



A.S.(MD)No.108 of 2015

THE MADURAI BENCH OF MADRAS HIGH COURT

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<i>Judgment Reserved On</i>	<i>Judgment Pronounced On</i>
28.06.2024	29.08.2024

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

A.S.(MD)No.108 of 2015

1.The Commissioner,
Hindu Religious and Charitable Endowments
Administration Department,
Nungambakkam High Road,
Chennai-34.

2.The Deputy Commissioner,
Hindu Religious and Charitable Endowments
Administration Department,
Chokoikulam, Madurai-2.

...Appellants

--Vs--

1.S.Munusamy Chettiar
2.G.Soundaian
3.G.Ayyasamy
4.Nagalakshmi

...Respondents

PRAYER: This Appeal Suit filed under Section 70(2) of the HR and CE Act 22 of 1959, against the Judgment and Decree dated 26.10.2005 passed in O.S. No.24 of 2001 on the file of the Sub Court, Aruppukottai.

For Appellants : Mr.P.T.Thiraviyam
Government Advocate

For R3 : Mr.S.Parthasarathy



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JUDGMENT

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The present First Appeal is preferred by the Hindu Religious & Charitable Endowment Department (hereinafter referred to as HR&CE Department) against the Judgment and Decree dated 26.10.2005 passed in O.S. No.24 of 2001 on the file of the Sub Court, Aruppukottai. The appellants herein are the defendants in the suit and the respondents herein are the plaintiffs in the suit. For the sake of convenience, the parties are referred as per the ranking in the suit.

2. The plaintiffs had filed the suit in O.S.No.24 of 2001 to set aside the orders passed by the 1st defendant in A.P.No.2 of 1984, dated 30.09.1985 and order passed by the 2nd defendant in O.A.No.57 of 1976, dated 01.11.1978, wherein in the said orders it has been held that the suit temple is a religious institution as defined in Hindu Religious and Charitable Endowments Act, Tamil Nadu Act, 22/59 (hereinafter referred to as HR&CE Act) and it is not a private temple belonging to the plaintiffs. The suit was allowed in favour of the plaintiffs and aggrieved over the same the present First Appeal is preferred by the HR&CE Department.

3. The brief facts as stated by plaintiffs are that the plaintiffs are the pangalis to each other having the common ancestor. One Perali Chettiar had



purchased the property an extent of 20 x 51 kambu equivalent to 60' x 153' vacant site through a registered sale deed dated 15.12.1868. The said Perali Chettiar died leaving behind his surviving only brother Soundappa Chettiar. That Soundappa Chettiar died leaving behind his only surviving daughter Soundeeswariammal, Soundappa Chettiar and Chinniah Chettiar as his legal heirs. The present plaintiffs are the sons of Soundappa Chettiar, and Chinnappa Chettiar respectively. The aforesaid Soundeeswariammal have not attained puberty and has led the life as a "sanyasin". The plaintiff's parents Soundappa Chettiar and Chinnaiah Chettiar have looked after the needs of Soundeeswariammal. Due to the aforesaid care, affection and love bestowed by the plaintiff's parents upon that Soundeeswariammal she wanted to render all the helps which will enable the plaintiff's parents and their descendants to attain the eternal benefits. The abovesaid Soundeeswariammal thought of constructing a temple within the property purchased by their ancestor Perali Chettiar, which is owned by his heirs namely Soundeeswariammal. Soundappa Chettiar and Chinniah Chettiar also had taken very great efforts and strain. And from and out of the joint effort of them they have constructed a temple in the said property. In that temple the presiding deity is Samundeeswari Amman and there are other sub shrines also. After the death of abovesaid Soundeeswariammal her body was interned in that temple premises itself and the samadhi of Soundeeswariammal also since her godly effect



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was so merciful to them. As stated above the Soundeeswariammal, the plaintiffs parents alone have constructed the temple from and out of their own money and the outsiders have nothing to do with it. It is an obvious fact that the temple is situated in the private land belonged to the plaintiff's family. All along the poojas were performed in the temple only by the plaintiff's family members and at present the 1st plaintiff is doing poojas for the past about 20 years. Previously his ancestors were rendering pujas in the temple. Likewise, the plaintiffs and their ancestors alone were maintaining and administering the temple all these years continuously and outsiders had not interfered in the administration of the temple. The HR&CE Department also has never interfered in the plaintiffs' administration of temple all these years. But due to wrong understanding of law the subordinates of defendants had mistakenly have sometimes collected the contribution and audit fees from the plaintiffs. But such payments were made by the plaintiffs under protest and the same is paid due to coercion of the defendants and their subordinates. The Assistant Commissioner of HR&CE Ramnad at Madurai has initiated proceedings for the appointment of non-hereditary trustee to the temple, but the same was objected by the plaintiffs. The plaintiffs were advised to file a petition under Section 63 (a) of the HR&CE Act before the 2nd defendant for a declaration that the Samundeeswari temple is not a religious institution and they have file O.A.No. 57 of 1976 accordingly. In the said proceeding the plaintiffs were not allowed to



