

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.1450 of 1992

Kemalamuthu Chatram
rep. by N.K.Easwaramurthi
Tirunelveli Jn. .. Appellant

-Vs-

1. S.R.S. Sankarasubramania Pillai (died)
2. Mohamed Hussain
Proprietor
Shifa Clinic
Kailasapuram
Tirunelveli Junction
3. Rajalakshmi Ammal
4. S.R.S. Ramasubramaniam
5. S.R.S. Shanmugham
(RR3 to 5 brought on record as L.R.
of the deceased 1st respondent
vide as per order of Court dt.
20.6.2003 made in CMP
No.13826/02) .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree of the Principal District Judge, Tirunelveli, dated 7.11.1990 and made in A.S.No.140/90 reversing the judgment and decree of the Principal Subordinate Judge, Tirunelveli, dated 18.7.1990 and made in O.S.No.7/89.

!For Appellant : Mr.T.R.Rajagopalan

^For Respondents : Mr.S.V.Jayaraman, Senior Counsel,
for Mr.B.S.Gnanadesikan

:JUDGMENT

This second appeal has been brought forth by the plaintiff in a suit for recovery of possession and other reliefs from the judgment of the learned Principal District Judge, Tirunelveli, made in A.S.No.140/90, which arose from the judgment of the learned Principal Subordinate Judge, Tirunelveli, made in O.S.No.7/89.

2. The plaintiff Kemalamuthu Charities, Tirunelveli, represented by

its Manager, sought for the relief of recovery of possession of two items of immovable properties mentioned in Schedules I and II to the plaint along with damages for the acts done by the defendants and also the damages for the use and occupation of the property on the following allegations:

The properties mentioned in the plaint Schedules belonged to the plaintiff. The Tamil Nadu Act 18/60 is not applicable to the suit properties. The first defendant took the I Schedule of property on lease in the year 1960. There were proceedings between the plaintiff and the first defendant, wherein it was held that the Tamil Nadu Act 18/60 was not applicable to the suit properties. The II Schedule of property was not the subject matter of the lease in favour of the first defendant. The first defendant was permitted to take water from the well situated in the second item. There were neem and athi trees in the second item. The first defendant without any authorities sold the trees at the rate of Rs.500/- to the second defendant, who cut and carried away the same, and thus, the defendants are liable to make good to the plaintiff by paying Rs.1,000/-. The first defendant without any authority has leased out a part of the II Schedule of property to the second defendant in the month of March 1987. The second defendant put up an illegal construction to a height of 15 feet. The plaintiff sent a telegraphic message on 5.3.1987. But, the second defendant proceeded with the construction hastily and completed the same on 10.3.1987. The defendants were liable to pay damages for the use and occupation of the portion of the II Schedule of property at the rate of Rs.1,000/- per month from 4.3.1987. Thus, the defendants were liable to pay over a period of 22 months, a sum of Rs.11,500/-. The plaintiff sent a notice to the defendants on 13.3.1987 terminating the tenancy of the first defendant. The first defendant received the same; but, he intimated that he has deposited the rent in the account of the plaintiff with the Bank of Tamil Nadu, Tirunelveli. But, the same was done on his own accord. Under such circumstances, there arose a necessity for the plaintiff to file the suit for the above said reliefs.

3. The suit was resisted by the first defendant inter alia stating that the suit was not maintainable; that the Kemalamuthu Charities was a not a legal entity or a jurisdic person; that the properties never vested with the plaintiff charities; that the provisions of Act 18 of 1960 were applicable to the properties in question, and hence, the suit was not maintainable; that the plaintiff cannot take exemption under the guise of a trust; that the plaintiff was not a trust; that it was only a charge that has been created over the properties; that it was clear from the intention of the testator; that calling the plaintiff charity as a trust was a misnomer; that the II Schedule of property was an appurtenant site for the beneficial enjoyment of the first defendant; that it was a part and parcel of the demised premises; that the first defendant was not liable to pay the amount much less Rs.1,000/- towards damages; that the first defendant was not liable to pay any amount for the use and occupation as claimed in the plaint; that the suit notice was properly replied, and thus, the plaintiff was not entitled to the reliefs.

