

(2017) 03 MAD CK 0094

In the Madras High Court

Case No : Appeal Suit (MD) No. 180 of 2016

The Deputy Commissioner, Hindu Religious

APPELLANT

Vs

Kannan alias Kannian

RESPONDENT

Date of Decision : 02-03-2017

Acts Referred:

Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 — Section 6(18),
Section 6(20)

Citation : (2017) 2 LW 739 : (2017) 3 MLJ 582

Hon'ble Judges : Mr. S.S. Sundar, J.

Bench : Single Bench

Advocate : Mr. S. Kumar, Additional Government Pleader, for the Appellants; Mr. V. Chandrasekar, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mr. S.S. Sundar—The defendants in the suit in O.S.No. 54 of 1990 on the file of the Principal Subordinate Court, Thanjavur, are the appellants in the above Second Appeal.

2. The respondent in this appeal filed a suit in O.S.No. 54 of 1990 on the file of the Principal Subordinate Court, Thanjavur, to set aside the order passed by the second defendant in A.P.No.61 of 1986, dated 06.07.1989 and for consequential relief. This suit is a suit filed under Section 70 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. The respondent earlier filed an application in O.A.No.35 of 1985 under Section 63(a) of the Tamil Nadu Hindu Religious and Charitable Endowments Act for a declaration that Arulmigu Ramalinga Swamy Samathi in Puthur Village, Papanasam Taluk, Thanjavur District is not a religious institution coming under the purview of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. This application was dismissed by the first defendant in the suit namely the Deputy Commissioner, Hindu Religious and Charitable Endowments Department, Thanjavur, by order dated 27.06.1986. As against the said order, the respondent herein filed an

appeal before the second defendant namely the Commissioner, Hindu Religious and Charitable Endowments Department, Chennai, as provided under Section 69(1) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. The second defendant also confirmed the order of the Deputy Commissioner, Hindu Religious and Charitable Endowments Department and hence, the respondent herein filed the suit in tune with Section 70 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. In the plaint, the respondent has reiterated his case before the Deputy Commissioner, in the application filed under Section 63(a) of the Act.

3. It is the consistent case of the plaintiff that the small institution known as Ramalinga Swamy Samathi situate in Puthur Village in Papanasam Taluk, is not a temple or a religious institution as defined under the provisions of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. Though it is not a mutt, according to the respondent, Shri Ramalinga Swamy Samathi cannot be considered as a religious institution.

4. The respondent specifically pleaded that he has been holding the office of trusteeship after the death of one Kovindammal who was earlier holding the office of trusteeship for a period of ten years prior to his office. Before the said Govindammal, it was contended by the respondent that her husband Late Krishnaswamy Pillai was the trustee. Similarly, it was also contended by the respondent that the father of Krishnaswamy Pillai by name Muthusamy Pillai was holding the office of trusteeship prior to his son.

5. It is stated by the respondent that one Ramalinga Swamy, the founder of the temple was a holy person and he died unmarried. It was the case of the respondent that the said Ramalinga Swamy was entombed in the property and later, by his descendants namely the family members, he was worshipped. According to the respondent, the said Ramalinga Swamy himself wanted a samathi to be erected after his death. It was further contended by the plaintiff that the said Ramalinga Swamy was a close relative of Muthusamy Pillai's father by name Ramaswamy Pillai. Since the Ramalinga Swamy Samathi was a private institution of the descendants of the founder by name Ramalinga Swamy, the plaintiff contended that it is not a public temple or a religious institution to be recognised as one coming under the purview of the Act. It is also the plaintiff's case that the said Govindammal, executed her last Will and testament on 01.06.1983 and that by virtue of the Will, the plaintiff became the successor to the trust. After the death of Govindammal on 18.07.1984, the plaintiff became the trustee to manage the suit institution. It was further contended by the plaintiff that during the life time of the said Govindammal, she filed an application in O.A.No.11 of 1984 for similar relief under Section 63(a) of the Act and that she died even before an order was passed. It appears that the plaintiff thereafter has filed an application in O.A.No.35 of 1984 before the first defendant which was dismissed by him by order dated 26.07.1986. The order passed by the appellate authority namely the second defendant, confirming the order of the

first defendant was also characterized by the plaintiff as an order without careful consideration of material facts. According to the plaintiff, the report of the Inspector which clearly prove the facts pleaded by the plaintiff was not considered by the authority. Since the authorities have failed to consider the fact that the presence of Lingam or other idols in the premises would have no legal implication regarding the character of the institution as purely a private institution. The specific case of the plaintiff is that Ramalinga Swamy is not referable to the Lord but the founder of the institution who was also entombed in the property.

