BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.07.2024

CORAM:

THE HONOURABLE **MRS.JUSTICE S.SRIMATHY**

A.S(MD)No.129 of 2015

The Commissioner,
Hindu Religious and Charitable
Endowments Department,
Madras-34. ... Appellant

/Vs./

1. Rukmani
2. Lalitha
3. Vimala
4. Anandaraj(Died)
5. Vijayakumari
6. Rajashree
7. Rachit Bhonsle Anantharao ...Respondents

[Respondents 6 & 7 are brought on record as LRs of the deceased 4th respondent vide Order of this Court, dated 01.04.2024]

PRAYER: Appeal Suit is filed under Section 70(2) of Hindu Religious and Charitable Endowments Act, against the Judgment and Decree dated 03.02.1990 passed in O.S.No.62 of 1989 on the file of the Subordinate Court, Thanjavur.

For Appellant : Mr.P.Subba Raj,
Special Additional Government Pleader

For Respondents : Mr.V.Chandrasekar, for R-2, 3 & 5

JUDGMENT

The present Appeal Suit is preferred by the defendant HR&CE Department in the suit against the Judgment and Decree, dated 03.02.1990 passed in O.S.No.62 of 1989 on the file of the Subordinate Court, Thanjavur.

2. The plaintiffs in the suit is the respondents herein and the defendant in the suit is the appellant herein. For the sake of convenience, the parties shall be referred to as plaintiffs and defendant as per the ranking in the suit.

3. The only contention raised by the defendant HR&CE is that the temple which was constructed by the plaintiffs is a public temple and therefore it will come under the purview of Hindu Religious and Charitable Endowments Act. But the contention of the plaintiffs is that it is a private temple and no public would be allowed inside the temple. Moreover, the temple was constructed inside the house for specific purpose of the ladies who belongs to Marattiar family. The said ladies are not supposed to go outside, hence in order to facilitate them for worship, the present temple was constructed. At any point

of time, the public were not entertained to enter inside the temple, rather inside the house. The Learned Counsel appearing for the plaintiff submitted that the Court below had elaborately considered the issue and has come to the conclusion that it is a private temple. And no documentary proof was submitted by the defendant HR&CE to prove that the temple is a public temple.

4. The point for consideration is whether the temple in question is private temple or public temple coming within the purview of the HR&CE Act.

5. The contention of the plaintiff is that the 1^{st} plaintiff's father Vijay Vimalanatha Sakeb was a descendant of Marathi Royal family. On 11.12.1925 he had constructed the temple in Manojappa Street for the benefit of his family members especially to the women of the family. The temple exclusively belongs to the plaintiff's family. Further, the temple is situated within a portion of the house. The common public was never allowed to worship in the temple and they were never allowed to do any pooja in the temple. All the poojas are conducted by the plaintiff's family members alone. Further the temple is not having Dwajastambam, Palipedam, hundial etc. The temple was constructed on 11.12.1925 and from the date of the construction the temple was in exclusive possession of the family. While that being so, the

department had issued a notice for contribution to the department in the year 1981 and the said notice was challenged in O.A.No.2 of 1982 and the same was dismissed. Against which an appeal in Appeal No.96 of 1983 was filed and the same was dismissed on 22.06.1988. Thereafter the order dated 17.03.1983 passed by the Joint Commissioner was confirmed by the order of the Commissioner dated 22.06.1988 and the same is challenged to the suit with a prayer to set aside the said order. The contention of the defendants that the common people are worshiping in the temple and hence the same ought to be considered as common temple and the same comes within the purview of the HR&CE Act.

6. This Court after considering the pleadings, evidence, rival submissions and after perusing the records is passing the following judgment. When the plaintiff had claimed that the temple was constructed on 11.12.1985 by the 1st plaintiff's father in their own family property, the defendants had not denied or disputed the said claim. Further it is seen that the specific contention of the plaintiff is that the temple is put up within the premises of the house that too in a portion of the house belonging to the family, which fact is also not denied by the defendants. Also, the temple is maintained and managed by the family members. The further contention of the plaintiff that the common public

was not allowed to worship in the temple, no festival was conducted by the common public. These facts also were not denied by the defendant. Furthermore, the Dwajastambam, Palipedam and Hundial etc. are not available in the temple.

7. It is a settled proposition of law that the HR&CE Department ought to prove the temple belongs to the common public. When the defendants had not placed any evidence to the effect, then it can be safely concluded, the temple in question is only private temple.

8. This Court had already considered the determining factors to consider the temple as private or public in A.S.(MD)No.105 of 2015 vide judgment dated 29.08.2024 wherein it is held as under:

> *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 in the 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 t 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 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 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 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 Hon'ble 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
(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."

***E.** This Court vide judgement dated 27.08.2024 in the case of A.S.(MD)No.197 of 2016 filed by 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.*

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.

9. In the aforesaid judgements even if Dwajastambam, Palipedam are available, it is held by the Courts that then also it cannot be held the temple are public temple. In the present case, even the Dwajastambam, Palipedam and Hundial are not available, which is not denied by the defendant. Hence in such circumstances the temple in question cannot be held as public temple.

10. Further in the present case the defendants had substantiated through any piece of evidence that the temple in question is public temple.

11. By taking all facts and factors into consideration, this Court is of the considered opinion that the defendant / appellant has not raised any legally sustainable ground to entertain this appeal and the same deserves to be dismissed.

12. Accordingly, this Appeal suit stands dismissed, confirming the judgment and decree passed in O.S.No.62 of 1989 on the file of the Subordinate Court, Thanjavur. No Costs.

16.07.2024

Index : Yes / No
NCC : Yes / No

KSA

TO:

1. The Subordinate Court, Thanjavur.

2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

S.SRIMATHY, J.

KSA

Judgment made in
A.S(MD)No. 129 of 2015

Dated:
16.07.2024