4. The second defendant contested the suit stating that the charge so provided was not exempted from the provisions of the Tamil Nadu Act 18/60; that the second defendant was not aware of the previous proceedings between the plaintiff and the first defendant; that the second defendant took a portion of the suit properties on lease from the first defendant only with the consent and knowledge of the plaintiff and also for the beneficial of the

trust; that he was not liable to pay any damages either for the occupation or for the management of the trust; that he was not a trespasser, and hence, the suit was to be dismissed.

5. The trial Court framed the necessary issues, tried the suit and decreed the same in entirety. An appeal was preferred by the defendants therefrom. The learned District Judge allowed the appeal in part, denying the relief as to the recovery of possession in respect of the I Schedule of property, while affirmed the judgment of the trial Court in other part. Hence, this second appeal has been brought forth by the plaintiff as regards the disallowed part, wherein the relief recovery of possession in respect of the first item was denied.

6. At the time of admission, the following substantial questions of law were formulated by this Court:

(1) Whether the learned Principal District Judge is right in holding that the suit before the Civil Court is not maintainable?

(2) Whether the compromise decree is clear and unambiguous in declaring that the suit properties absolutely belonged to Kamalamuthu Charities is the learned Principal District Judge right in holding that there was only a partial dedication?

7. This Court paid its full attention on the rival submissions made and had a thorough scrutiny of the entire materials available.

8. Advancing his arguments, the learned Counsel for the appellant would submit that there was a complete dedication to the trust, and hence, the suit was maintainable; that the properties would not attract the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act (Act 18/60); that the documents relied on by the parties were not considered in the proper perspective by the first appellate Court; that it is pertinent to note that Ex.B5 was the judgment of the Court rendered, wherein there was an amendment of the earlier scheme framed; that Ex.B5 was marked and relied on by the defendants; that a reading of the Clauses found therein cannot, but result in the dismissal of the appeal filed by the defendants before the first appellate Court; that it is pertinent to point out that the consent of the learned Advocate General was obtained under Sec.92 of the Civil Procedure Code, which being a sine qua non for framing a scheme for a public trust; that the first appellate Court has placed much reliance on the judgment rendered in O.S.No.22/41, wherein originally a scheme was framed; that the scheme was subsequently amended and modified in O.S.No.22/57 ; that from the very reading of the amended scheme, it would be clear that the funds and assets of the trust and all improvements and additions made to the existing properties fell into and be held as part of the trust properties; that considering the same, the first appellate Court has taken an erroneous view that there was only a charge created over the trust, and hence, the suit would not lie; that even Clause 5 of the decree, to which the defendants made lot of stress, only shows that the management and the right to conduct and perform the charities alone were vested with the hundars; that the scheme decree was originally framed and subsequently amended in accordance with the wishes of the founder; that it is pertinent to point out that the title of the properties is absolutely vested with the trust; that the first appellate Court has failed to consider that the scheme decree passed in O.S.No.22/41 has been subsequently amended, and what were all the amendments made in the scheme decree were not taken note of by

the first appellate Court, which lead to the erroneous conclusion that it is not a public trust; that in such circumstances, the judgment of the first appellate Court has got to be set aside, and the judgment of the trial Court has got to be restored.

9. Contrary to the above contentions put forth by the appellant's side, the learned Senior Counsel Mr.S.V.Jayaraman for the respondents would submit that the first appellate Court was perfectly correct in holding that the suit was not maintainable, since the provisions of the Tamil Nadu Act 18/60 would be attracted to the instant properties; that a reading of the original scheme framed in O.S.No.22/41 and as evidenced by Ex.B4, would clearly indicate that the plaintiff charity was not a trust; but, only certain obligations were created; that there was no dedication of the properties for any religious or charitable purposes; that only an insignificant part has been allotted for the same; that even the properties have been dealt with by the sharers; that there was an occasion when the properties were partitioned between the parties; that in the instant case, there was evidence to show that the income from the properties were substantially intended to be taken by the charity and not to be used for the charity; that only an insignificant and minor portion of the income was allowed to be used for the maintenance of the alleged charity; that under such circumstances, it would be clear that there was no complete dedication; that on the other hand, only for the maintenance of the charity, a minor portion of the income was expected or required to be used, and hence, it cannot be stated that there was a public charity to get exemption from Act 18/60; that the first appellate Court has clearly pointed out all the necessary clauses under the scheme decree in O.S.No.22/41 and found that it was not a public charity, and hence, only a charge was created over the properties, and under such circumstances, the first appellate Court's judgment has got to be sustained, and the appeal be dismissed.

