

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

**The Commissioner, Hindu Religious and Charitable Endowments
Department, Vs. Ramalinga Reddiar**

**The Commissioner, Hindu Religious and Charitable Endowments
Department, Vs. Ramalinga Reddiar**

SooperKanoon Citation : sooperkanoon.com/831105

Court : Chennai

Decided On : Jun-24-2009

Reported in : (2009)5MLJ1032

Judge : M. Venugopal, J.

Acts : Tamil Nadu Hindu Religious and Charitable Endowment Act - Sections 6(20), 9(12), 33, 63 and 69(1); Tamil Nadu Hindu Religious and Charitable Endowment (Amendment) Act, 1999; Tamil Nadu Hindu Religious and Charitable Endowment (Amendment) Act, 2008; Hindu Law

Appeal No. : A.S. No. 512 of 2002

Appellant : The Commissioner, Hindu Religious and Charitable Endowments Department, ;The Deputy Commissioner, H.

Respondent : Ramalinga Reddiar

Disposition : Appeal dismissed

Judgement :

M. Venugopal, J.

1. The appellants/D1 to D4 have filed this appeal as against the Judgment and decree dated 6.6.2001 made in O.S. No. 39/93 on the file of the learned Principal Subordinate Judge, Tindivanam.

2. The germane facts of the case are set out below:

The property mentioned in the plaint schedule is a Samathi Private Mutt and Institution and the first plaintiff is the Managing the same and maintaining the Samathi in her own rights as per the wishes of the founder. The founder of the Mutt and Institution is one Batcha Reddiar. The first plaintiff is the wife of Batcha Reddiar. For the said Batcha Reddiar and for the first plaintiff, they have no issues. Since the said Batcha Reddiar has no issues, he decided to erect a Samathi in the plaint mentioned property. Accordingly, he purchased an extent of 0.27 cents in S. No. 51/7 from one Kanoovu Ammal on 26.3.1921 for a valuable consideration as per sale deed. Since he wanted to have a permanent Samathi to be remembered and worshipped by its community people and relatives, he purchased the above said property which lies on the northern side of the suit village. Further as per the custom prevailing in a village, Samathi should always be erected at the out skirts of the village and on the northern side. Therefore, the said property has been purchased by Batcha Reddiar with an intention of erecting a Samathi for him.

a) The said Batcha Reddiar as per the customs followed by his community in order to make it divine and to give sanctity has installed a Vinayagar Idol, then called as 'Sundara Vinayagar without any superstructure. In an auspicious day of Karthigai 1921, he put up a superstructure over the idol and installed another idol of Dhandayudapani made up of granite stone. For the purpose of maintaining his Samathi by the descendants in the future, he purchased the properties for Samathi and Mutt created by him. Notwithstanding the fact that the Mutt and Samathi are described as temple in the instruments through which properties were purchased. Out of Batcha Reddiar's own fund, the Mutt and the proposed Samathi was never made public and it was always managed and maintained only by Batcha Reddiar as his private property.

b) Neither the third parties nor any villagers were allowed to worship the Vinayagar and Dhandayudapani idols as a matter of right. More over, in all the documents

and instruments, the said Batcha Reddiar described himself as 'Dharmakartha' of his Mutt and Trustee and from the recitals of the said documents, it can be inferred that Batcha Reddiar wanted to create an irrevocable Mutt in which neither of his legal heirs should claim the independent right and that is why he described himself as a 'Manager'. He died on 28.12.1948 without any issues leaving the first plaintiff as his sole heir. As per the wishes of Batcha Reddiar, the first plaintiff has taken up the management of the Mutt and endowment created by her husband, buried her husband Batcha Reddiar on the south western of the built up area and that the first plaintiff erected a Samathi with inscriptions on stone plaque as wished and directed by Batcha Reddiar. The first plaintiff has installed a Lingam idol over the Samathi, since the deceased her husband Batcha Reddiar has been a staunch Shivatte as incarnation of Batcha Reddiar's soul. The first plaintiff and her community people and the relatives believed that the soul of Batcha Reddiar is incarnated with Linga and that is why the Linga was installed as per Hindu Ahamas and Sastras.

c) The first plaintiff, after the demise of her husband Batcha Reddiar wanted to create Samathi as a permanent structure put up pucca superstructure and constructed a pucca compound wall surrounding the Samathi and over the idols. The first plaintiff has contributed her savings and profits derived from the endowed property for the erection of the said pucca structure . The first plaintiff has been and is maintaining the Samathi and idols without any intervention of the third parties in the village. She has been performing Khala Pujas and putting on lights to the samathi and to the idols erected by her husband in reverence and remembering of her husband in soul. No third parties are allowed to participate in this regard.

