ANDHRA PRADESH HIGH COURT

Nori Venkata Rama Dikshitulu

Vs.

Ravi Venkatappayya

Appeal No. 183 of 1954 and Second Appeal No. 326 of 1954, in O. S. No. 113 of 1951

(Satyanarayana Raju and Mohd. Ahmed Ansari, JJ.)

22.08.1958

JUDGMENT

Ansari, J.

1. The question arising for decision in these two appeals is whether S. No. 333 of Vatticheruku village had been dedicated for raising Dharma Vanam or tope for public benefit. The appellant in one of the aforesaid appeals is one out of the four plaintiffs to a suit for permanent injunction, restraining the defendants from interfering with their possession and enjoyment of part of the said property. In the other the appellants are defendants 1, 2 and 4 to 7 to a claim under Section 92 of the C. P. C. for removing them from the office of trustees, for appointing new trustees and vesting the property in them. The land now measures Acs. 8.28 cents and originally belonged to one Nori Lakshmipathi Somayajulu, who was an ancestor of the appellants. In 1788 he had dedicated the property to charity and the exact nature of this endowment is now in dispute. There is no written document showing how the property had been gifted; but Ex. B-1, an extract from the Inam Register of 1868, describes the land as Dharmadayam. Its third column states the property as dry, tamarind trees 18 and the eighth column mentions it as for the public benefit. The 11th column shows one Nori Lakshmipathi to be the person who had made the grant and the 13th column states the same person as the grantee. Finally the 21st column says :

"As this is charitable tope, this is to be confirmed without Quit rent."

The Inam Commissioner confirmed it on permanent tenure, which was followed by a title deed in favour of three persons, Ex. B-2 being the aforesaid deed. Therein the Inam Commissioner acknowledges the grantees' title to a Dharmadayam inam consisting of the right to the Government revenue on land claimed to be Acs. 8-42 cents dry and held for the public benefit.

2. No dispute appears to have arisen till the year 1941, when wet cultivation was introduced in

the locality. Prior to the aforesaid year the trustees had been executing leases, some of which show the land to be part of the trust. Indeed P. W. 1, who is the appellant in the second appeal, admits in his cross-examination that A-8 to A-13 show the land itself to be the trust. There is also evidence in the case that after the wet cultivation was introduced in the village some of the tamarind trees had begun to die down. Ex. B-18, which is dated 21-8-1949 and is the report from the Tahsildar of Guntur, states that out of the area of the fields Acs. 4-06 were then covered by wet cultivation; that 48 tamarind trees existed on the ground in the extent of Acs. 3 and that Acs. 0-62 cents were being used for tombs and burials of Saivaits. The report in these circumstances recommended the area of Acs. 3-60 cents alone to be retained as inam tope, what was under cultivation to be resumed and what was the burial ground or had the tamarind trees, should be retained as the inam. Ex. B-19 is the order from the Collector and it directed the Tahsildar to submit resumption proposals for Acs 5-72 cents out of S. No. 333. Finally on 24-4-1951, Acs. 5-72 cents were removed, as they were unfit for raising and maintaining a tope and ryotwari patta was issued to the persons possessing occupancy rights in the land. Ex. B-22 shows the patta of the area as having been given to the appellants. But by that time civil litigations had begun.

3. On 18-7-1949, four persons had filed a suit for premanent injunction, wherein the third and the fourth plaintiffs were alleged to be the full owners and also defendants 13 to 17 in the case. It is alleged in the plaint that their ancestor conceived the idea of raising tamarind tope for public benefit without relinquishing his right in the soil thereof; that the Government on its part have accepted the idea and granted him an inam in respect of land revenue only to enure so long as the tope was maintained for public benefit and that accordingly on some part of the land a tope was raised, the rest, on which trees could not be planted, having been enjoyed by him and his descendants through cultivation. The plaint further alleges that from recent past the land was found no longer fit for raising and maintaining the tope and the charity had become incapable of performance. The plaint then avers interference by the defendants Nos. 1 to 12 in the plaintiffs' enjoyment and in their agricultural operations. On the aforesaid allegations it prayed for the permanent injunction. Most of the documentary and all the oral evidence in these appeals had been led in the aforesaid suit. The trial Court dismissed the suit and the appeal against the decree was heard by the same Subordinate Judge with the other suit under Section 92 of the C. P. C.

