

Malayammal And Others

Vs

A. Malayalam Pillai and Others

Civil Appeal No. 140 of 1977

((K. Jagannatha Shetty, N. D. Ojha JJ)

10.10.1990

JUDGMENT

K. JAGANNATHA SHETTY, J. -

1. This is an appeal from the judgment and decree of the Madras High Court and it arises out of a suit for partition and possession of certain properties.
2. The facts leading to the institution of the suit are as follows : On March 3, 1942, one Karuppanna Pillai (hereinafter referred to as "testator") executed his last will and testament Ex. B-1. Thereunder he disposed of all his properties described in five schedules A, B, C, D and E. He directed that the properties under A, B and C schedules shall be respectively taken and be in the possession of the defendant, the first plaintiff and the second plaintiff. In respect of E schedule properties, he has made a bequest creating an endowment that after his lifetime, it should be managed for the purpose and in the manner mentioned therein. The dispute in the suit was as to the validity of the endowment. One Palaniammal and Chellammal are the sisters of the plaintiffs and the defendant. The testator created a life estate in favour of those sisters in respect of D schedule properties with a direction that after their lifetime the properties shall be dealt with in the same manner as the E schedule properties. We are not concerned in the present litigation with any of the properties in schedules A to D. We are concerned only with the validity of the disposition of E schedule properties.
3. The will is in Tamil but we are helpfully provided with the English translation of the relevant portion. It is also found incorporated in the judgment of the District Judge. It runs as follows :

"After my lifetime, the aforesaid three persons, Ponnuswami Pillai, Malayalam Pillai and Thangavelu Pillai, shall take and manage the E schedule properties, from out of the income from the said properties pay the kist for the aforesaid E schedule properties, and out of the balance of income for the salvation of my soul after my lifetime, shall enter my body, after my life is extinct, in the land S.F. No. 68/B, Punjai Thottakurichi Village pertaining to the aforesaid E schedule, build structure therefor and put up light everyday, shall plant flower plants in the said land and grow them, shall construct a Matam for annual ceremonies, install pictures therein, put up light in the Matam everyday, conduct Guru Pooja, distribute saffron coloured cloths and on that day, shall feed the poor. Since the aforesaid Ponnuswami Pillai is the eldest of the sons, he shall be the Manager, to conduct the above matters. The surplus income shall be taken in the shares of 2/4 by Ponnuswami Pillai, 1/4 by Malayalam Pillai, and 1/4 by Thangavelu Pillai. After the said Ponnuswami Pillai's life, out of

his male heirs, the eldest son shall conduct in the same manner as above and the surplus income shall be taken by the said eldest son."

4. There then follows a residuary clause which is as under :

"The movable and immovable properties belonging to me and not mentioned herein shall be taken and enjoyed by the aforesaid three persons after my lifetime."

5. The plaintiff's case has been that the testator could not have created the endowment of properties for construction of his own tomb or samadhi and for performing pooja and ceremonies thereat. Since the testator has bequeathed E schedule properties for "Samadhi Kainkaryam", the trust would be invalid and the said properties should be shared by the plaintiffs and defendant under the residuary clause in the will as if they remain undisposed of by the testator. The suit is also for account from the defendant regarding the income of the E schedule properties.

6. The defendant has resisted the suit and sought to justify the creation of the trust and its purposes. It was contended inter alia, that the matam and the samadhi were constructed for different purposes. They are separated by a respectable distance. At the samadhi, there is no performance of pooja. It is only at the matam, the ceremonies and Guru Pooja are performed with feeding the poor and distribution of saffron cloths. These acts are distinctly and substantially religious and charitable purposes. It was also contended that the plaintiffs in any event are not entitled to claim partition and separate possession of the E schedule properties.

7. At the trial, learned Subordinate Judge accepted the plaintiff's case declaring that the dedication of the E schedule property for purposes enumerated under the will was invalid and accordingly he decreed the suit as prayed for. In appeal, the District Judge took a different view. He held that the purposes for which the E schedule properties have been dedicated were charitable or religious in nature. He dismissed the suit but gave certain directions to the defendant for rendition of accounts of the surplus income from the properties which the defendant as a manager is obliged to do.

8. In second appeal to the High Court, the learned Single Judge expressed the view that the trust in respect of the properties for construction of the samadhi with raising flower garden and lighting up would not be valid as it is not recognised under the Hindu law. That part of E schedule properties referable to the samadhi and its maintenance should remain as the property undisposed of by the will. Neither the plaintiffs nor the defendants will be entitled to it under the terms of the will. He however, held that the endowment and directions as to application of the property for construction of the matam and performance of ceremonies and pooja would be valid since they are religious and charitable in nature. He dismissed the suit or partition while at the same time affirmed the decree for accounting the surplus income from the properties referable to the matam and charities.