d) In the suit village, majority of the caste Hindus belong to Reddiar Community and most of them are in a way related to the first plaintiff and Batcha Reddiar. Besides Reddiar Community, there are people in stray numbers in Yadava's Community and except the first plaintiff and her relatives, without her permission and consent were allowed to enter into the first item of the suit property. In the year 1972, the first plaintiff put up a Mandabam on the Eastern side of the Samathi and idols out of her own fund. Besides, sinking a well in the first item of the suit

property,thereupon, she built another Mandabam on the southern side of the suit property in the year 1982, out of the income derived from the endowed properties. She has also installed Navagrahas in the said property, since she is also a staunch Shivatte. The lock and key for the said properties is always kept by her. The first plaintiff has appointed a person to perform Poojas and naivethyams as and when desired by her and the said person shall open the said property only with her permission to carry out the said functions. Thus, the first item of the suit property has been treated and managed by Batcha Reddiar and the first plaintiff as their private property and none else than the said persons shall enter into the said property and worship the idols installed as a matter of right.

e) Added further, the abovesaid property has never been treated as a temple. As per the Hindu Ahamas, a Hindu temple which is being treated as a public temple will have a Thuvajasthambam, Balibeedom, Vaganas, Urchavars and Brahmordhavam on a fixed day of an year, when the urchavamoorthy is taken around the Mada streets of the temple. In the first item of the suit property, there are no Thuvajasthambam, Balibeedom, Vaganas, Urchavars and there is no Brahmorchavam. Since the said property is a Samadhi and private institution raised by the first plaintiff and her husband, it does not have the said things. If the said property is a temple, it should have been built in the middle of the village so as to have mada veethis,but the said property was built at the out skirts of the village. There is no hundi installed in the said property and at no point of time, contribution from public were received or accepted for its maintenance and management.

f) Batcha Reddiar even though appointed a manager, he wanted a supervision over the manager and in anxiety to see the endowment and poojas are not neglected by the Manager and the Manager is made responsible to panchayatars. The Panchayatars have not been named and not given any right of taking over the management in case of default nor have been given the right of entry to perform poojas. To prevent third parties from encroaching the properties, Batcha Reddiar wanted somebody to see that it is prevented by his community people and relatives and hence he mentioned panchayatars in the deeds. There is no single occasion till today for the panchayatars to intervene since the first plaintiff is

carrying out the kattalai as directed by her husband and in the absence of the Panchayatars exercising their power. The suit properties should be constructed to be Samathi, private Mutt and Institution.

g) The second appellant/second defendant has taken a view that the suit first Item is a public temple which comes within the ambit of HR & CE Act. Therefore, the first plaintiff has been obliged to file an application to declare the suit properties as Samathi and Mutt in O.A.31 of 1979. However, the second appellant/second defendant passed an order erroneously hold that the suit propeprty is a public temple on 24.11.1980. The first plaintiff has filed an appeal in A.P. No. 65 of 1981 as per Section 69(1) of the HR & CE Act. Aggrieved against the said order passed by the second appellant/second defendant. However, the first appellant/first defendant has followed the order passed by the second appellant/second defendant and confirming the order dated 7.12.1987 passed in A.P. No. 65 of 1981.

h) Pending suit, the first plaintiff has expired on 7.4.1992. By virtue of the Will executed by the deceased first plaintiff in favour of the second plaintiff, the second plaintiff is entitled to the suit properties and except the second plaintiff, there are no other heirs to inherit the estate of the first plaintiff. Inasmuch as the appellants, therefore, the 4th appellant has made an endeavour to take possession of the plaint schedule properties, the plaintiffs have filed the suit seeking the relief of declaration that the Institution consisting of Samathi Mutt and temple and the schedule mentioned properties are not religious institution coming within the ambit of Tamil Nadu Hindu Religious and Charitable Endowment Act and for the relief that the Institution is a private one as per Section 63(a) of the T.N.HR & CE Act and for permanent injunction restraining the appellants/defendants, their agents and their men from interfering with the possession and management of the suit properties by the plaintiffs.

3. The first appellant/first defendant has filed a writtten statement adopted by the defendants 2 to 4 inter alia taking the denial pleas that (1) the property temple in the schedule is a private mutt and Institution(2) that the first plaintiff managing the same and maintaining the same in her own right and according to the wishes of

the founder(3) that Batcha Reddiar is the founder of the Institution and that he wanted to erect his Samathi in the suit properties etc.,

3a) The case of the appellants is that Sundaravinayagar temple is a public temple and it is in existence even before the year 1921 and Batcha Reddiar and his wife/first plaintiff admitted the existence of Sundaravinayagar Temple and that he acted only as a trustee of the temple and endowed some properties to the temple and provided for the performance of the 'Anna Naivaithiam', and that he empowered the panchayatars to question the trustees on their failure, if any in the performance of Anna Naivaithiam and supervise the same. Further Batcha Reddiar posed himself and acted as the trustee of the temple. Therefore, the said Batcha Reddiar and the first plaintiff claiming under him are estopped to contend that the suit institution is Samathi and not a temple.