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adduce the oral evidence by examining other witnesses. The 2nd defendant has not even examined the Inspector of HR&CE who has submitted the Ex.C1 report. The Deputy Commissioner has attached much weight to Ex.C1 report but had not allowed the procedure while marking the Ex.C1. Further the persons from whom the statements were recorded by the Inspector also had not been examined by the Deputy Commissioner. The Deputy Commissioner has erroneously decided and dismissed the petition on 01.11.1978. Aggrieved over, the plaintiffs had preferred an appeal before the 1st defendant Commissioner in A.P.No.2 of 1984. The 1st defendant also has failed to appreciate the contention of the plaintiff. Further the 1st defendant has erroneously come to conclusion that the plaintiff had not proved the temple is situated in private land. It is settled law even private temple can be situated in promboke land, simply because a temple is situated in the poramboke land that temple would not lose its private nature and character. The 1st defendant has observed that the ingredients of the public temple namely Balipeedam etc., are present and held that the suit temple a public temple. It is again a settled law that in the private temple the family members can have any kind of worship to their taste, will and wishes. The presence of Balipeedam etc. will not usurp or take away the rights of the plaintiffs to claim as a private temple. Hence the suit is filed against the orders of the 1st and 2nd defendants.



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4. The defendants deny the purchase of the suit land on 15.12.1968 by the said Perali Chettiar and the site does not belong to the plaintiffs and also deny the construction of temple by the plaintiff's ancestors. Further the plaintiffs ought to prove the genealogy appended with the plaint and the relationship between Perali Chettiar and Soundeeswari Ammal. The name of the deity 'Chaundeeswari Ammal' has no relevance to 'Soundeeswari Ammal' who is alleged to be the heir of Perali Chettiar. Infact the temple is situated in S.No.74/1 in 10 cents at Thonugal Village. The total extent of S.No.74/1 is 1 acre and 64 cents and registered in patta No.211 in the name of another temple called Arulmigu Veiyulagandamman Temple and the kist for the total property is being paid by the Trustee of that temple. The defendants deny the suit temple was constructed by Soundappa Chettiar and Chinniah Chettiar out of their own funds. And deny the body of Soundeeswari Ammal was buried within the premises of the temple and even assuming to be so, it will not clothe any rights or title in the temple for the plaintiffs. It is not true the poojas to the temple are being performed by the plaintiff's family. The poojas are performed twice a day by the poojari and prasadam is distributed to all gathering public. On Vijayadasami day, Chaundeeswari will be decorated and taken on procession in the streets of konars and moopanars, in the village. At the time of procession, archana will be done by the public belonging to all community of the village and nearby villages. The



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plaintiffs never administered the temple but administrated by the Board of Trustees belonging to different communities. It is not true the plaintiffs had paid the contribution by mistake. It is a statutory obligation to pay contribution and audit fees. The allegation that the plaintiffs were not allowed to examine the witnesses during the proceedings under section 63(a) of the Act is denied as false. Also, it is false to state the 2nd defendant failed to examine the Inspector of HR&CE. Infact during enquiry on 17.07.1978 the report of the Inspector was marked with the consent of the Advocate of the plaintiffs and he did not object to the marking the report as C1 nor the advocate insisted the examination of the Inspector. Further the 2nd defendant never objected the examination of further witnesses on the side of petitioner. The plaintiffs attribute motive on the 2nd defendant, who is a quasi-judicial body is unwarranted. The defendants submitted that the O.A.No.57 of 1976, filed by the plaintiffs before the 2nd defendant was dismissed after full enquiry. On the appeal filled by the plaintiff in A.P.No.2/84 it was rightly dismissed by the first defendant. The plaintiffs have no documentary evidence to substantiate their claim. The physical features of the temple clearly reveals the existences of Mahamandapam, Madappalli, Well, Nandi, Vinayagar which are the specific features or public temple. The order of the appellate authority was communicated in time and hence the suit is filed beyond limitation. Hence the defendants prayed to dismiss the suit.