4. The plaint in this case alleges that the plaint schedule property was constituted a Dharmadayam land for the purposes of raising a tope for the public benefit, which was of considerable benefit to the villagers; that it was a resting place and a source of protection to the cattle belonging to the villagers from midday heat; and that the fruit, tender leaves and the dry twigs of the trees were being distributed to the villagers. It further states that the land was the village common ground, that carts coming from the other villages were enabled to have a resting place under the shelter of the trees in the tope and that the nomadic agricultural labourers, who visited the village during sowing and harvesting season, were able to pitch their tents there. The next important allegations are that the village with its population of about 4000 souls had no other poramboke and the suit tamarind tope is the only common meeting and resting place for the

villagers and visitors. Complaints are then made concerning neglect by the trustees of their duties, with the result of the trees having died; and concerning their having taken advantage of the situation by cutting about 25 tamarind trees for their personal use. The defence in this suit like the allegations in the earlier claim is that the defendants' ancestor had never parted with the ownership of the land; that the inam grant was not of the land, but only of the melwaram and that to Government after an elaborate inquiry has come to the conclusion that the tope cannot be revived on an extent of Acs. 5-72 cents and had granted pata for the same.

5. By the common consent of the parties the evidence taken in the earlier claim, O. Section 399 of 1949, was treated as evidence in the later case and the learned Judge of the lower Court has found the entire land to have been dedicated for the benefit of the public. He has therefore held that only assessment on the suit land was not given to the charity. He has further found that the trustees had rendered themselves liable to be removed from their office and were to be replaced by others, who would make genuine attempt to carry out the original objects of the trust. Accordingly he has held that it was in the interests of all concerned that a scheme should be framed for the proper administration of the trust, whose essential ingredients were to be that the existing trustees should be removed, that they were to render accounts of their past administration, that the new trustees should either replant tamarind trees in the available extent of the suit land by raising the level of the ground or plant such other shade-giving trees which will withstand the stagnation of water and at the same time enable the purposes set out in the plaint. The Judge consistently with the aforesaid conclusion dismissed the appeal. Against the decrees two appeals have been filed before us. The several grounds pressed for allowing the appeals are that :

> (1) The property dedicated to charity was only the melwaram interest in the land;
> (2) assuming the land to have been given, the fulfilment of the object of the trust has become impossible having regard to the introduction of wet cultivation in the village and consequently the trust is extinguished; and that
> (3) the appellants having got a fresh title, the property cannot be held as still subject to the trust.

6. As regards the plea of the dedication being only of partial interest in the property, it is clear that the endowment had been made about 80 years prior to Ex. B-1. Therefore the case of the ancestors having conceived the idea of tamarind tope for public benefit and the Government having after accepting the idea granted him an inam in respect of land revenue is impossible. Moreover, Ex. B-1, shows the ages of the three persons to whom the title deed had been subsequently granted as ranging from 30 to 45 years, which means that none of them was the original grantor. Further the document shows their relation to the grantor to be of grand-sons. It follows that the dedication of the land in the case was much earlier to its confirmation. Indeed there were already on the land 18 tamarind trees for the public benefit when Ex. B-1 was prepared. Now if the object of these trees were to give shade to the travellers and passers-by or

their fruits to the poor, and it is not denied that charity topes of such nature are very common in that part of the country, the trustees of the endowment would get some interests in the land, which would be apart from the rights over the trees. For example, they would get the right of possession over such parts of the land, where the trees be standing. They would further get the right to use this land for meeting the necessary expenses or for preserving the trees. Again they would get the right to exclude strangers to the trust. Moreover these rights would not be confined to where the trees be standing; but they would extend to such areas as were meant for the tope though it be still open. Ex. B-1 shows such area to be Acs. 8-42. The trustees would thus get over the entire area the right of preserving trees, of extending plantation and cultivating open space for the trust purposes i. e., to raise the necessary funds. That the number of trees over the area had increased cannot be disputed; for we have in Ex. B-18 the number of tamarind trees as 48, while 18 such trees situated in an extent of one acre were stated on the date of the document to have been recently cut. It follows that the right of spreading the trees over the land not covered by them in the 1858 had been exercised in the case. Therefore, the trustees in this case held possession of the entire land i.e. where the trees stood, as well as where there were no such trees. They also had the right of putting the soil to such use as would serve the trust, which meant their having the domain over the land for the purpose. This conclusion is strengthened by the admission of P. W. 1, who is the appellant in the Second Appeal, that certain documents show the land itself to be the trust. In addition there are leases of part of the land in favour of Dharmakarata of a Velam tope. For example, Ex. B-6, which is of 1921, is a kabuliat for a period of nine years and for about 5 acres out of the suit land. It describes the lessor as Dharmakarta, the land to be for raising dry crops but the lessors to be at liberty to plant tamarind trees and to preserve them with fencing. It therefore shows the cultivation of those parts of the lands, where trees were not then growing, to be subject to the paramount charitable object. Ext. B-7 is another lease of 1930 and is part of the land measuring Acs. 2-50 cents. It describes the lessor as Dharmakarta, the land as Dharma Chintala Vanam and contains provisions casting responsibility for any trees that might be planted on the land on the lessees. The trial Court has found, and the conclusion has not been shown to be erroneous, that only after the wet cultivation had started the several leases began to describe the lessors as managers and still later as absolute owners. Therefore the conduct of those, who were managing the land, shows the possession of the lands not covered by the trees to be with the trustees, and their cultivation to be with their permission. In addition there is the material evidence of part of the land being used for another charitable object, which could not be, unless ownership of the land had been transferred to the trust. In these circumstances it is obvious that the land itself was dedicated and not only some partial interest in it.