10. After careful consideration of the rival submissions made, this Court is of the firm view that the judgment of the first appellate Court has got to be necessarily set aside.

11. The controversy between the parties in the second appeal would rest upon the question whether the plaintiff Kemalamuthu Charities, Tirunelveli, was a public trust or public charity, which would get exemption from the Tamil Nadu Act 18/60. The case of the appellant as could be seen above, was that it was a trust and a public charity, and hence, the properties of the plaintiff charities are exempted under the Act 18/60. On the contrary, what was all contended by the respondents before the Courts below and equally here also is that it was not a charity; but, only charges were created over those properties, and hence, it cannot be exempted from the provisions of Act 18/60. It would be more appropriate and advantageous to cite the decision of the Apex Court reported in AIR 1957 SUPREME COURT 797 (M.DASARATHARAMI REDDI AND ANOTHER VS. D.SUBBA RAO AND OTHERS), wherein a similar question came up for consideration and it has been held thus:

"Dedication of a property to religious or charitable purposes may be either complete or partial. If the dedication is complete, a trust in favour of public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached to, and follows, the property which retains its original private and secular character.

Whether or not dedication is complete would naturally be a question of fact to

be determined in each case in the light of the material terms used in the document. In such cases it is always a matter of ascertaining the true intention of the parties; it is obvious that such intention must be gathered on a fair and reasonable construction of the document considered as a whole. The use of the word "trust" or "trustee" is no doubt of some help in determining such intention; but the mere use of such words cannot be treated as decisive of the matter. The answer to the questions whether the private title over the property was intended to be completely extinguished or whether the title in regard to the property was intended to be completely transferred to the charity can be found not by concentrating on the significance of the use of the word "trustee" or "trust" alone but by gathering the true intent of the document considered as a whole."

12. From the very reading of the decision cited supra, it would be clear that whether or not a dedication is complete would normally be a question of fact to be determined in each case in the light of the material terms used in the document. But, in the instant case, admittedly, one Kemalamuthu, a Dancer, created the trust in the past namely centuries ago; but, no document is available. Admittedly, there was a suit filed for framing of a scheme in O.S.No.22/41 by the parties concerned. The judgment rendered therein was marked as Ex.B4. The first appellate Court had the support of the judgment in O.S.No.22/41 to hold that it is not a public charity, and under Act 18/60, it cannot have exemption. In the course of the judgment, the first appellate Court has extracted the relevant parts from Ex.B4, which runs as follows:

"It is a common case that the income from the properties left by Kemalamuthu was very large, and it was only a small fraction of such income that was necessary for performing the charities. The language used in most of these documents suggest that these people took the properties. Which were simply burdened or changed with a trust for charity, it may also be noted that none of these documents prescribe the line of devolution for consequent management."

After extracting the above said portion, the lower appellate Court has pointed out that the parties have also dealt with some of the properties in the past, and they have also divided the same.

13. At this juncture, it has to be pointed out necessarily that the first appellate Court has thoroughly failed to consider the judgment that was rendered by the Sub Court in O.S.No.22/57, which was filed for modification of the scheme, that was originally framed in O.S.No.22/41. Needless to say that once the original scheme framed in O.S.22/41, was modified subsequently by a judgment of the competent Court in O.S.22/57 as found under Ex.B5, the modified scheme has to prevail. It is not in controversy that such a modification was made by a subsequent judgment in O.S.22/57, and it has also taken its effect. This Court is of the view that the following parts in the judgment in O.S.22/57 have got bearing in the instant case.

"....

2. The "Kemalamuthu Charities" shall mean and include the charities specified in Schedule I hereto.

3. The properties described in Schedule II-A to II-E to the plaint in O.S.22 of 1957 on this Court's file and the other properties described in previous scheme decree in O.S.No.22 of 1941 on this Court's file are hereby declared to belong to the "Kemalamuthu Charities" and shall be held in trust for the

perpetual maintenance of the charities mentioned in para 2 supra. All the properties that may be acquired hereafter from the funds and assets of the trust and all improvements and additions made to the existing properties shall fall into and be held as part of the said trust properties.