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5. The Trial Court after considering the pleadings, evidence had allowed the suit. Aggrieved over the same the present First Appeal is preferred by the defendant / HR&CE department.

6. The primary contention of the defendant / appellant is that the suit is filed beyond limitation. The suit ought to be filed under section 70 of the Act within 90 days from the date of receipt of the copy of the order. It is seen that the order in A.P.No.2 of 1984 was passed on 30.09.1985. The suit is filed on 16.04.1986 and was numbered as O.S.No.34 / 1986 on the file of Sub Court Sivagangai. Thereafter transferred to Aruppukkottai and renumbered as O.S.No.24 of 2001. The contention of the plaintiffs is that the plaintiffs did not receive the copy of the order. The plaintiff came to know of the order when the defendants tried to interfere in the right of the plaintiff during 1st week of January. Hence the plaintiff had applied for the copy of the order on 07.01.1986 (but the 1st defendant had mistakenly endorsed the copy application was filed on 16.02.1986), the order was made ready on 02.04.1986 and the plaintiff received the order on 02.04.1986, thereafter the plaintiff had filed the suit on 16.04.1986. On the other hand, the defendants had barely denied the allegation and had stated that the order was served to the plaintiffs. But the defendants failed to state on which date the order



was issued to the plaintiffs, whether the order was send through registered post or by any other means in their written statement. Therefore, this Court is of the considered opinion that the order was not issued by the defendants in time. The plaintiff had applied when it was brought to their knowledge. Then the copy of the order was received only on 02.04.1986 and the suit is filed on 16.04.1986, which is within 90 days from the date of receipt of the copy of the order. Hence this Court is of the considered opinion that the suit is filed within limitation.

7. The next contention of the defendant is that having tomb inside or behind the temple will not alter or modify the characters of public temple. Mere existence of a samadhi in a temple will not be a bar in declaring the institution as a public temple and many public temples are having samadhi like Pogar Samadhi in Palani temple. This Court considers the example cited by the defendants is not correct, since Pogar was a Sanyasi and he has no family members and the Palani temple cannot be cited as example. Further the contention of the defendants is not acceptable for one more reason since if any Samadhi is built on the mortal remains of the deceased member of the family, then Sivalingam or Vinayagar or any other God as per the wishes of the family members would be consecration over the Samadhi or nearby Samadhi. Thereafter the descendants of the deceased would worship the Samadhi by conducting guru pooja. In the present case the deceased Soundeeswari Ammal had not attained puberty & not married. After her demise



her family members constructed Samadhi and were worshipping by conducting guru pooja to the Samadhi of the deceased person. When the Temple along with Samadhi is constructed then the same cannot be considered as Temple, more so cannot be considered as Public Temple. The issue whether the Samadhi can be considered as Temple is elaborately considered in the case of ***Sri Ramanasramam by its Secretary and others Vs. the Commissioner HR&CE*** reported in ***1960 II MLJ 121*** and the relevant portion is extracted hereunder:

*“Reference was made in the judgment to the decision of Viswanatha Sastri J. in Ramaswami v. Board of Commissioner Madras Hindu Religious Endowments reported in (1950) 2 MLJ 511, where on account of the long public religious worship what were originally memorials for heroes or martyrs had subsequently developed into-temples and came to be recognised as temples. In Bodendraswami Mutt V. President of Hindu Religious Endowments Board reported in (1955) 2 MLJ 60, it was held that a Samadhi of a holy man and a saint cannot ordinarily evolve into a temple for public religious worship and that the mere presence of idols of Gods, and recognised deities in the Matam round the Samadhi and the festivals which have grown up around such Samadhi inevitable in the case of all tombs of saints and great men in this country, **would not bring it within the definition of a temple and that a Samadhi is not a temple.***

We have already referred to the Supreme Court decision in which it was held that the dedication of property for worship at a tomb is not sanctioned by Shastraic practices and is not valid amongst Hindus. A number of decisions of this court were referred to with approval, viz, Kunhamutty V. Ahmad Musaliar (1935) 68 Mad LJ 107 : (AIR 1935 Mad 28), A.



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*Draiviasundaram Pillai v. Subramania Filial, 1945-2 Mad LJ 328 : (AIR 1945 Mad 217) and Veluswami Goundan v. Dandapani, 1946-1 MLJ 354 : (AIR 1946 Mad 485), for the position that the **building of a Samadhi or tomb over the remains of a person and the making of the provision for the performance of Gurupoojas and other ceremonies in connection with the same, cannot be recognised as charitable or religious purposes according to Hindu Law.**”*

When the Courts had rendered a categorical finding that the Samadhi is not temple and Samadhi cannot be recognized as charitable or religious purposes according to Hindu Law, the contention of the defendant in the present case is against such propositions laid down by the Courts in the aforesaid judgments.