6. The suit was resisted by the defendants on various grounds. The defendants disputed the very existence of Ramalinga Swamy Samathi. According to the defendants, the temple is misrepresented as Shri Ramalinga Swamy Samathi and the case of the plaintiff is totally a misconceived one. The other contentions regarding the description of the founder of the institution as a holy person and that there was a samathi worship in the suit institution are specifically denied. However, the defendants admit the fact that Shri Ramalinga Swamy temple was founded by one Ramalingam and that his properties were endowed for the temple. The defendants also admit that the body of the founder was interned behind the temple after his death. It is also contended by the defendants that there are regular poojas and worship in the temple and special poojas on important occasions are also performed in the temple. It was specifically contended by the defendants that Govindammal herself had given a statement in 1975 admitting the nature of the suit temple as a religious institution and that the legacy under her Will cannot claim a better title than the testator. The defendants also put the plaintiff to strict proof of his case on the due execution of the Will alleged to have been executed by Govindammal in favour of the plaintiff.

7. The trial Court decreed the suit holding that the order of the defendant holding that the suit institution is not a samathy but a temple is erroneous having regard to various facts admitted or established. After relying upon the evidence of P.W.1 to P.W.3 and D.W.1 and other circumstances and the documents filed by the plaintiffs, vide Ex.A1 to A10 and Ex.B1, the trial Court determined the character of the temple as a private institution, not coming under the purview of the Hindu Religious and Charitable Endowments Act, 1959. The present appeal has been filed by the defendants 1 and 2.

8. The learned Additional Government Pleader appearing for the appellants argued the appeal on the following points:

(a) The lower Court failed to consider the fact that the temple is located in Survey No.71-B2, which is classified as Vandi Poramboke land.

(b) The idols of Sivan, Nandhi, Visalakshi Amman, Vinayagar, Bhairavar and Palipeedam are located inside the temple to indicate that the institution is a temple but not a samathi as claimed by the plaintiff.

(c) The Will alleged to have been executed under Ex.A10 cannot be the basis to

decide as to the character of the institution as the same was executed long after the construction of the temple. Even assuming that the Will is true and valid, the recitals also would indicate that the temple was in existence long prior to the samathi.

(d) The revenue patta cannot be taken as an evidence of title and that the character of the temple cannot be decided on that basis.

(e) The public are worshipping as a matter of right and that therefore, the dedication can be presumed. The plaintiff has not discharged his burden of proving the character of the institution as a private one especially when there is a presumption that all the temple in the State of Tamil Nadu are public temples. The existence of a tomb inside the premises of the temple or behind the temple will not alter the character of a public temple. All the Hindu festivals like Karthigai, Poosam, etc., are celebrated in the temple and that the institution is recognised as a place for worshipping. After the amendment to Tamil Nadu Hindu Religious and Charitable Endowments Act, even samathi is recognised as a religious institution.

9. The learned Additional Government Pleader apart from making the above submissions, raised a ground with regard to the genuineness of the Will which was never an issue argued before the Court below. According to the learned Additional Government Pleader, the relevant portion in the Will have been corrected and hence, the Will does not appear to be a genuine Will. The Will is the original Will and the same was produced before the Court. During trial, the defendants have not raised their little finger about the truth or validity of the Will or about any irregularity in the manner of execution of the Will. Neither in the written statement nor in the grounds of appeal, the appellants disputed the genuineness or the truth or validity of the Will Ex.A10, dated 01.06.1991. Having regard to the specific finding of the Court below and the other circumstances, this Court has no reason to doubt either the genuineness of the Will or the truth and validity of the Will. Since the genuineness of the Will was not doubted by the authorities and the defendants have relied upon the recitals of the Will, it is not open to them to raise an issue attacking the genuineness of the Will.