9. In the Letters Patent appeal, the Division Bench had disagreed with the views expressed by learned Single Judge. It has been observed that the matam is close to the samadhi and the former has been built for the purpose of providing a convenient place for the purpose of offering worship and performing ceremonies connected with the samadhi and matam are covered by one scheme, and therefore, the entire trust must fail. In support of the conclusion, the Division Bench largely relied upon the decision of the Privy Council in *N. Subramania Pillai v. A. Draviyasundaram Pillai* [AIR 1950 PC 37].

10. In the Privy Council case referred above, the testator by name 'Kanakasabhpathy' in his will

constituted a trust of his properties with certain directions as to its application. He directed that "his body should be buried in a samadhi and at the same place where the samadhi is made, a matam should be built with a stone inscription in the front portion of the matam as 'Kanakasabhpathi Samadhi Matam'." He also directed that regular worship should be conducted with Guru Pooja and poor feeding. Construing the terms of the will, the Privy Council observed that the directions given by the testator were embodied in a single scheme and they were primarily intended to keep his memory alive and to enhance his own posthumous reputation. Feeding the poor was to be conducted during the daily pooja to be performed in connection with the burial place and it did not provide for any charity apart from the ceremonies to be conducted at his own burial place and therefore the trust must fail.

11. In Hindu system there is no line of demarcation between religion and charity. On the other hand, charity is regarded as a part of religion [Hindu Law of Religious and Charitable Trusts by B.K. Mukherjea, 5th edn., p. 11]. But "what are purely religious purposes and what religious purposes will be charitable must be entirely decided according to Hindu law and Hindu notions." [Mayne's Hindu Law, 11th edn., p. 912]

12. The perpetual dedication of property for construction of a samadhi or a tomb over the mortal remains of an ordinary person and the making of provisions for its maintenance and for performing ceremonies in connection thereto however, has not been recognised as charitable or religious purpose among the Hindus. But the samadhi of a saint stands on a different footing. This was the consistent view taken by the Madras High Court in several cases, namely, C. Kunhamutty v. T. Ahmad Musaliar [ILR 58 Mad 204 : AIR 1935 Mad 29], A Draiviasundaram Pillai v. N. Subramania Pillai [ILR 1945 Mad 854 : AIR 1945 Mad 217 : (1945) 1 MLJ 328], Veluswami Goundan v. Dandapani [(1946) 1 MLJ 354 : AIR 1946 Mad 485 : 227 IC 103]. This Court in Saraswathi Ammal v. Rajagopal Ammal [1954 SCR 277 : AIR 1953 SC 491] has approved those decisions of the Madras High Court. Jagannatha Das, J., who spoke for the court said (at p. 289) : ("We see no reason to think that the Madras decisions are erroneous in holding that perpetual dedication of property for worship at a tomb is not valid amongst Hindus."

13. The view taken in Saraswathi Ammal case [1954 SCR 277 : AIR 1953 SC 491] has been reiterated in Nagu Reddiar v. Banu Reddiar [(1978) 2 SCC 591 : AIR 1978 SC 1174] where Kailasam, J., observed : (SCC p. 600, para 15)

"The raising to a tomb over the remains of an ancestor, an ordinary person is not recognised as religious in nature. The burden is on the person setting up a case of religious practice in the community to prove it. This prohibition may not apply when an ancestor is cremated and a memorial raised for performing sharadha ceremonies and conducting periodical worship for this practice may not offend the Hindu sentiment which does not ordinarily recognise entombing the remains of the dead."

14. We are, therefore, inclined to hold that the provision made by the testator for construction of a samadhi over his burial place and for its maintenance cannot be regarded as valid.

15. But that however, does not mean that the entire dedication of E schedule properties must fail. It is one of the cardinal principles of construction of wills that wherever it is possible, effect should be given to every bequest of the testator unless it is opposed to law, custom or practice. If the testator has set apart the property intended for endowment and disclosed his charitable intent in any one of his directions, such direction may be extricated leaving aside the directions which are repugnant to

the recognised notions of Hindu religion or Hindu law. Attempt should be made to give effect to the provisions made for recognised charitable purposes even though the entire scheme of the testator cannot be saved. In the instant case, the E schedule has been endowed for construction of a samadhi and matam, and for performing religious rites and charitable acts. The samadhi and matam are constructed in the same survey number but are independent of each other, separated by a distance of about 15 feet. Performance of annual ceremonies, conducting Guru Pooja, feeding the poor and distribution of saffron coloured clothes to mendicants appear to be independent and have no connection with the samadhi. There is no indication in the will that Guru Pooja should be performed to the testator. In fact he has not even indicated that his photo should be kept in the matam. His directions are only to install pictures at the matam, put up light everyday in the matam and perform Guru Pooja once a year with the other charities. These provisions in the will are not in close parallel with and indeed far removed from those obtained in the Privy Council decision in Subramania Pillai case [ILR 1945 Mad 854 : AIR 1945 Mad 217 : (1945) 1 MLJ 328]. The Division Bench of the High Court was therefore in error in relying upon that decision to invalidate the entire endowment.

