaliar were also persons with religious feelings. Samiyappa Mudaliar went to Banaras and brought a

Lingam and installed the same in the temple and the deity was called Ramalingaeswaraswami. Chokkappa Mudaliar continued the construction

and completed the same. He also installed idols of Parvathi Amman, and performed the Kumbabhishekam. The temple itself was built in the private

family patta land of 7 mahs in extent. In this connection, the family partition deed dated 24.7.1980 may be seen. The cost of the construction of the

temples and the construction of house for the residence of Archakas were met from the family funds. In the family partition made in the year 1890,

referred to above, a specific reference is made to the construction of the temple in the family patta land and the right of the management belongs

only to Chokkappa Mudaliar and Subba Mudaliar and their descendants. It is also stated that the family worship is being done from the time of its

foundation and daily Neivedyam and Pooja are performed by the trustees appointed by the plaintiff's family. The public were never allowed to

worship in the temple. Chokkappa Mudaliar was in management until he became blind of both eyes and thereafter his natural son and the adopted

son of Ramalinga Mudaliar viz. Subba Mudaliar became the sole hereditary trustee of the temple. The elder son of Chokkappa Mudaliar viz.

Samiyappa Mudaliar pre-deceased his father leaving no male issue. Consequently, the entire properties of the two brothers and the management of

the private family temple devolved upon Subba Mudaliar, the plaintiff's father. The plaintiff's father died in the year 1914, and after his death, the

plaintiff's elder brother and the senior member of the family took up the management of the family properties as well as the suit private family

temple and he was in sole possession and management of the suit temple and performing and carrying on worship. He died in the year 1928. There

was a partition on 20.3.1922 among the plaintiffs and his five brothers. Under the said partition deed, some more properties were set apart for the

family deity Ramalingaeswaraswami, in addition to 7 velies, mentioned above, which was endowed by virtue of a will in the year 1885. The

partition deed of the year 1922 is specifically referred to the persons to manage the temple. It would state that Ramalinga Mudaliar should be

trustee for his life and after his death his eldest son and on failure of male issues, the senior most male member in the family, i.e., the plaintiff and his

male descendants according to seniority should manage the temple and its properties and perform the family worship also. According to the plaintiff, he is in sole possession and management of the temple and its trust, by-virtue of the deed, as their family trust.

3. When the H.R & C.E. Department came forward with a claim that the said temple is a public temple, the plaintiff applied to the Deputy

Commissioner, Hindu Religious and Charitable Endowments Department, Thanjavur in O.A. No. 27 of 1969 under S. 57(a) of Act 30 of 1951

for declaring that the suit temple is the private family temple of the temple and therefore it is Dot governed by the Hindu Religious Endowments

Act. On 19.2.1962, the petition was dismissed by the Deputy Commissioner and the plaintiff filed an appeal in Appeal No. 22 of 1962 before the

Commissioner unsuccessfully and the same was dismissed by order dated 31.10.1962. It is also stated in the plaint that the Commissioner

accepted the position that the burden laid upon the department to establish by positive evidence that the suit temple is a public temple, but on a

mistaken view that the earlier order in O. A. No. 436 of 1932 dated 16.2.1933 under S.84 of the Madras Act II of 1927, precluded the plaintiff

from claiming that the suit temple is a private temple. The plaintiff challenged the view taken by the Deputy Commissioner and the Commissioner.

4. The defendant Commissioner filed a written statement on 29.6.1963. The defendant disputed the genealogical table given in the plaint, that the

suit temple is a public temple and that it has all the indicia of a private temple. It is also stated that there is a Garbhagraham, Arthamandapam,

Mahamandapam, Bali-Peedam etc. in the temple.

5. The plaintiff filed Exs. A1 to A14 and defendant filed Exs.B1 to B5. The plaintiff examined P.Ws. I to 5 and the defendant did not examine any

witness. The learned Subordinate Judge, Nagapattinam dismissed the suit by judgment dated 6-8-1964. There was an appeal to this Court in A.S.

No. 177 of 1965. This Court set aside the decree and judgment of the learned Subordinate Judge and remitted the suit for fresh disposal. After the

remand, the plaintiff filed Exs. A15 to A18. The defendant did not file any documentary evidence after remand, but examined D.W. 1.

6. By judgment and decree dated 28.8.1981, the learned Subordinate Judge, Nagapattinam, decreed the suit holding that the suit temple is a

private temple and that the plaintiff is entitled to declaration.

7. It is against this judgment and decree, the Commissioner, Hindu Religious and Charitable Endowments Department has filed this appeal.

8. It is contended by the appellant that the plaintiff is estopped from claiming the suit temple as a private temple by reasons of the order in O.A.