8. The next contention is that the suit temple is situated in S.No.74/1 admeasuring 10 cents which the plaintiff claims that the same is purchased through sale deed marked as Ex.A1, but the said sale deed ought to be rejected since the sale deed does not discloses four boundaries. This contention of the defendants ought to be rejected, since on perusal of the sale deed dated 15.12.1868 it is seen four boundaries are mentioned and described as the land situated “west to seller’s property, north of cart track leading to Santhai, east of Santhai thopu land and south of P.Kamatchi Chettiar, Sankaran Chettiar, Raman Chettiar Kollai lands”. When the sale deed had clearly mentioned about the four boundaries, then the said plea of the defendants that the sale deed is not having four boundaries is



incorrect. In fact, the said issue was elaborately considered by the Trial Court. The Trial Court had considered the DW1 deposition and had held that DW1 had deposed that there are vacant sites on northern and western sides of the suit temple, ground on the western side of the suit temple and street on the southern side of the temple. The said description coincides with the description of four boundaries in the said sale deed. Therefore, the respondent's contention is rejected.

9. The next contention of the defendant is that the land in S.No.74/1, 74/3 and 74/4 comprised in Patta No.374 which is marked as Ex.B1 is classified as government poramboku land and even in "A" register it is shown as poramboku land which is marked as Ex.B2. Further the said fact is stated in the proceedings of Deputy Commissioner of HR&CE in O.A.No.57 of 76 which is marked as Ex.B3. On the basis of the aforesaid documents the defendants claim the land is government poramboku belongs to the Arulmigu Veiyulagandamman Temple. Furthermore, the DW1 and DW2 had deposed that the suit temple situated in Patta No. 211 in the name of Arulmigu Veiyulagandamman Temple and the taxes are being paid by the said temple.

10. The above said contention cannot be accepted since the DW1 during



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cross examination conducted on 01.02.2005 had deposed that the patta was issued recently by including the suit temple in the patta issued to Veiyyulagandamman Temple. Which indicates all along the suit temple property was not included with the Veiyyulagandamman Temple and it was included recently only. Therefore the Ex.B1 cannot be relied on and the same ought to be rejected.

11. Further the respondents had relied on Ex.B2 which is “A” Register and submitted that the suit temple is situated in government porumboku land and the DW1 also had deposed the suit property is in government porumboku land. On perusal of the deposition of DW1 it is seen the said DW1 had deposed the suit temple is in Ryotwari punja land. On perusing the Ex.B2, it is seen that the land in S.No.74/2 alone is mentioned as government porumboku. Further Ex.B2 states the S.No.74/1, 74/3 and 74/4 are Ryotwari Punja lands and kist is paid for the said lands as Rs.1.84/-, Rs.2.28/- and 0.85 respectively. The suit temple property is situated in S.No.74/1, then it is Ryotwari land even as per “A” register marked as Ex.B2. If the suit temple land is in Ryotwari punja land, then originally the property would have been with some individual and the plaintiff’s ancestors had purchased the said land from the individuals. Therefore, the claim of the plaintiffs are correct and the contention of the respondents that the suit temple land is government porumboku land is false and incorrect even as per the documents of



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the defendants HR&CE marked as Ex.B2. Therefore, the Patta No.211 issued to Arulmigu Veiyulagandamman Temple by including the suit temple land is incorrect and the said Patta No.211 ought to be modified. The revenue authorities ought to be directed to delete the suit temple land in the Patta No.211.

12. The next contention is that the section 6(20) of the Act was not properly considered by the Trial Court. The suit temple has the features of public temple. The temple has Vinayagar idol, Balipeedam, Madapalli and the same is the evidence to conclude the temple is a public temple. Moreover, the temple has more sannadis, the temple celebrates number of Hindu religious festivals like Vijauadhasami, Vinayagasadurthi etc., on all auspicious days as per custom and usage of the Hindu Community, the procession of deity and hence the institution ought to be declared as public temple and cannot be termed as private temple. This Court is of the considered opinion that the contention of the defendants cannot be accepted, since existence of various sannadhi, existence of Vinayagar idol, Balipeedam, Madapalli etc. cannot be considered as factors to decide whether the institution is public temple or private temple. The issue of relevant factors to declare the public temple is already considered in various judgments and few are referred below:

A. The Hon'ble Division Bench in the case of *Commissioner, HR&CE*



Board, Nungambakkam and another Vs. T.S.Palanchami and seven others

reported in **2003 (1) CTC 65** wherein it is held that the character of the temple has to be decided based on the evidence adduced in each and every case and the crucial factor for determining the character of the temple is whether, there has been dedication to public and the right of public to offer worship at the temple as a matter of right, wherein it is observed as follows:

“22. 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 presumption.”