10. As against the factual contentions raised by the learned Additional Government Pleader appearing for the appellants, the learned counsel for the respondent vehemently argued that the suit institution is not a religious institution within the meaning of Hindu Religious and Charitable Endowments Act, 1959, but it is a private temple attached to the samathi of founder. The learned counsel submitted that unless the samathi is used as a public place of religious worship, it cannot be treated as a public temple to bring the same under the purview of the Tamil Nadu Hindu Religious and Charitable Endowments Act. After referring to the admitted facts in this case, the learned counsel for the respondent also read out the orders of the Deputy Commissioner and the Commissioner, Hindu Religious and Charitable Endowments Department to demonstrate that the conclusions of defendants are erroneous. The learned

counsel for the respondent after meeting the factual contentions raised by the appellants, finally submitted the following points:

(a) Unless there is a dedication to the public, the temple, which was constructed by an individual, remains the property of the said individual;

(b) The temple was constructed by one Ramalingam and the founder wanted his samadhi to be erected in the premises. After the founder was entombed his descendants worshipped samadhi and other deities. It was recognised only as a Samadhi by public and hence, public did not offer worship.

(c) In this case, there is no evidence of public worship. Even if the public are permitted to offer worship it does not bring the institution as a religious institution coming under the purview of the Hindu Religious and Charitable Endowments Act, 1959;

(d) Samadhi of founder inside the temple premises and performance of pooja in Samadhi coupled with the recitals in the Will Ex.B10 would give a clear indication that the temple is a private temple;

(e) When the public cannot offer worship in a temple as of right it can be presumed that there was no dedication to the public;

11. From the pleadings and issues raised before this Court, the point for determination in this appeal is whether the temple in question is a public temple or a religious institution coming under the purview of Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as "the Act").

12. A religious institution is defined under Section 6(18) of the Act as follows:

"(18) "religious institution" means a math, temple or specific endowment." Section 6(20) of the Act reads as follows:

"(20) "Temple" means a place by whatever designation known, used as a place of public religious worship, and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of public religious worship." Thus, the two requirements to be satisfied before bringing an institution within the meaning of "temple" are

(a) It must be a place of public religious worship;

(b) It must be dedicated to or for the benefit of or used as of right by the Hindu Community or any section thereof as a place of public religious worship.

13. In this case, the learned Additional Government Pleader produced the copy of statements of witnesses recorded by the Inspector of Hindu Religious and Charitable Endowments Department, his report and the questionnaire prepared by the Inspector stating that they are part of the proceedings of Deputy Commissioner, Hindu Religious and Charitable Endowments Department, marked as Ex.B1.

14. Items 1, 4, 5, 6, 16, 18, 23, 24, 25, 26, 31 and 36 of the questionnaire prepared by the Inspector of Hindu Religious and Charitable Endowments Department which are treated as part of his report is reproduced hereunder:

1

The Origin of the Institution when and by whom the Institution was founded and when the Idols were installed and by whom?

Not known

4

Whether the dedication can be inferred from the nature of the Institution, the nature of the user and the way the Institution has been administered?

It cannot be inferred the dedication of the temple in question from its nature, the nature of the use and the way in which the temple is administered.

5

Is the Institution a place of public religious worship?

Yes

6

Whether the temple has been used as of right by a Hindu Community or any section thereof as a place of public religious worship?

Since the temple is in dilapidated condition, and the performances such as deity pooja, archanai and abisekam etc are not done as per agamas, it is learned that the public stopped worship.

16

Whether the public attach any special importance to worship in the temple on important religious and festival occasions?

No

18

Are the people in the habit of making offerings to the deity? Give details.

No

23

Whether the worship conducted in the temple is the same as being conducted in other public temples? Whether after performance of Archanai, Vibuthi, Kumkum satari, distribution of theertham and thulasi take place and whether people would assemble there? Whether Archanais abishegams, marriages, tonsure ceremonies mudi kanikkai were performed by the public?