3b) Moreover, the further pleas of the appellants are that Batcha Reddiar never claimed that the suit property was intended for his Samathi or that it is his private temple, that he. He never intended to purchase any property for the purpose of his Samadhi. Since the Institution is a public temple, he endowed the properties for the upkeep and maintenance of the temple and also for the performance of the 'Pal Kavadi' and 'Mahotchavam' in the month of Thai. The 'Pal Kavadi' and Mahotchavam can be performed by the general public only and they took part in the festival as a matter of right and that neither Batcha Reddiar nor the first plaintiff ever claimed that the Institution is a Samadhi or a Mutt and that it is their private property and also that the documents under which Batcha Reddiar purchased the properties do not create an irrecoverable Mutt and that the first plaintiff buried her husband in the south-west corner of the built up area and erected a Samadhi with inscriptions, as directed by Batcha Reddiar and Batcha Reddiar and the first plaintiff belong to Caste of Hindu Siva Worshipper and therefore, the installation of the idol of Linga in the temple as per the Hindu Ahamas and Sastras have been done and that the suit institution is a public temple as defined under Section 6(20) of the HR & CE Act and hence it comes under the purview of the said Act. Continuing further the absence of the structures like 'Dhwajasthambam' 'Vahanas' 'urchavars' 'Bromothsam' etc will not necessarily lead to the conclusion that the suit institution is a private Mutt or temple and the temple need not necessarily

have 'Mada Veedhis' around it.

3c) Besides the above, the appellants contend that Batcha Reddiar never claimed that the office of the trusteeship lies with his family or heirs and that he claimed himself as the present trustee 'Tharkala Trustee' which means that the trusteeship may lie with any one in future and that the Batcha Reddiar wanted panchayatars to supervise the manager as he wanted to prevent the third parties from encroaching upon the properties is denied and that the first appellant and the second appellant have correctly held that the suit Institution is a public temple falling under Section 6(20) of the T.N.HR & CE Act and not a private mutt or samadhi and that the Will alleged to have been executed by the first plaintiff is denied, when the plaintiff has no right over the temple.

4. On the basis of the aforesaid pleadings, the trial Court has framed in all three issues. On the side of the respondent/plaintiff's witnesses, P.W.1 to P.W.4 were examined and Exs A1 to A4 were marked and on the side of the appellants/defendants, D.W.1 was examined and Exs B1 to B10 were marked and Exs C1 to C3 were marked.

5. The trial Court, on an appreciation of the oral and documentary evidence and taking note of the available material evidence on record, and after analysing the same in depth has come to a conclusion that the suit property and the temple, Samathi and Mutt are Institutions not coming under the control of HR & CE Board and that they are Institutions which do not come under Section 33(a) of the said Act belonging to the separate individuals and accordingly passed a decree besides granting the relief of permanent injunction.

6. Heard both the learned Counsel appearing for the parties and this Court has noticed their respective contentions.

7. The point that arise for determination is

Whether the respondents/plaintiffs are entitled to the declaratory relief of claiming that Samadhi, Mutt, temple and the suit schedule mentioned properties are not religious institutions as per HR & CE Act and that the suit institutions are a private

one as enjoined under Section 33(a) of HR & CE Act and for the relief of permanent injunction?

8. Contentions, Discussions and Finding:

Mr. M.R. Murugesan, the learned Special Government Pleader(H.R.& C.E) urges before this Court that the trial Court ought to have held that the suit temple is a public religious temple coming within the purview of the definition under Section 6(20) of the HR & CE Act and further the suit temple and its properties are being used as a place of public religious worship dedicated to or for the benefit of or use of right by the Hindu community and these aspects have not been looked into by the trial Court in a proper perspective and further the trial Court has not appreciated Exs D1 to D10 documents to prove that the dedication and management of the temple and that Ex D6 document will show that Batcha Reddiar has been shown as a person in charge management of the temple and in an important fact is that the temple has been founded by the villagers even prior to the year 1921 out of the public funds and moreover by placing reliance of Exs P1 to P4, the trial Court has come to the conclusion that the temple is a private one and that trial Court has failed to see the idols, Navagraha has come into existence for worshipping performing daily poojas etc without any let or hindrance and all these factors will go to point out that the temple in issue is a public one and that the public are not worshipping samadhi primarily but worshipping incidentally and therefore primarily worship is in respect of idols only and the samadhi in the present case contains all the indication of temple and the temple has evolved from the samadhi and in any event, the entire temple precinct cannot be called as Samadhi and therefore prays for allowing the appeal in the interest of justice.

9. The learned Special Government Pleader(HR & CE) appearing for the appellants submits that the plaintiffs are converting the temple into samadhi and that the samadhi has been constructed by the first plaintiff viz., the wife of Batcha Reddiar and that the Vinayagar temple is an ancient one and it has been constructed before the year 1920 and the second plaintiff is the sister's son of the first plaintiff and in Exs D1 to D10 documents, Batcha Reddiar has been described as temporary manager and that in Ex D3 gift deed dated 6.1.1921 in favour of

Vinayagar temple executed by the said Batcha Reddiar, he has to answer the panchayatars in case of any of the violation of conditions mentioned therein and if the events are not performed then the temporary manager can be questioned by the panchayatars and therefore it is quite evident that Batcha Reddiar has given control to the panchayatars and in paragraph 5 of the plaint Batcha Reddiar has described himself as Dharmakartha but whereas Exs D2 to D10 referring as temporary manager and that managing affairs of the temple is different from trusteeship and further it is averred in the plaint that Dharmakartha is an English parlance refers to the word manager and Trustee and that he has got list annexed to the temple.