B. The Hon'ble Supreme Court in the case of **Radhakanta Deb and another Vs. The Commissioner of Hindu Religious Endowments, Orrisa, reported in AIR 1981 SC 798** had held to determine the temple in question is a public or private temple then the said temple should be subjected to four tests. The relevant portion is extracted hereunder:

....

“The four tests are (1) whether the user of the temple by members of the public is as of right; (2) whether the control and management vests either in a large body of persons or within the members of the public and the founder does not retain any control over the management; (3) Whether the dedication of the properties is made by the founder who retain the control



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and management and whether control and management of the temple is also retained by him; and (4) where the evidence shows that the founder of the endowment did not make any stipulation for offerings or contributions to be made by the members of the public to the temple, this would be an important intrinsic circumstance to indicate the private nature of the endowment.”

....

“The concept of a private endowment or a private trust is unknown to English law where all trusts are public trusts of a purely charitable and religious nature. Thus, under the English law what is a public trust is only a form of Charitable Trust. Dr. Mukherjee in his Tagore Law Lectures on the Hindu Law of Religious and Charitable Trusts (1952 Edition) has pointed out that in English law the Crown is the constitutional protector of all properties subject to charitable trusts as these trusts are essentially matters of public concern. The learned author has further pointed out that one fundamental distinction between English and Indian law lies in the fact that there can be religious trust of a private character under the Hindu law which is not possible in English law. It is well settled that under the Hindu law, however, it is not only permissible but also very common to have private endowments which though are meant for charitable purposes yet the dominant intention of the founder is to install a family deity in the temple and worship the same in order to effectuate the spiritual benefit to the family of the founders and his descendants and to perpetuate the memory of the founder. In such cases, the property does not vest in God but in the beneficiaries who have installed the deity. In other words, the beneficiaries in a public trust are the general public or a section of the same and not a determinate body of individuals as a result of which the remedies for enforcement of charitable trust are somewhat different from those which can be availed of by beneficiaries in a private trust. **The**



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members of the public may not be debarred from entering the temple and worshipping the deity but their entry into the temple is not as of right”.

C. In the case of ***Kuldip Chand and another Vs. Advocate General to Government of H.P. and others*** reported in (2003) 5 SCC 46, the same tests were adopted by the Hon'ble Supreme Court to determine whether the temple is public or private.

D. In the case of ***Commissioner HR&CE Vs. A. Krishna Iyer*** filed in A.S. (MD)No.105 of 2005, the High Court vide judgment dated 03.10.2018 had held as under:

“19. One of the further important ingredients required to declare a temple as a public temple is that there must be dedication for the benefit of the Hindu community as a place of public religious worship. In the present case, there is no evidence of such dedication. It has been the consistent stand of the plaintiffs that the temple had been worshiped only by the members of the first plaintiff trust and its samudayam and the general public do not have a right to worship.

20. In 1972 of SSC Page.329, T.D.Gopalan Vs Commissioner of Hindu Religious and Charitable Endowment, Madras, the Supreme Court held as follows:

- (a) that origin of the mandapam had been proved to be private.*
- (b) That its management had remained throughout in the members of the Thoguluva family; and*



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(c) that there was complete absence of any endowed property. The temple has to be declared as a private temple.?

21. In the present case, the origin of the temple is obscure. But it is seen from Exs.A11 to A14 that the Travancore Samasthanam have given a specific grant to the community at Parvathipuram village and that the management of the Sree Venugopalaswamy Temple had been vested with the members of the Brahmin community in the village. It is clear that the temple is a private temple. It is also seen that DW-1 had admitted that Exs.A11 to A14 relate to the grant made by the Travancore Samasthanam to the temple more than 150 years ago. It is also seen that DW-1 had admitted that in the schedule of incorporated and unincorporated temples in the Travancore Cochin Hindu Religious Institutions Act, Sree Venugopalaswamy Temple was not included. Thereafter, even after the territories had been transferred to Tamil Nadu and the said Act has been repealed by the Tamil Nadu Hindu Religious and Charitable Endowment (3rd Amendment) Act, in schedule-1 of the Act, Sree Venugopalaswamy Temple, Parvathipuram is not included as an incorporated or unincorporated temple.