16. Counsel for the plaintiffs nevertheless argues that the defendant has been performing Guru Pooja only to the testator and not for the deity. He referred to us Exs. A-5 to A-9 which are the invitations sent by the defendant for the annual ceremonies and Guru Pooja to be performed to the testator. But in construing the validity of an endowment created under a will, we cannot be guided merely by the acts of the manager or the manner in which the executor of the will has understood the directions of the testator. We are required to examine the dominant intention of the testator and that could be ascertained only by the terms of the will. The terms of the will in this case clearly specify the religious or charitable purposes. The defendant Ponnuswami Pillai (DW 1) in his cross-examination has also explained that there was a mistake in the writing of Exs. A-5 to A-9 for which he was not responsible. He has testified that he performed really the annual ceremonies on the date of death of the testator and no pooja was performed at samadhi. The pujas are performed only at matam with Guru Pooja to Lord Subramania on 'Thai Poojam' every year. He has further stated that the annual ceremonies of the testator fall on Margali Mrigaseerusham Nakshatram and Guru Pooja is not performed on that day.

17. It is undisputed that the testator died on Margali Mrigaseerusham Nakshatram. Ramaswamy Gounder (DW 2) has also deposed that no Guru Pooja was performed on the date of death of the testator and it was performed only to Lord Subramania in Thai month every year. He used to participate in the Guru Pooja every year along with the other villagers. The evidence of Marudamuthu Pillai (DW 3) also supports these versions.

18. We have no reason to disbelieve the testimony of the defendant and his witnesses. Even the evidence from the plaintiff indicates that the matam is called 'Matam of Sri Subramania Swami'. Ex. B-2 is a printed marriage invitation of the plaintiff (PW 1) in which it has been expressly stated that the plaintiff's marriage will be performed 'at our Matam Sri Subramaniaswami Sannadhi built by our grandfather Karuppanna Pillai....' Ex. A-11 also refers to the matam as Subramaniaswami Sannadhi. Ex. A-2 is the Commissioner's Report. The Commissioner has stated that there are pictures of gods in the matam. There is a pooja room. Lord Subramania's picture is also in the pooja room. The deity of Sri Vinayagar in granite has been installed at a special place with material to indicate that pooja is also being performed to Sri Vinayagar.

19. It is true that the directions of the testator are in general terms, and there is no particular mention in the will as to whom Guru Pooja is required to be performed since no particular deity is named in the will. But trust cannot be rendered invalid on that ground. It is for the court to ascertain the

presumed intention of the testator and give effect to it. As observed by Patanjali Shastri, J., as he then was, in Veluswami Goundan case [(1946) 1 MLJ 354 : AIR 1946 Mad 485 : 227 IC 103] where no deity is named in the deed of endowment, the court should ascertain the sect to which the donor belonged, the tenets which he held, the doctrines to which he was attached and the deity to which he was devoted and by such means the presumed intention of the testator as to the application of the property should be ascertained. We agree that these are the safe guides. If we peruse the various terms in the will and the provisions made for offerings, it will be clear that the testator was a great devotee of Lord Subramaniaswami. He has made provisions to perform annual pooja to Lord Subramaniaswami and Sri Vinayagar in the different temples out of the income from A to C schedules. The matam also goes by the name of "Subramanya". The evidence of DW 1 to DW 3 further indicates that Guru Pooja is being performed to Lord Subramania followed by poor feeding and distribution of saffron coloured clothes. The endowment with regard to these purposes must therefore be upheld.

20. The permanent dedication of properties for performance of annual ceremonies of the testator is equally valid. Whether one terms it as annual shradha or anniversary, it is certainly a religious rite and it is not uncommon among the Hindu testators to make provisions in their wills for celebration or performance of such anniversaries of themselves or their ancestors.

21. We are, therefore, unable to agree with the decision of the Division Bench of the High Court. We are on the other hand in agreement with the views expressed by learned Single Judge.

22. In the result, the appeal is allowed. In reversal of the judgment of the Division Bench, the judgment and decree of the learned Single Judge are restored.

23. The respondents must pay the costs of this appeal to the appellants.

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