Since the temple is in dilapidated condition the public are not in the habit of going for worship in the temple.

24

Whether on auspicious and important festival days the Utsava Idol Vighraha is taken in procession and accompanied by melam and bhajana party sevathi do sevas and pay the archaka, who accompanies the deity, small cash presents?

As there is no utsava idol in the temple, the question of procession accompanied by melam and bhajana does not arise.

25

Are there hundials in the temple? Where are they kept? What is the purpose of collection?

No

26

Did the Institution pay any contribution to the Ex. Board or the Temple Committee when it was functioning, if so state the amount paid on each festival?

No record available in this regard

31

Whether public are allowed into the temple for worship without the permission of the Dharmakarthas? Was there any occasion when permission sought was refused?

If the public want nobody can prevent from worship. The sannathies are opened without doors.

36

Do the public as a matter of course, contribute personally and pecuniarily for any ordinary or extra-ordinary functions connected with the temple?

No

15. Except a self-declaration in item 5, the report of Inspector and the questionnaire do not indicate that the temple was constructed by public or worshipped by public as a matter of right. No flag staff, no hundial and no collection from public for any purpose. In the report, it is seen that no one has given statement suggesting the temple as a public temple. The Inspector of Hindu Religious and Charitable Endowments Department, has given a report stating that the temple is in the administration of plaintiff's family for three generations. The statement of witnesses recorded by the Inspector are dealt with by him in para 4 of the report which is relevant and extracted as under:

4. nk;kDtpy; Fwpgg; pLL; ss; itfs; Fwpj;J g[jj];]iu Brhe; ;j jpU.K.fUg;igah

Kg;gdhh;-1, jpU.rh.fypad;-2, jpU.g.nuh\$Bfhghy; gps;is-3, jpU.g.fUkg; hapuk;-4, Bkwg; o Bfhapypy; g{i\$ bra;a[k; g{rhhp k.nuhR-5, MfpBahiu tprhhpj;Bjd;. Bkwg; o Bfhapiy vg;BghJ ahh; fl;odhh;fs; vd;w tpguk; bjhpahJ vd;Wk;; kDjhuhpd; KdB; dhuhd jpU.nuhkypA;frhkp rkjhj MdBghJ mtUf;fhf fl;lg;gl;l rkjhj Bfhapy; vd brhy;y Bfs;tpg;gll; jhft[k;; Bkwg; o BfhapYfF; bghJkf;fs; Rthkp jhprpf;f bry;tjpy;iybad;Wk;; Ch;kf;fs; Bkw;go BfhapYfF; ve;jtpjkh d bghUs; cjtpa[k; bra;tjpy;iybad;Wk; Bfhapy; eph;thfj;jpy; Ch;f;fhuh;fs ; jiyapl;lpyi; ybad;Wk; TWfpd;wdh;. g{rhhpia tprhhpj;j BghJ BkYk; TWifapy; Bkw;go Bfhapypy; jpdKk; xU fhy g{i\$ bra;tjhft[k;; tUlgpwg;g,[fpUj;jpif, jPghtsp, bghA;fy; ijgg; {rk;; gAF; dp cj;jpuk;; jpUthjpiu Mfpa tpBrl ehlf; spy; mgpB& fk; bra;tjhftk[;, njw;F MFk ; bryt[fs; kw;Wk; jdf;F rkg; s goj;juj;jpw;fhf khjk;1-fF; 13 kuf;fhy; bey; Mfpad kDjhuh; FLkg; j;jhh;fBs bfhLj;J te;Js;sdh; vd;fpwhh;. bghJkf;fs ; nf;Bfhapypy; vJt[k; bra;tjpy;iy. jA;fk;; bts;sp eiffs; ny;iy. cw;rt tpf;fpufA;fs; ny;iy. thfdA;fs; ny;iy. Rthkp g[wg;ghL ny;iy. Cz;oay;; mh;r;rid, mgpB&f fl;lz tR{y; ny;iy. g{i\$F; Btz;oa kzp, jl;L, Bjhz;o, J]gf;fhy;; bfz;o, tpg{j p jll; Mfpa gpj;jis rhkhd;fs; css; J vd thfF; Kyj;jpy; Twpa[ss; hh;