10. Added further the learned Counsel for the appellants submits that the deceased Batcha Reddiar is not the founder of the temple and that beneficiaries when they are in large number are ascertained one and Batcha Reddiar has no issues and therefore he has built the temple and his family is only ascertained the beneficiary and that how the samadhi will be before entering the village and that no accounts and documents have been produced to establish that the amounts have been spent for the construction of the temple or the monies have been drawn from the Bank and Naivethyam performed only in a temple and not in a samadhi and out of 10 acres of land dedicated to the temple, the events being performed and they are managing affairs of the temple of their own and the plaintiffs converted the temple as samadhi and admittedly there is no hundi and that no way HR & CE Act say what is the private temple and Section 6(20) of the said Act only speaks of 'temple' meaning a place by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu Community or of any Section thereof, as a place of public religious worship and therefore the suit temple is a public one.

11. The pith and substance of the argument advanced by the appellants side is that samadhi, mutt, they are not a public temple and that the Mutt is a place where disciple will be given the teaching and free lodging and boarding for them will be provided and that the Vinayagar temple is a public temple and in a samadhi cannot have a Kalasa Pooja with a permission of the first plaintiff and that the evidence of P.W.4 is to the effect that he is not aware in which year temple has

been built but the temple is called as 'Pillaiyar temple' and that he has deposed that after obtaining the permission, they will worship the deity of the temple and it is the specific evidence of P.W.2 that they will call the suit temple as samadhi temple and it is thought as samadhi. It is the evidence of P.W.3 that the plaintiffs will allow the people to the temple whom, he likes and specifically in Ex P4, it is mentioned as 'family temple' and that the samadhi cannot have a Kumbhabishekam.

12. The learned Counsel appearing for the appellants cites the decision reported in *Pichai alias Chockalingam v The Commissioner for Hindu Religious and Charitable Endowments (Administration Department)* 1971 MLJ 166 wherein it is held as follows:

The definition of 'temple' contemplates following conditions, namely 'temple' means 'place by whatever designation known used as a place of public religious worship(1) and dedicated to the Hindu community or any Section thereof as a place of public religious worship; or (2) and dedicated for the benefit of the Hindu Community or any Section thereof as a place of public religious worship or(3) and used as of right by the Hindu community or any Section thereof as a place of public religious worship.

He also presses into service, the decision reported in *V. Mahadeva Gurukkal v. Commissioner for the Board of Hindu Religious Endowments, Madras* AIR 1956 Mad 522 AIR V 43 C 166 Sept wherein it is laid down as follows:

A temple which began as a private temple may, in course of time, become a public temple by express or implied dedication, the latter being proved by use of the temple by the Hindu Public as of right and without taking any permission from anyone. Under Section 9(12) no express dedication on a definite date need be proved, if it is proved beyond all doubt that the temple has been used as of right by the Hindu Public as a place of religious worship without taking anybody's permission, leading to an irresistible inference of implied dedication.

13. Yet another decision reported in *Subbiah Pillai v. The Commissioner HR & CE (ADM) Department, Madras* 77 L.W. 94 relied on the side of the appellants

whereby and whereunder it is observed as follows:

A temple was proved to have been founded by the plaintiff's family who had settled properties for its use and benefit, there was no evidence on record to show that any member of the public either offered moneys or endowed any property to the temple. The entire properties belonging to the temple were in the possession of the plaintiff's family. No member of the public either interfered with their managements and possession of the properties or called upon them to render any account in regard to the income of the properties. There was no cogent or clear evidence to prove that the members of the public as a matter of right were allowed to worship in the temple. The temple was situated not only adjacent to the plaintiffs' house, but the plaintiffs have access and entrance to the temple directly from their house, and the gate will be always locked except when pooja is performed by the archakar. Held: It is not a public temple. The ordinary Hindu sentiment is not to prohibit any worshipper from worshipping in a temple, even though the temple was intended mainly for the worship of the members of the family of the founder. Merely because the temple is situated on a natham, it cannot be called as a public temple.

The learned Counsel appearing for the appellants citing the Judgment of this Court in A.S. No. 825 of 1995 dated 26.6.2008 wherein it is held that the plaintiff is a public trust and the suit temple is a public one. He also relies on the decision of this Court in D. Shanmugha Desikar v. The Commission for Hindu Religious and Charitable Endowment 2008 (1) TNLJ 26 (Civil) wherein it is held that 'when there was no Gopuram or palipeedam and condition stated under Section 9(12) of HR & CE Act is not a public or private temple and that the matter has been remanded back to the trial Court. He also relies on the Judgment of this Court passed in A.S. No. 285 of 1997 dated 11.2.2008 wherein this Court in paragraph 24 of its Judgment has inter alia held as follows:

The daily poojas, deeparathana and the festival of Kumbabishekam are related to a public temple and not for any samadhi. As per the settlement deed, the settlor has clearly stated that Kumbabishekam, daily poojas and deeparathana shall be performed to the deity and therefore, the plea of the respondent is totally a self-

contradictory version to enjoy the property as his own and hence the respondent cannot claim the institution as a private samadhi.