22. The above points clearly establish that Sree Venugopalaswamy Temple, Parvathipuram is a private temple belonging to the first plaintiff Trust. It is under the exclusive management of the members of the trust. The defendants have not produced any evidence contradicting these facts established by the plaintiffs. It is also seen that the inspection report had not been produced which goes to the root of the case. The plaintiffs did not have any opportunity to cross examine the defendant's witness on the issues raised in the said report. It is to be presumed that the report had not been produced only because it was adverse to the stand of the defendants.”



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E. This Court vide judgement dated 27.08.2024 in the case of A.S.(MD)No. 197 of 2016, ie., ***the Commissioner, HR&CE v. Arulmighu Kottar Ezhava Oor, Arumughaperumal Pillayarswamy Kovil*** had followed the aforesaid judgments and held that if the entry to the general public is not as a matter of right, then the temple is private temple.

13.Following the aforesaid judgments, this Court is of the considered opinion that the existence of Vinayagar idol, Balipeedam, Madapalli and other sannadis or celebrating Hindu religious festivals like Vijayadhasami, Vinayagasadurthi etc., on all auspicious days as per custom cannot be a factor to declare the temple as public temple. The temple would be considered as public if the general public have uninterrupted ingress and egress without any permission. In the present case the plaintiff family alone has exclusive right even ingress and egress and the general public as a matter of right has not right to enter the temple. In such circumstances, the said temple cannot be declared as public temple. Further if the aforesaid four tests are applied to the present case, it is seen the entry to the general public is not as a matter of right, the management is within the Jashta member of the family and the endowment is within the control of the said families. Therefore, the temple in question is only private and not public temple.



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14. The next contention of the respondents is that the plaintiffs had not produced the Will before the HR&CE authorities, hence the same ought to be rejected. This Court is of the considered opinion even if the same is not produced, the position of the suit temple would not be altered, since in the present case the main issue is only whether the suit temple is private temple or public temple. If the suit temple is declared as a public temple, then the respondents have a role in the public temple, wherein the respondents HR&CE ought to have ascertain the nature of endowment, properties belonging to the temple, accounts, management etc. and the perusal of the Will may be essential. If the suit temple is declared as private temple, then the respondents have no role in the said private temple. Since in the present case the Trial Court had already declared the suit temple property is Private temple and the same is confirmed by this Court, this plea of the respondents / appellant has no relevance at all.

15. The Trial Court failed to consider the fact that a legatee cannot claim a better title than the testator, who had admitted the temple has to perform charities as per the Will dated 03.03.1924, since the temple is a public. If the Will mandates to perform charities, then the charities are always for public and charity is part and parcel of Hindu Religion and then the temple ought to be public. Such a



contention of the respondents are mere assumptions. Hence the said contention is rejected. Further as stated earlier the present temple is declared as private temple, the said contention of the respondents has no relevancy at all.

16. The next contention of the defendant is that the suit temple is being worshipped by the public continuously as of right by the Hindu Community and hence the institution ought to be declared as public temple. The defendants had misconstrued the public worship in the temple. In the case of ***Sree Panimoola Devi Temple & others Vs. Bhuvanachandran Pillai and others*** reported in **2014 (13) Scale 485** the Hon'ble Supreme Court after referring to the following observation of the Privy Council in *Babu Bhagwan Din* had taken note of the fact that Hindus generally do not turn away the people who come to worship and that by itself would not be sufficient to enable a determination that the temple in question is a public temple and the same is extracted hereunder:

“In these circumstances it is not enough in their Lordships' opinion, to deprive the family of their private property to show that Hindus willing to worship have never been turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual mela. Worshipers are naturally welcome at a temple because of the offerings they bring and the repute they give to the idol: they do not have to be turned away on pain of forfeiture of the temple property as having become property belonging to a public trust. Facts and circumstances, in order to be accepted as sufficient proof of dedication of a



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temple as a public temple, must be considered in their historical setting in such a case as the present; and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentiments or practice that Worshipers should be turned away; and as worship generally implies offerings of some kind it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity.”

17.Following the aforesaid judgment, the contention of the defendant that the general public would worship in the temple in question and hence it has to be declared as public temple is rejected, since Hindus generally do not turn away the people who come to worship and that by itself would not be sufficient to enable a determination that the temple in question is a public temple. As stated supra the ingress and egress to the temple should be available as a matter of right to the general public, if the said free ingress and egress is only on permission then the same is not public temple. In other words, the temple would be considered as public if the general public have uninterrupted ingress and egress without any permission. In the present case there is no uninterrupted ingress and egress to the general public, therefore the temple is private temple.