16. Plaintiff has examined himself as P.W.1 and P.W.2 and P.W.3 were also examined to reiterate his contention that the temple was constructed by plaintiff's ancestor one Ramalingaswamy. The witnesses have spoken to about the character of temple as a private temple and its reputation as such. There is absolutely no other evidence to contradict the statement of P.W.1 to P.W.3. D.W.1 has deposed as under:

ehA;fs; Bfhpty; vd;W brhyy; g;gLfpd;w nlj;jpy; bfhokuk; nyi; y. tz;o vJt[k; fpilahJ. bghJkf;fs; fhzpf;if brYj;jpajw;Bfh, brYj;jpajhfBth hpf;fhh;Lfs; vJt[kpy;iy. jhth Bfhpty; xU g{i\$F;F bfhzL; tugg; l;lJ vdg; jw;F hpf;fhh;Lfs; cs;sJ. hpf;fhh;il jhf;fy ; bra;atpy;iy. jhth nlj;jpy; vA;fshy; epakdk; bra;agg; ll; g{rhhp ny;iy

17. The evidence of D.W.2 that the temple was under the control of department is not supported by any evidence. The evidence of D.W.1 is also contrary to the report of Inspector. The Deputy Commissioner has only relied on the report which does not contain any material to show that the temple is a public temple.

18. The learned counsel for the respondent relied upon the judgment of a learned single Judge of this Court in the case of Commissioner, H.R. & C.E. v. Sri Ayyappa Baktha Sabha reported in (2011) 1 MLJ 971 wherein this Court has held as follows:

"35. ... A private temple can be equated to a pooja room in a private house, wherein there is no dedication of the temple to the public or a section thereof and the public cannot have a right of entry and worship without the permission of the owner. If the entry of others is restricted and regulated by such persons, then it can be said that there is no dedication of the temple to the public or a section thereof and hence the temple's public character has to be ruled out and the private character of the temple has to be upheld. In this case, besides making clear pleading that the suit temple is a private temple owned by the

plaintiff Sabha and the right of entry and worship is available to members of the plaintiff Sabha alone without any restriction; that the others having faith in the Ayyappa cult are permitted to offer worship in the suit temple, but they do so only with the permission of the plaintiff Sabha and that the plaintiff Sabha retains its right to deny access to the temple to any person, who is not a member of the plaintiff Sabha, it has also been pleaded in clear terms and evidence has been adduced in support of such plea to the effect that a signboard has been exhibited at the entrance, which reads "Right of Admission Restricted". There is no contra evidence from any other worshipper, who is not a member of the plaintiff Sabha to the effect that he or other Hindu public are having right of entry into the temple and can offer worship in the temple as of right. There is no independent witness to speak about such rights exercised by the persons who are not members of the plaintiff Sabha or that admission to the temple is not restricted as claimed by the plaintiff. Under such circumstances, this Court is of the view that the contention of the plaintiff that the mere fact that the suit temple resembles a public temple in its features as it contains Gopuram, Sthubam etc., and poojas and abishekams are conducted as it is done in public temples, shall not take away the character of the temple as a private temple, when it is pleaded and established that there was no dedication of the temple to the public and the public cannot offer worship in the temple as of right. The contention of the respondent/plaintiff, in this regard, cannot be brushed aside as one without having substance."

19. In the case of *Goswami Shri Mahalaxmi Vahuji v. Rannchoddas Kalidas*, reported in AIR 1970 SC 2025, the Hon"ble Supreme Court has observed that the origin of the temple, the manner in which the affairs were managed, the nature and the extent of the gifts received by it, rights exercised by devotees in regard to worship therein, the consciousness of the manager and consciousness of the devotees themselves as to the public character of the temple are relevant factors to establish whether the temple is public or private.