14. Per contra, the learned Counsel appearing for the respondent submits that an Advocate Commissioner has been appointed before the trial Court and he has given a detailed report which forms part of the records and that in the suit temple, there is no kodimaram, Hundi and no collection of money made among the members of the public and in fact as per amendment made to HR & CE Act in the year 1999, earlier samadhi has been included as a temple and later the same has been deleted as per Tamil Nadu Act 4 of 2008 and that the deceased Batcha Reddiar being an affluent person put up temple in a private patta property belonging to him and that he has purchased the property and constructed Vinayagar Temple and it is a misnomer to say samadhi as a temple. It is the specific defence of D.W1 that earlier Commissioner's final report has not been filed and it is the categorical evidence that the case records are not available and merely because the public are allowed an entry in a Hindu Private temple, the same will not go to prove that a temple is a public one.

15. The learned Counsel appearing for the respondent brings it to the notice of this Court, the decision of this Court reported in *The Commissioner for the Hindu Religious and Charitable Endowments, Madras-34 v. Swamikeela Arasalwar Dharmam in Veera kerala Varampuram Gramam (Street), Shencottah Village, Shencottah Taluk, Tirunelveli District, through its Trustees* : (1983)2MLJ274 wherein its among other things held that the mere fact that the public is being allowed to participate in the festivals connected with the temple, or allowed to worship in the temple could not persuade the Court to readily infer that there is dedication to the public and that the crucial test is that the Hindu public or any Section there must be entitled to use the place as a place of public religious worship'. Further he relies on the decision reported in *Chennammal v. The Commissioner for Hindu Religious and Charitable Endowments, Madras* 1973 MLJ 442 wherein it is held that in the absence of an express dedication for the benefit of the public, user by the public as of right must be established and such user as of right is far different from the trustees being willing to welcome the public to come and worship in the temple. The suit temple was held to be a private temple

not coming within the scope of Madras Act 22/1959. In the aforesaid decision, it is also held at paragraph 9 to the effect that 'the law is well settled that, when the origin of the temple is known as a private temple, then the clearest possible evidence is necessary for converting that temple into a public temple and we are clearly of the opinion that, in this particular case, no such evidence is available'. He also cites the decision of the Honourable Supreme Court *Saraswathi Ammal v. Rajagopal Ammal* : [1954]1SCR277 wherein it is held that 'in considering the validity of a dedication of property for religious purpose what is a religious purpose under the Hindu Law must be determined according to Hindu notions. Under the Hindu Law religious or charitable purposes are not confined to purposes which are productive of actual or assumed public benefit. The acquisition of religious merit is also an important criterion. In the same decision, the Honourable Supreme Court has observed that' Where, notwithstanding that the major portion of the income may have to be spent for Gurupooja and Annadhanam in connection with the annual sradh, it is clear from a settlement deed that the dominant purpose of the dedication of property was the samadhi Kainkariyam, that is to say the worship of and at the Samadhi (tomb) the settlement deed is invalid. The reason is that perpetual dedication of property for worship at a tomb is not valid amongst'. Further it is observed in paragraphs 7 and 8 as follows:

The learned Judges of the Madras High Court appear to have made the Full Bench reference above noticed on an argument before them that erection of tombs for deceased persons and endowment of properties for the upkeep thereof and for the performance of worship thereat were common amongst, Hindus of certain communities and that it is believed by them to redound to their spiritual benefit and that the validity of such endowments have been recognised by the Courts. But the case that they referred to is *Muthukana Ana Ramanadham Chettiar v. Veda Levvai Marakayar* 34 Mad. 12(H) which relates to Muslims and it may well be that the position is, as stated therein amongst Muslims. We have been referred to a statement at page 223 of P.R. Ganapathi Iyer's *Hindu and Mahomedan Endowments*, Ed.2. wherein it is stated-

Gifts for the maintenance of tombs or samadhies of private persons have been regarded as valid under the Hindu Law.

We have been unable to find on what authority this statement was based. There is only a solitary passage in the case reported as the - Most reverend Joseph Colgan. v. Administrator-General of Madras 15 Mad. 424 at P. 446 (1) wherein it appears as follows:

Dedication of property in perpetuity for the performance of religious ceremonies maintenance of tombs and other purposes not allowed by English Law to be charitable, have always been held lawful amongst Hindus and Muhammadans.

Insofar as this statement relates to tombs of Hindus, we are unable to find any support from our knowledge and experience. There have been no doubt instances of Hindu Saints having been deified and worshipped but very few, if at all have been entombed and we are, not aware of any practice of dedication of property for such tombs amongst Hindus. Such cases, if they arise, may conceivably stand on a different footing from the case of an ordinary private individual who is entombed and worshipped thereat. The case reported as Commissioners, Hindu Religious Endowments, Madras v. Narasimham AIR 1939 Mad. 134(J) has also been referred to. It is a somewhat curious case furnishing an instance where images of as many as 66 heroes who were said to have been killed in a war between two neighbouring kingdoms in the 13th century were installed in a regular temple and systematically worshipped by the public for several centuries and inam grants therefor made during the Moghul period. With reference to the facts of that case, the learned Judges were inclined to hold that the worship was religious. This, however, is a case of a grant from a sovereign authority and in any case is not an endowment for worship of a tomb.