7. The learned Advocate of the appellants has then argued that with the introduction of wet cultivation in the locality the fulfilment of the object of the trust has become impossible and therefore the property must revert to the heirs of the grantor. In this connection he relies on Ex. B-17 which is the Commissioner's Report in the case showing plantation of tamarind trees in the area to be impossible, unless the entire area be raised. This the advocate argues to be not

practicable. The report has been proved by P. W. 7. There is further evidence in the form of the report contained in Ex. B-18, which preceded the grant of the patta of the land to the appellants. Therein also it is mentioned that the renovation of the tope is impossible and that the land is fit only for wet cultivation being surrounded on all sides by wet fields. In support of this argument reference was made to *Gela Ram v. District Board*[1], where the land had been given for the purposes of being used as a road to connect the main road with the public garden and was held by the District Board as trustees for the public. The land on which the gardens were planted was sold and the gardens ceased to exist; thereby

[1] AIR 1923 Lah 93

the fulfilment of the purpose for which the land in suit had been given, became impossible, and the trust was held extinguished. The learned Judge further held that on the extinction of the trust, the owner of the property was entitled to recover it. We need not multiply authorities, for the proposition is well-established that on the failure of the object of the trust there is what is called the resulting trust in favour of those who had given the property. It is equally well-established that equity treats trust for charitable purposes as an exception to this rule of resulting trusteeship. In charitable cases the rule is that where a person makes a valid gilt, whether by deed or by will, and either particularises no object or declares trust in favour of particular objects which fail or does not exhaust the subject matter of the gift, the Court, if it can find a general intention in favour of charity will not suffer the property or the surplus after giving effect to the charitable trust, to result to the giver or his estate, but will execute the general intention of charity by a cy pres application of the trust properly. It follows that even assuming the evidence in the case as establishing the land as unfit for tamarind trees, the appellants should not be entitled to it if there be paramount intention to give the property to charity, in which case other trees would be allowed to grow for purposes of giving shade etc.

8. The learned counsel of the appellants has pressed before us that the application of the cy pres doctrine is confined to where trust be created by will and relies in support of his argument on *Audesh Singh v. Commissioner of Lucknow*[2], In this case, in response to an appeal for funds for starting a college of Kshatriya Community certain amount was subscribed on behalf of the plaintiff by the Court of Wards under whose management the estate of the plaintiff was. The founding of the college became impossible by reason of the passing of the Lucknow University Act, 1920 and the defendants, who were the promoters of the College, wanted to utilise the collected funds for general educational advancement of the community. The plaintiff instituted a suit for obtaining refund of the money on the ground that the specific purpose for which it was given had failed. The suit was dismissed by the Subordinate Judge, but the Chief Court reversed the decision holding that the gift was for a particular institution conditional upon its coming into existence and not one for the general uplift of the Kshatriya community. The learned Judge further expressed the opinion that the doctrine of cy pres is applicable only in wills and not in deeds. Further reliance was placed on *Harish Chandra v. Hindu Dharm Sewak Mandal*[3], Here a gift was made of certain land to the Secretary of the Hindu Dharam Sewak Mandal for the express purpose of being used as the site of an Ashram to be built for imparting training to young

Hindu religious reformers. For several years the Mandal did nothing in the way of building the Ashram and ultimately the Mandal ceased to exist having been absorbed by the Hindu Maha Sabha. After the death of the donor his sons sued to recover the land. It was held that as the land was given for a specific purpose and for a specific purpose only, it was a conditional gift and it became a nullity as soon as the performance of the condition was rendered impossible. The learned Judge found that there was no general charitable intention in the case and therefore held that the trust could not be executed cy pres by allowing the Hindu Maha Sabha to build an Ashram on the land.