20. In the case of *The Commissioner, H.R. & C.E. Board v. T.S. Palanichamy and seven others* reported in 2003 (1) CTC 65 a Division Bench of this Court has held as follows:

"20. The presumption on which the State wants to rely is thus a presumption which has been wrongly assumed to exist by the misreading of a judgment delivered way back in the year 1920. On appeal heard by the Privy Council from that judgment the Privy Council did not refer to any presumption and the case was decided on the basis of the evidence adduced in the case. The judgment of Sheshagiri Aiyar, J., was misread and was stated as the source of authority for a proposition which he had not laid down in AIR 1934 PC. The Privy Council in that case (AIR 1934 PC 230) had no evidence on basis on which to lay down that the Court should presume that the temples in Madras Presidency are public temples.

21. It is evident that it is only the erroneous observation made in AIR 1934 PC 230 that has formed the foundation for the statement made in some of the

judgments of this Court that there is a "presumption" or that the "law is well settled" even when it is not, that the temples in greater part of Madras Presidency are public temples. The apex Court in more than one decision has warned against reading observations in judgments as if they formed part of the statute. Such a warning has been administered in numerous cases and very recently in the case of *Gangadhar Behera v. State of Orissa*, 2002 AIR SCW 4271, wherein it has been observed that, "...There is always peril in treating the words of a judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

22. Each case has to be decided on the basis of the evidence placed before the Court in that case and not on the basis of any non-statutory presumption of the nature canvassed for by the State. What is crucial for the purpose of deciding as to whether the temple is a public temple or private is the dedication to the public and the right recognised in public to offer worship at the temple as of right. That question is to be decided on a consideration of the oral and documentary evidence in the case and not on the basis of any non-statutory presumptions.

23. The apex Court in the case of *Gopalan*, has adverted to matters which are required to be considered while deciding as to whether the temple is a public temple or a private temple. The Court therein referred to the decision rendered in the case of *Goswami Shri Mahalaxmi Vahuji v. Rannchhoddas Kalidas*, wherein it has been held that the appearance of a temple though a relevant circumstance was by no means decisive, and that the circumstance the public or a section thereof had been regularly worshipping in the temple as a matter of course and they could take part in the festivals and ceremonies conducted in that temple apparently as a matter of right, was a strong piece of evidence to establish its public character and if offerings were being made by the public and the expenses were being met by public contribution, it would be safe to presume that the temple was public. "In short, the origin of the temple, the manner in which its affairs were managed, the nature and the extent of the gifts received by it, rights exercised by devotees in regard to worship therein, the consciousness of the manager and consciousness of the devotees themselves as to the public character of the temple were factors that went to establish whether the temple was public or private."

21. From the above judgment, it has been categorically held that there is no presumption as to the character of temple as public and such presumption is not permitted by any statute or by precedent. In this case, absolutely there is no evidence to indicate that the temple was either established by public or dedicated to public.

22. Learned Counsel for the respondent further relied upon a decision of this Court in the case of *The Commissioner, H.R. & C.E. v. Swamikeela Arasalwar Dharmam* reported in 1983 (II) MLJ 274 wherein this Court has held as follows:

"4. ... There is no evidence in the present case that the trust or for the matter, the temple specifically, was by course of conduct, got dedicated to an indeterminate multitude of the public. There is no proof of user of the temple by the public as of right. Proof of user by the public, of the temple without interference and as of right would be cogent evidence that there has been a dedication in favour of the public. Such a proof is wanting in this case. It is true that Utsavams are being conducted and the deity is being taken in procession and on such occasions, there will be participation of outsiders. But the mere fact that festivals are being conducted and the deity is being taken in procession and at that time members of the general public participate in the functions are not sufficient by themselves to draw an inference that the temple has been dedicated to the public. Equally so, the presence of physical features which are usually found in a public temple is not of much significance, so long as the test of public religious worship as of right is not satisfied. The evidence of P.W. 1, clearly indicates that it is not expected by the gramadars that outsiders may worship in the temple and perform kainkaryam as of right. On the other hand, there is a clear indication that the gramadars wanted to exclude the general public, other than themselves, from worshipping in the temple as of right. The mere fact that public is being allowed to participate in the festivals connected with the temple, or even allowed to worship in the temple could not persuade the Court to readily infer therefrom dedication to the public. The crucial test is that the Hindu public or any section thereof must be entitled to use the place as a place of public religious worship, and they must be doing it as of right and not as gratis from the persons in management."