In the three Madras cases in which it was held that the perpetual dedication of property by a Hindu for performance of worship at a tomb was not valid, there was no suggestion that there was any widely accepted practice of raising tombs and worshipping thereat and making endowments therefor in the belief as to the religious merit acquired thereby. In the present case also, no question has been raised that in the community to which the parties belong there was any such well-recognised practice or belief. The defendants in the written statement make no assertion about it. But on the other hand, the plaintiff in para.12 of his plaint

asserts that the-

Institution of samadhi and ceremonies connected with it are not usual in the community to which the parties belong.

Undeem it may be assumed that such a practice is not likely to grow up amongst Hindus where cremation and not burial of the dead is the normal practice, except probably as regards sanyasis and in certain dissident communities. 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.

16. He also relies on the decision reported in *Nagu Reddiar v. Banu Reddiar* AIR 1978 SC 1174 (a) wherein at paragraphs 14 and 15 it is held as follows:

The rule that a provision for the purpose of Puja over the tomb of the remains of a person is invalid is subject to certain exceptions. As pointed out by this Court in *Saraswathi Ammal's case* (supra) there have been instances of Hindu Saints having been defied and worshipped but very few if at all have been entombed. Such cases stand on a different footing from the case of an ordinary private individual who is entombed and worshipped thereat. After referring to the decision in *Saraswathi Ammal's case*, a Bench of the Madras High Court in *Sri Ramanasramam by its Secretary G. Sambasiva Rao and Ors. v. The Commissioner for Hindu Religious and Charitable Endowments, Madras* observed that as samadhi over one who comes to be regarded as of the illuminati or even the tombs of heroes may evolve in course of time as a shrine of Hindu Public religious worship, as was held in the *Board of Commissioners for Hindu Religious Endowments, Madras v. Pidugu Narasimham and Ors.* *Ratnavelu Mudaliar v. Commissioner, for H.R & C.E. and Rama Swami v. The Board of Commissioner, Madras*. This Court referring to the decision of *Board of Commissioners for Hindu Religious Endowments, Madras v. Pidugu Narasimham and Ors.* (Supra) observed that the Judges of the High Court were inclined to hold that the worship was religious. But this was a case of a grant from a Sovereign authority and was not an endowment for worship of a tomb. In a Bench of the Madras High Court held that the samadhi or tomb of one Apparswami is a place of religious worship taking into account that the institution was for over a century regarded as a place of religious

worship. Viswanatha Sastri J. in T.R.K. Ramaswami Serval and Anr. v. The Board of Commissioners for the H.R.E. Madras through its President, expressed his view that it was sufficient if the worshippers considered themselves likely to be the recipients of the bounty or blessings of a Divine Presence, which they believed to exist at the place. Samadhis of saints are recognised as religious institutions in the South. It is well known that the Samathi of saint 'Pattinathar' is considered as a place of worship in Tiruvottiyur near Madras. According to tradition great saints have attained Yoga Samadhi in the well known pilgrim centers; Saint Tirumoolar attained samadhi in Chidambaram, Saint Konganavar at Tirupathi, Saint Valmiki at Srirangam and Bhgamuni at Palani.

The raising of 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. A place of worship will not cease to be religious because of its being in the memory of a person.

17. He also relies on the decision of the Honourable Supreme Court reported in Malayammal v. A. Malayalam Pillai : 1990(2)SCALE740 wherein at paragraph 12 it is among other things observed as follows:

The raising of 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 Shradha 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.

18. As far as the present case is concerned, report of an Advocate Commissioner Exs. C1 to C3 assumes significance in the considered opinion of this Court. In the Advocate Commissioner's report, it is mentioned that the suit property

Sundaravinayagar temple is situated on the eastern side of the Sirunavur Village and on the south of the temple there is a road with adjoining Nanja land and that Sundaravinayagar Temple has compound wall on four sides and that on 15.9.1986 Mahakumbabishekam has been performed and the same has been inscribed in the culvert and Batcha Reddiar has expired on 28.12.1948 and that his body has been entered in the said place and that the first plaintiff has expired on 7.4.1992 as per the mentioning made in the culvert and in the Sundaravinayagar temple at the agni corner, there is a Madapalli and that there is no pallipeedam in the temple, there is no Hundi, there is no Kodikambam and there are no Durvaraghabhavaras and there are no vaganas and the temple is not in possessing the aforesaid items and before the Vinayagar temple, there is one Mandabam etc and that the samadhi and temple are placed together.

19. To the report of the Commissioner, the third appellant/third defendant has filed an objection stating that there is no samadhi and that if it is so, the same should have been made mention of by means of length and breadth and that the same has not been properly mentioned by the Commissioner in his report and that the Commissioner's report is not helpful to the Court to arrive at a decision.