18. The next contention of the respondents is that for declaring the institution as private one the burden is on the plaintiffs. Generally, in civil cases the plaintiff ought to prove their case if they ascertain certain facts. In the present case the plaintiff had proved through the Sale Deed dated 15.12.1868 marked as Ex.A1 and Will executed by Soundeeswariammal marked as Ex.A2, that the land is a private land belonging to the plaintiffs family and there is a Samadhi of Soundeeswariammal. Also proved that the general public is not allowed as a matter of right and hence the suit temple is only Private Temple.

19. But if the defendants are relying on the proposition that there is presumption that all temples in Tamil Nadu are public and the person who is ascertaining the temple is private ought to prove the temple is private temple, then the defendants is incorrect in stating so. Even though several judgments were passed right from 1920 based on the said presumption, the said judgments cannot be relied on, since the subsequent judgment of Division Bench in the case of the **Commissioner HR&CE Vs. T.S. Palanichamy** reported in **2003 (1) CTC 65** has clarified such presumption is not available in HR&CE Act and the relevant portion is extracted hereunder:

“9. The decision rendered in the case of Lakshmana Goundan Vs. Subramania Aiyar AIR 1924 PC 44 was on an appeal from a decision of the Full Bench of this Court comprising of Sadasiva Aiyar, Seshagiri Aiyar



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and Burn JJ., in the case of *Subramani Aiyar Vs. Lakshmana Goundan* reported in AIR 1920 Mad. 42. Each one of them wrote a separate opinion.

It is the opinion of Seshagiri Aiyar, J. that has been referred to in the case of the *Mundacheri Koman Vs. Achuthan Nair*, AIR 1934 PC 230. The judgment of Seshagiri Aiyar, J. discussed at great length every document that had been produced by the parties in the case and after considering the same formulated the point for decision in that case: “Was there a dedication of the shrine for public worship and has the temple thereby become public religious endowment?”

...

13. Thus the entire foundation for the assumption made that there is a presumption that all the temples in Madras Presidency are public is founded only on this statement of Seshagiri Aiyar, J. who did not decide the case before him on the basis of any presumption, but who after deciding the case with regard to the evidence placed before him, considered it necessary for him to make certain general observations to the effect that outside public have not established kattalais or built chatrams for private temples in southern India except Malabar.

14. The observations so made are clearly not to the effect that there is a presumption that the temples in the Madras Presidency are public temples. What was actually said was that the Learned Judge and also the Counsel who appeared in the matter were not aware of cases where public had established kattalais or built chatrams for the accommodation of the travellers in private temples. The observation in AIR 1934 PC 230 that Seshagiri Aiyar, J. had stated that in the greater part of the Madras Presidency private temples are ‘practically unknown’ is factually incorrect.

15. The words Madras Presidency are not used in the observations of Seshagiri Aiyar, J. who referred to south India and who nowhere stated that



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there was such a presumption and who certainly did not invoke such presumption for deciding that case.

16...

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 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 Seshagiri 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 which 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 '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".

20. The Learned Counsel appearing for the HR&CE department had relied



on the following judgments for the said proposition of presumption:

- a. Hindu Religious and Charitable Endowment (A) Department Vs. N. Sivarawajan Nadar reported in 2001 (2) CTC 513
- b. Sri Varasidhi Vinayagar Sath Sangam Vs the Commissioner HR&CE and another reported in 2008 (3) LW 931
- c. Om Sakthi Sri Periyapalayathamman Trust Vs. the Commissioner HR&CE and another reported in 2008 (3) LW 1174
- d. The Commissioner HR&CE Vs. K. Ramanathan reported in 2009 (4) CTC 563

21.All the aforesaid judgments relied on by the appellant HR&CE are rendered based on the presumption only. When the earlier Hon'ble Division Bench had held such presumption is not available, then the aforesaid judgements cannot be relied on. Further the aforesaid judgments had not discussed whether the presumption is available or not, but simply had followed assuming that presumption is available. But the judgment of the Hon'ble Division Bench in T.S.Palanichamy's case had elaborately discussed and held that the presumption started from the judgment rendered in the case of ***Subramani Aiyar Vs. Lakshmana Goundan*** reported in ***AIR 1920 Mad 42*** which was referred by Privy Council in ***Mundacheri Koman Vs. Achuthan Nair*** reported in ***AIR 1934 PC 230***.