23. In the same judgment, the evidence of defendants in that case (H.R. & C.E. Department) was considered in paragraph 6 and it is relevant in this case. It is extracted as follows:

"6. The evidence placed on behalf of the defendants is of cursory nature. They were content to examine an Inspector of the Hindu Religious and Charitable Endowments Department, as D.W. 1. It is true, in chief examination D.W. 1 spoke about the features of the temple such as the existence of Vimanam, Kalasam, Karpagraham and Praharam, and the fact that poojas are being conducted daily and the public worship during festival days. As is stated above, the presence of certain physical features in the temple, which are normally found in a public temple does not by itself lead to any inference that the temple is a public temple. D.W. 1 has not stated that public worship in the temple is as of right. Significantly, no member of the public who alone could speak about the right of the public to worship in the temple has been examined. D.W. 1 has seen the temple only once. His visit was only casual and not a purposeful visit. He has not made any report of his visit. He has not even examined any member of the public. His evidence does not in term controvert the evidence of P.W. 1. The plaintiff trust is purely a private one founded and carried on to cater to the needs of a particular sect of Brahmins, owner-residents of a particular street. Their building a temple subsequently, carrying on worshipping in the temple and the

conduct of festivals, are entirely their exclusive affairs. There is no public element in them, Hence, it has got to be held that the plaintiff trust, its properties and the temple it built cannot come within the mischief of the Act, and as such the judgment and decree of the Court below have got to be confirmed."

24. Relying upon the above judgments, the learned counsel for the respondent submitted that the defendants have not established the fact that the suit institution is a public institution since the documents filed by the plaintiff would clearly show that the temple in question is a private institution and the department cannot exercise any control over the institution. The Hon'ble Supreme Court in the case of Radhakanta Deb v. The Commissioner of H.R.& C.E., Orissa, reported in AIR 1981 SC 798 suggested four tests to determine the character of temple whether it is a public temple or private temple. They are enumerated here for convenience:

- (i) Whether the public use the temple as of right;
- (ii) Whether the control and management vests in public and the founder does not retain any control over management;
- (iii) Even if there is dedication of properties by the founder whether the founder retains the control and management of the temple and properties.
- (iv) Whether the founder of endowment made any stipulation for offerings or contributions to be made by the members of the public to the temple.

25. In the present case, there is no indication that members of public were allowed to make any contribution on the occasions they were allowed to worship at the temple and there is no endowment made to the temple by any outsiders. The control and management of the temple at all times was with the plaintiff and his predecessors in interest. There is no evidence in this case to contradict the case of plaintiff that the temple was established by his forefathers. There is no proof to show that there was dedication of temple for the benefit of public or that the public could worship there as of right. No evidence of any contribution from public or participation of public in the affairs of temple. No Hundial. Samadhi of founder is not likely to be visited by public as a place of religious worship. The question whether the temple was public or private has to be determined on the basis of entire evidence. Going by the records, I am of the view that the defendants 1 and 2 have misdirected themselves while deciding the character of the temple as a public temple by recording a fact that there is no evidence as to the establishment of temple, without considering the specific case of plaintiff. In the absence of any independent evidence or material to show that the temple was either established by public or dedicated to the public, the submission of learned Additional Government Pleader have no factual foundation. Even for the submission of the learned Additional Government Pleader that the temple is located in a land classified as poramboke, there is no evidence and the appellants admit that patta for the lands stand in the name of deity. The finding of Court below that the temple in question is a private temple and not a public temple is

based on evidence and hence, justified. In view of my conclusions reached above, I do not find any reason to take a contrary view than the view expressed by the trial Court. I do not find any legal infirmity in the judgment and decree of the trial Court. Hence, the above appeal is dismissed and the judgment and decree of the lower Court in O.S.No.54 of 1990 dated 31.01.2005 is confirmed. However, there is no order as to costs.