[2] AIR 1934 Oudh 329
[3] ILR 58 All 687 : AIR 1936 All 197

9. There would be no objection to the proposition stated in the aforesaid cases that unless donor's general charitable intention be established, there can be no question of an application of cy pres. We have, however, considerable doubt in accepting as correct the view that the application of the doctrine is confined only to trusts created through wills, as starting results would follow if we were to do so. For example funds in trust for particular objects may prove more than sufficient for its purposes and if the trusts be by wills showing general charitable intensions, the Courts would settle schemes for the cy pres application of the surplus. That according to the view could not be done in a similar situation should the trust be created through a deed. Again in the case of land for the institution which has ceased to exist, it the trust be by will showing a general charitable intention, the Court would act, but in case of a deed with a similar intent, it would not. Such a refusal would be not on grounds of limitation in rule itself; for, it nowhere states the general charitable intention must be contained in the will in order that it be given effect to. On the other hand the basis of the refusal would be that the rule has been generally applied in cases of testamentary trusts. But if the rule be capable of wider application, we do not see why it should be so circumscribed. As has been pointed by Ghose J. in *Advocate General of Bengal v. Webb Johnson*[4], the doctrine has been borrowed from the Roman Law because by that law donations for public purposes were sustained and were applied cy pres to other purposes. The case where the learned Judge quoted Story for the above observation related to the trust known as Silver Wedding Trust Fund which was started on the occasion of the anniversary of the Silver Wedding of King George V. Under the direction of the Queen the fund was held by the treasurer for charitable endowments and the income was applied for the higher education of the children of soldiers, who had fallen or become permanently disabled during the war. Part of the income could not be spent on those objects which resulted in accumulation of a considerable sum as surplus income. In these circumstances the Court applied the cy pres principle and extended the scope of the trust by including under it the education and assistance of children of the officers and soldiers, who rendered military service during the war. The learned Judge summarising the law on the point says at p. 795 (of Cal WN) : (at. p. 798 of AIR) :

> "The doctrine of cy pres is, therefore, the doctrine of nearness or approximation and it appears in English jurisprudence in three separate departments, yet with similar operation and effect; firstly, it is applied in the law of testaments; secondly, in the law of private trusts; and, thirdly, in the law of charitable trusts where gifts have been made for

charitable purposes, which either originally or in course of time cannot be literally executed".

Also Lewin on Trusts states the law at page 148 to be as follows :

"Trusts for charitable purposes are an exception to the law of resulting trusts; for where a person makes a valid gift, whether by deed or will, and either particularises no objects or declares trusts in favour of particular objects which fail or do not exhaust the subject-matter of the gift, the Court, if it can find a general intention in favour of charity, will not suffer the property or the surplus after giving effect to the charitable trust, to result to the giver or his

[4]29 Cal WN 793

estate, but will execute the general intention of charity by a cy pres application of the trust property".

10. We therefore hold that cy pres rule applied to trusts other than testamentary, where the general charitable intention be found to exist. In the particular case before us such an intention is proved, for the object of the grantor appears to be not to have only tamarind trees for the purposes of giving shade to the travellers and fruits to the poor, but to have trees that would achieve those objects. It follows that difficulties in growing tamarind trees should not cause the property to revert. Moreover the existence of tombs on the land shows the charitable intention to be much wider. We therefore think the second ground for allowing the appeal fails.

11. It has been lastly argued before us that the appellants having got fresh title to the property by virtue of the patta being granted to them, the new title cannot be made subject to the trust. Reliance in this connection is placed on *Punniah v. Kotamma*[5], wherein it has been held that in case of resumption the land, previously the property of the trust, becomes the property of the person to whom Government grants it subject to the obligations ordinarily attached to the ryotwari tenure. We do not take the aforesaid authority as laying down the proposition that trustees of an institution can derive personal advantage from the administration of the trust property; for it cannot be disputed that he, who has the management of property either as an express trustee or in some fiduciary character, is not permitted to gain any personal profit by availing of his position. The rule goes so far that if the trustees sell the land to a *bona fide* purchaser without notice and afterwards becomes the owner of the land, though for good and valid consideration, the trust revives again and he is bound to restore the land to the trust. That is the general rule and it has been affirmed conclusively in *Muhammad Esuf Sahib v. Abdul Sathar Sahib*[6], It was held therein that the resumption of the inam by levy of full assessment on the lands and issue of ryotwari patta to the trustees did not free the land from the trust and make them the private property of the trustees. It was further held that even if the lands were resumed and regranted to the trustees in their individual capacity on full assessment, they were bound to hold the land so granted for the benefit of the trust under the provisions contained in Section 88 of the

Indian Trusts Act. It cannot be denied in the case that prior to the resumption the lands were being cultivated by or on behalf of those who were the descendants of the original grantor and they were being described at one lime as trustees. It is equally clear that but for their being trustees they would never have got the possession of the land and having so obtained it, any rights arising therefrom would be held for the trust alone. It follows that the patta which they got because of their possession must also be for the trust and the fresh title cannot be a ground for allowing the appeal. The trial Court has therefore not erred in directing appellants' removal, nor has it erred in ordering planting of other trees, should growing tamarind trees be found impossible. In these circumstances these appeals fail and are dismissed with costs.

Appeals dismissed.

[5] ILR 40 Mad 939

[6] ILR 42 Mad 161