4. The patta and municipal registry relating to the trust properties shall be made out in the name and under the description of "The Kemalamuthu Charities, Tirunelveli 1". All title deeds regarding the properties hereafter acquired shall likewise be made out in the name of the said charities.

....

12. The manager after defraying the expenses of the charities and of the management shall out of the surplus amount carry five per cent thereof to a Reserve Fund and invest it in an authorised bank in the name of the 'Kemalamuthu Charities' represented by the manager for the time being.

....

17. At the close of each year after the passing of the accounts at a meeting of the general body of hukdars or their nominees present in person or by proxy, the manager shall after setting apart the reserve fund as required above, distribute the remaining surplus income among the hukdars according to their shares. When the votes are equal, the manager shall exercise his power of casting vote. The manager shall call for such general meeting. The share amount shall be paid by the manager only to the several hukdars individually direct and receipts obtained from them for such payment. No interim division or payment shall be made on any account. No advance or loan shall be given to any hukdars or nominees on any account.

....

20. The manager shall do everything to protect the charity properties and when necessary file suits in consultation with the advisory committee and other necessary legal proceedings to recover them from trespassers tenants holding over etc. If he fails to do so any hukdar may do so and be reimbursed his costs from the charity funds."

14. From the above modified scheme, it would be abundantly clear that the properties, which were originally covered at the time of framing the original scheme in O.S.No.22/41, are exactly the properties covered under the modified scheme. It was clearly pointed out in the modified scheme that the properties described in the previous scheme in O.S.22/41, are declared to belong to Kemalamuthu Charities and shall be held in trust for the perpetual maintenance of the charities mentioned therein. It remains to be stated that as per the modified scheme, all the properties acquired thereafter from the funds and assets of the trust and all improvements and additions made to the existing properties should fall into and be held as part of the trust properties. Even the patta and municipal registry relating to the trust properties shall be made out in the name and under the description of Kemalamuthu Charities, Tirunelveli, and all title deeds regarding the properties acquired shall be made out in the name of the said charities, and thus, it would be clear that the properties should continue to vest and be taken in the name of the trust and not in the name of the individuals. What was all talked about was as to the management of the trust in the individuals and not as to the ownership or title or interest of the individuals on the trust properties. It is also further spoken about in the modified scheme that there should be a distribution of the remaining surplus income among the hukdars according to their shares by the manager after setting apart the

reserve fund for the purpose of the trust.

15. As pointed out above, Clause 20 reads that in order to protect the charity properties, the manager has to file necessary suits in consultation with the advisory committee and other necessary legal proceedings to recover from the trespassers tenants holding over, etc. A reading of the modified scheme would make it abundantly clear that all the properties in question, which were the properties covered under the original scheme, vest on the trust, and the manager of the trust was expected to take immediate proceedings for ejectment of the trespassers and also the tenants holding over.

16. The learned Senior Counsel for the respondents placed much reliance on Ex.B4, the scheme originally framed in O.S.22/41. The first appellate Court has also refused the relief placing much reliance on Ex.B4; but for a while, it has forgotten that Ex.B5 the modified scheme, has come into existence, which has superseded Ex.B4, and the modified scheme under Ex.B5, as stated above, would clearly show that all the properties of the trust have been in the trust only and not with any individual, and except the question of management, they could not claim anything over there. In view of the modified scheme under Ex.B5, it has to be necessarily held that the plaintiff charity is a public trust, and the provisions of the Tamil Nadu Act 18/60 would not be attracted to the properties in question. It was the only legal impediment felt by the first appellate Court to deny the relief. This Court is unable to see any substance in those contentions put forth by the respondents' side, and in view of the same, what was disallowed by the first appellate Court has got to be granted in favour of the appellant.

17. In the result, this second appeal is allowed, setting aside the judgment and decree of the first appellate Court and leaving the parties to bear their costs.

Index: yes

Internet: yes

To:

1. The Principal District Judge

Tirunelveli

2. The Principal Subordinate Judge

Tirunelveli

3. The Record Keeper

V.R. Section

High Court, Madras.

nsv/

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