20. It is pertinent to point out tht P.W.1 in his evidence has deposed that he is the second plaintiff in the case and that Batcha Reddiar in the year 1921 has purchased the properties from Kanoovu Ammal and those properties are situated outside the Village on the northern side and for constructing Vinayagar Temple and to create samadhi on its right side, the aforesaid properties mentioned in 1921 documents have been purchased by the said Batcha Reddiar and after purchasing 27 cents, he has built Sundaravinayagar temple and he has been worshipping the same and further he has built the said temple from his own funds and in front of the temple, there is Ballipeedam, Vaganas, Kodimaram and Hundi etc., and he himself exclusively worship the temple and that he expired in the year 1948 and as per his wish, his body has been buried on the right side of the Sundaravinayagar temple and a mandapam has been raised on the place where Batcha Reddiar has been buried and Lingam and Rishabam have been erected for which both in the morning and in the evening daily in the temple and samadhi light will be lit and that the public are not taking part in the performance of poojas. It is further evidence of

P.W.1 that after the death of Batcha Reddiar in the year 1948, Sundaravinayagar Temple has been erected and Linga has also been established and that compound wall, vinayagar temple and Mandapam has been established and that no temple procession has been taken out and no festivals are conducted with the help of public and that the idols are not decorated and no festival has been conducted and that the place where the temple is situated belongs to Batcha Reddiar in his individual capacity as per sale deed.

21. In short, the evidence of P.W.1 is to the effect that the suit temple belongs to their family as a private samadhi temple. The evidence of P.W.1 also points out to the effect that on 15.9.1986 for the samadhi temple, he performed Kumbabishekam and Batcha Reddiar during his life time has not appointed anyone as an Administrator for the suit temple and except the first plaintiff, others have no right and hence no one is allowed inside the temple and further that Meenambal has administered the temple as per wish of her husband and that the Batcha Reddiar has described himself as temporary Manager and that he has executed the document in favour of the temple in that capacity only and after the death of Batcha Reddiar, when his wife/first plaintiff managed the temple, no one from the public has interfered with the administration of the suit temple and at present also, no one from the public has interfered with the affairs of the temple and that the 4th defendant has directly inspected the suit temple and has given a report which has not been taken into account by the defendants and that the samadhi's breadth is 6 feet and length is 6 feet.

22. P.W.2 during course of his evidence has stated that in his village, there are people from Reddiars, Yadavas, Adi Dravidar Community and they cannot enter the suit temple and that the suit place is called as 'samadhi temple' and before the erection of Samadhi, in that place Vinayagar, Dhandapani, Navagraha idols have been erected by Batcha Reddiar out of his own funds and that no one has been contributed any amount for the erection of said idols and in the said temple, there is no hundial and only when plaintiffs invite during festival times one cannot enter the temple and that the temple's lock and key will be with the plaintiffs and all of them are under the impression that the suit place is a samadhi and that the samadhi is situated at the very entry of the village.

23. P.W.3 in his evidence has deposed that to his knowledge public are not entering into the suit temple and no one can enter and worship inside the temple out of his or her volition and that the public cannot enter and worship and in the administration of the temple, the public have not taken part and it is not correct to state that there is no samadhi in the suit place and during the cross examination, he has specifically stated that after getting down from the bus, the temple is situated first in his village and that the renovation works have been carried out by the plaintiffs' relatives only and that the plaintiffs' family members will take part in the Urchavam and the public will not attend it voluntarily and during the Urchavam period, when they enter into the temple, they are not prohibited and the plaintiff's will allow the members of the public liked by them. At this stage, this Court opines that the Hindu sentiment is that no one is precluded from worshipping in a temple, though the temple is primarily meant for the worship of the members of the family of the founder. In private temple worship by outsiders/public is because of the leave and licence granted by the concerned Donor/founder's family and this cannot be construed as any dedication to the public.

24. P.W.4 in his evidence has deposed that Batcha Reddiar has constructed Vinayagar temple and the samadhi and they cannot go inside the temple without permission and that Batcha Reddiar's relatives can enter into the temple and that no procession is taken from the temple and that he is not aware of the year of the construction of the temple and that the temple is in existence from generation to generation and that temple accounts are being looked after by the second plaintiff. Moreover, P.W.4 also says that there is a priest for the temple who does daily pooja and Thaiposam urchavam will be performed in small scale with the relatives of Batcha Reddiar attending the same.

25. At this stage, it is not out of place to making significant mention that D.W.1 in his evidence has stated that he is serving as a suit Inspector of the Villupuram Assistant Commissioner's Office, H.R & C.E Department and that he has inspected the suit temple and that the sundaravinayagar temple is situated at the outskirts of the village and one can enter into the village, after passing through the temple. Neivethyams, poojas are performed by the priest and that the temple has a compound wall and that the priest is being paid by the second plaintiff and in the