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The Hon'ble Division Bench had categorically held that “the judgment of Seshagiri Aiyar, J. was misread and was stated as the source of authority for a proposition. The Privy Council in the case AIR 1934 PC 230 had no evidence on what basis it was laid down that the Court should presume that the temples in Madras Presidency are public temples.” Therefore, any judgments which had followed the judgment rendered in Subramani Aiyar Vs. Lakshmana Goundan reported in AIR 1920 Mad 42, Lakshmana Goundan Vs. Subramani Aiyar reported in AIR 1924 PC 44 Mundacheri Koman Vs. Achuthan Nair reported in AIR 1934 PC 230 cannot be relied on. Hence, the judgments relied on by the HR&CE department cannot be relied on.

22. The next contention of the defendant HR&CE is that the suit temple is a sub-temple and is being maintained by Arulmigu Veiyulagandamman Temple. The said contention was considered by the Trial Court and the Trial Court had held the defendant had not produced any evidence to prove the same. Further the Trial Court had held that the Arulmigu Veiyulagandamman Temple's Dharmakartha Thiru.Algu and Accountant Thiru.Muthukaruppan statements were recorded by the HR&CE, wherein the said persons have not stated that the suit temple is sub temple of Arulmigu Veiyulagandamman Temple. And also, not stated that Arulmigu Veiyulagandamman Temple is being maintained by them.



Further it is seen that the records maintained in the Arulmigu Veiyulagandamman Temple there is no whisper of any details regarding the suit temple, there are no records when the temple was built, who managed the temple, literally no records. On the other hand, the plaintiffs had produced records to show the land was purchased by their ancestors, the Will executed by Soundeeswariammal, records showing expenses etc. Further the statements of various persons belonging to the village Thenukal had admitted that the suit temple was constructed by the said Soundeeswariammal and the said statements are forming part of Ex.B3. Therefore, this Court is of the considered opinion that the suit temple is a private temple belonging to the plaintiffs and the same is nothing to do with the Arulmigu Veiyulagandamman Temple. Infact the HR&CE is trying to annex the suit temple with Arulmigu Veiyulagandamman Temple without any records and such act of highhandedness of the HR&CE should be deprecated.

23. The next contention of the defendants is that mere continuance of management by the plaintiff's ancestors will not give any right to the plaintiffs and the same will not alter the original parameters of the public temple. In the absence of any documentary evidence relating to foundation, management and administration of the institution the temple cannot be declared as private. This contention is totally against the records of the defendants themselves. The Ex.B3



has the statements recorded by the defendants, wherein the statements would indicate that the temple is constructed by the said Soundeeswari Ammal through her own money and income from the their own properties. As stated supra the Ex.A1 and Ex.A2 and other documents would indicate the property belongs to the plaintiffs, the expenses are met out by the plaintiffs. Infact continuance of management of the plaintiffs itself would indicate that the maintenance is carried on by the plaintiffs through their own source of income.

24. The next contention of the defendant is that the plaintiff had not correlated the fact that though the alleged samadhi is in the name of “Soundeeswari Ammal”, the temple is only in the name of “Samunndeswari Ammam”. This ground is unnecessary since the plaintiffs are having every right to name the temple. It is not necessary that the name of the mortal remains of the deceased Soundeeswari Ammal ought to be the name of the temple.

25. Finally, the contention of the defendant that the plaintiff’s advocate did not object for marking the Inspector’s report as C1 nor insisted the examination of the Inspector cannot be accepted. It is the case of the plaintiffs that the Inspector did not appear, the Deputy Commissioner of HR&CE had taken the Inspector’s report on record and marked as C1, which is not the procedure contemplated under



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the HR&CE Act. Infact under section 110 of the Act states any inquires under chapter V and VI ought to be conducted as per CPC. Under CPC all documents ought to be marked through the author of the document. If the report is not marked through the Inspector, then the same cannot be constructed it is marked as per CPC.

26. For the reasons stated supra, the Appeal Suit is dismissed confirming the judgment and decree passed by the Trial Court. The plaintiffs are at liberty to approach the revenue authorities to delete the suit temple property from the Patta No.211 issued to Arulmigu Veiyulagandamman Temple. On receipt of such petition, the revenue authorities ought to be directed to delete the suit temple from the Patta No.211. No costs.

29.08.2024

NCC : Yes / No

Index : Yes / No

Internet : Yes

Tmg



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To

1. Sub Court, Aruppukottai.
2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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