No. 436 of 1932. It is stated that Ex.B4 dated 16.2.1933 is the annexure to G.O. No. 375 in O.A. No. 436 of 1932 and Ex.B5 is the

proceedings of the Commissioner dated 16.2.1933, made in O.A. No. 436 of 1932. It is contended that the reasoning given by the trial court that

orders under Exs.B4 and B5 cannot operate as res judicata is not sustainable, and that the temple was dedicated for public and the public are

worshipping as a matter of right.

9. The learned Subordinate Judge, Nagapattinam has considered the documentary evidence and also the oral evidence in a very great detail. Two

issues are framed by the learned Subordinate Judge and they are:

(1) Whether the suit temple is a private temple, as alleged by the plaintiff or a public temple?

(2) Whether the plaintiff is barred from claiming that the suit temple is private temple, by reason of the order in O.A. No. 436 of 1932?

10. On issue No. 2, the learned Subordinate Judge came to the conclusion that the order in O.A. No. 436 of 1932 has not barred the plaintiff

from claiming the relief in the suit. The learned Subordinate Judge has observed that no finality can be attached to the orders of the Deputy

Commissioner, which are marked as Ex.B4 and Ex.B5,"in my view, rightly. The question whether the suit temple is a private temple or not, has to

be considered in the light of the situation of the temple and the history of the temple and the management of the temple by persons claiming right on

it.

11. The Supreme Court had an occasion to consider the question whether an institution could be characterised as a private or public temple in The

Poohari Fakir Sadavarthy of Bondilipuram Vs. The Commissioner, Hindu Religious and Charitable Endowments, The Supreme Court has laid

down:

The institution in suit will be a temple if two conditions are satisfied. One is that it is a place of public religious worship and the other is that it is

dedicated to or is to the benefit of or is used as of right by the Hindu community or any section thereof, as a place of worship".

The Supreme Court again had to consider the question whether a particular temple in Madurai in Tamil Nadu was a private or a public temple in

T.D. Gopalan v. Commissioner, H.R. & C.E. (AIR 1972 S.C.2316 : 87 L.W.40(S.C.) (S.N.)). The Supreme Court, having regard to the oral

and documentary evidence in that case held that the temple was a private temple. The Supreme Court held that the court has to consider the origin

of the temple, the manner in which its affairs are managed, the nature and the extent of the gifts received by it, the rights exercised by the devotees

in regard to the worship therein, the consciousness of the manager and the consciousness of the devotees themselves as to the public character of

the temple were features that had to establish whether the temple was public or private. The Supreme Court further proceeded to say that

dedication to public was not to be readily inferred. Such an inference, if made by the user by the public was hazardous, since it would not in

general be conversant with Hindu sentiments or practices that worshipers should be taken away, and as worship generally implied offering of

some" kind, it was not to be accepted that the managers of a private temple should in all circumstances desire to discourage popularity. The

Supreme Court approving what was said in AIR 1940 7 (Privy Council) held that a value of public user as evidence of dedication depends on the

circumstances with would give strength to the inference that a user was as of right. In the instant case, there is absolutely no evidence to satisfy the

requirements adumbrated by the Supreme Court in the cases decided by it. This Court has also considered a few features in H.R.C. Board v.

Gopalakrishna Iyengar (68 Law Weekly 50 S.N.). The learned Subordinate Judge, in paragraph 7, while discussing the issue No. 1, has traced

the history of the temple as to how it was founded, how Sivalingam was brought from Banaras for installation, how under various documents

between the members of the family, the management of the temple has been referred to, how temple should be managed and how family members

were aware of their rights and also the restrictions against the interference of the third parties in the temple. All these things had been going on since

188S, and the appellant has not taken pains to find out by deputing an officer to find out the actual situation of the temple and how, having regard

to the nature of the temple, in existence, it can be called a public temple. D.W.I was examined after remand and D.W. 1 Inspector, H.R. C.E.

Department, has not stated anything warranting the conclusion that the temple is a public : temple. The learned Subordinate Judge has also referred

to the decision in Chakkarai Chetti v. Commissioner, Hindu Religious and Charitable Endowments, Madras (1955-1.M.L.J. 503) that no evidence

is adduced by examining the member of the public that as a matter of right, they can offer the worship in the temple. Having regard to the facts and

circumstances of the case and in the light of the unimpeachable documentary evidence, I am of the view that the conclusion arrived at by the lower

court is correct in law. I, therefore, do not find any reason to interfere with the judgment and decree of the learned Subordinate Judge. Hence I

dismiss the appeal. However, there will be no order as to costs.