temple, there is Karbagraham, Mandabam and Mahamandabam etc and that the no member of the public is prevented from entering into the temple and it is not correct to say that because of samadhi it can be described as Madam and temple is in existence before the year 1921 and that for a samadhi, there is no urchavam and in the inside samadhi, no idols of gods will be kept and according to his enquiry, the members of the public are allowed inside the temple and Exs B1 to B10 are all documents belonging to the Sundaravinayagar temple and in the said documents, there is no mention of temporary manager and in the said documents no hereditary trustees are mentioned and that he has read the contents of the report of the previous Inspector Mr.R.Srinivasan and that the said report has not been filed into the Court and that the Kumbabishekam has been performed in the year 1986 and he is aware of the Mandapam that has been built in and it is true to state that the plaintiff's side has described inside the Mandapam as Samadhi etc and that on 23.7.1993, he has not served as an Inspector and he is not aware in a temple a samadhi can be erected. Merely because in Ex P4 in the Kumbabishekam invitation, it is mentioned as 'Our family temple' and further for performance of Kumbabishekam festival, people and friends have been asked to come and attend with dear and near once ,it cannot be construed by any stretch of imagination that the suit temple is a public one. The true test if whether the temple is a private or public one is for the Court ascertain whether the members of the public do have a free right of ingress and egress in regard to the worship of the idol/deity of a particular temple.

26. To know whether it is a public or private endowment, the four tests are (1) Whether the user of temple by the members of the public is or right(2) Whether the management and control vest either in a large body of individuals or whether the members of public and foundner do not retain any control over the management (3) Whether the dedication of the properties is made by the founder (4) Whether the evidence established that the founder of the temple has not stipulated for contributions or offerings to be made by the public.

27. In the case of private temple worship by persons other than founder's family will be by sufferance of founder's family. The private temple in short is meant for worship of founder/donor's family.

28. It is to be noted that a temple must conform to Agama Sastras or by immemorial public usage ought to have been regarded as a place of public religious worship, notwithstanding the non-confirmance with Agama Sastras. However, a samadhi by itself and not treated as a fitting object of public religious worship for a long time does not evolve into a temple.

29. The initial presumption that a temple is a public one can be rebutted by an individual who claims that it is a private temple by proving the said fact affirmatively and positively by clinching proof, before a Court of Law.

30. As far as the present case is concerned, it is clear from Ex B3 Gift deed that Batcha Reddiar has been described as a temporary Manager for the Vinayagar temple and that the gift deed has been executed by the said Batcha Reddiar himself. In the said documents, it is also made mention of that out of the income, after paying the tax, the remaining income can be made use for Annaneivethyam etc. Therefore, the suit temple has come into existence in and around 1921. Except Batcha Reddiar and after his demise, the deceased first plaintiff, no one from the public has looked into the administration of the temple nor they have interfered with the internal affairs management of the temple.

31. It is the contention of the learned Special Government Pleader(HR & CE) that generally in south India, there is a presumption that all temples are public one, of course presumption is a rebuttal one. A perusal of Ex A2 photograph along with negative shows that a lingam has been erected in the place where Batcha Reddiar's samadhi has come into existence and there are certain inscriptions found in Tamil vernacular which refer pinpointedly to the deceased Batcha Reddiar. After the demise of the first plaintiff, the second plaintiff is claiming his right as per Ex A1 Will dated 24.1.1988. In the said Will has been executed by the first plaintiff in favour of the second plaintiff who is none other than the sister's son of her/first plaintiff. In Ex A1, it is categorically mentioned that Batcha Reddiar's samadhi temple and Sundaravinayagar temple and Dhandayudapani idols and properties are absolutely to be enjoyed by him and further that the samadhi temple has been built by her and in the said temple no one can claim any right and the said property belongs to her husband and herself.

32. Merely because poojas are performed or light is lit in Samathi and that some idols have been installed inside the precincts of samathi it has not lost its essential feature of samathi or mutt and hence it is not a public temple in the considered opinion of this Court.

33. On a careful consideration of the respective contentions advanced on both sides and on a careful consideration of the evidence of P.Ws 1 to 4 and the evidence of D.W.1 and after perusing the other material documentary evidence on record, this Court is of the view that the suit property and the temple mentioned in the suit property absolutely belong to the plaintiffs and that in the said suit property and the temples are in the sundaravinayagar temple except the respondent/plaintiff no member of the public has any right or interest over the same and merely because during the Kumbabishekam or some festival period or even in Ex A4 document in the kumbabishekam invitation wherein it is mentioned as 'our family temple' and near and dear one of the relatives have been asked to come and attend the said function, the same cannot in anyway establish the suit temple as a public one and the crucial question is that whether the members of the public have got a right of worship in the temple as a matter of right and the ample oral and documentary evidence available on the side of the plaintiffs P.Ws1 to 4 clinchingly, convincingly and cogently point out that the suit temple and the idols belong to the plaintiffs, absolutely and they are entitled to the relief of declaration that the samathi, Mutt, temple and the schedule mentioned properties are not religious institutions coming within the purview of T.N.H.R. & C.E. Act and the Institution is a private one and permanent injunction as prayed for and therefore, the appeal fails.

34. In fine, on an over all assessment of the facts and circumstances of the case in a cumulative manner and on appreciation of oral and documentary material evidence on record, this Court dismisses this appeal as it is devoid of merits to prevent aberration of justice. Consequently, the Judgment and decree passed by the trial Court are affirmed by this Court for the reasons assigned by this Court in this appeal. Considering the facts and circumstances of the case, there shall be no order as to costs.

