**(2016) 09 KL CK 0015**

**High Court Of Kerala**

**Case No:** AS.No. 327 of 2001(OS.NO. 392/1995 of ADDL.SUB COURT,NORTH PARAVUR)

V.K. Manoj Pai — APPELLANT

Vs

Indirambal — RESPONDENT

**Date of Decision:** Sept. 7, 2016

**Citation:** (2016) 4 KerLJ 167 : (2016) 4 KLT 48

**Hon'ble Judges:** Mr. P. Bhavadasan, J.

**Bench:** Single Bench

**Advocate:** Sri. V. Rajendran (Perumbavoor) and Sri. George Varghese Kizhakkambalam, Advocates, for the Respondent No. 2; Sri. P.R. Venketesh, Advocate, for the Respondent No. 1; Sri. S.R. Dayananda Prabhu, Advocate, for the Appellant

**Final Decision:** Disposed Off

**Judgement**

**Mr. P. Bhavadasan, J.** - Plaintiff is in appeal against dismissal of a suit for recovery of possession with future mesne profits.

2. For a better understanding of the disputes, the relevant pleadings are extracted hereunder: Appellant is the son of deceased 6th respondent. Deceased respondents 5 and 6 are the sons of deceased Venkateswara Pai Madhava Pai. 7th respondent is the son of deceased 5th respondent. Appellant and respondents 1, 2, 3, 5 and 7 belong to Hindu Gowda Saraswatha Brahmin Community. Pending the appeal, respondents 5, 6 and 8 died. Their legal representatives were not impleaded as the appellant was prepared to take the risk of their non-impleadment.

3. Plaint schedule property belonged to the joint family of deceased Madhava Pai and his brothers. They partitioned the property in the year 1112 ME. Ext.A1 is the partition. The plaint schedule property is item No. 17 in A schedule to Ext.A1. The building situated in the property was constructed after Ext.A1 partition. The properties described in A schedule to Ext.A1 were set apart in common for meeting the common expenses. A schedule properties are not partiable. They belong to a Hindu Mithakshara Family comprising the appellant and the aforementioned

respondents. The appellant filed the suit for himself and on behalf of other members of the family. A schedule properties in the partition deed are inalienable and none of the family members could have encumbered the same. As per the partition deed, they are set apart to perform some spiritual rites. Executants 1 to 3 in Ext.A1 document were entrusted with the duties of upkeeping the family temples and discharging other spiritual obligations. Income from the properties described in item Nos. 12 to 17 in A schedule to Ext.A1 were to be utilised for conducting Upakarma, Ashtamirohini, Anandhavrutham, Udhwanadhwadhasi, Samaradhana, etc. in the family temple. That apart, the income should be utilised for conducting certain obsequies of the ancestors. There are express stipulations in Ext.A1 that those who committed default in discharging the duties would be personally liable. According to the appellant, the said stipulations in Ext.A1 legally constituted a private religious and charitable trust. Therefore the properties in A schedule to Ext.A1 are the trust properties and executants 1 to 3 therein were the trustees. and after them, their successors are liable to maintain the trust. Family members are the beneficiaries. 5th respondent and his father deceased Madhava Pai, against the stipulations in Ext.A1, sold out the properties. Later, the 2nd respondent also sold out certain properties to the 3rd respondent. In one of the buildings, the 5th respondent and others are running a ration shop under the guise of a licence issued to the 4th respondent. 8th respondent conducts trade in another shoproom with the connivance of the 3rd respondent. All these transactions do adversely affect the interests of beneficiaries of the trust. Therefore, the appellant contended that all these transactions are illegal and the properties are liable to be recovered from the possession of the respondents with mesne profits.

4. Respondents 1 and 2 filed separate written statements. Both of them contended that the suit is not maintainable in law. It is mainly because the children of deceased Madhava Pai were not made parties to the suit. Legal heirs of deceased Kesava Pai were also not impleaded. The so-called trust was also not impleaded in the suit. Hence the suit is bad for non-joinder of necessary parties.

5. According to the contesting respondents, the plaint schedule property exclusively belonged to deceased Madhava Pai. It was originally belonged to his father Venkateswara Pai. Subsequent to his death, there was a partition in 1112 ME and Madhava Pai got the properties in the said partition. Statement that the properties in A schedule to Ext.A1 were set apart as common property is denied by the respondents. Impartiability attributed to the properties in A schedule to Ext.A1 is also denied. It is incorrect to contend that the properties comprised in A schedule are the properties of a Hindu Mithakshara Joint Family. The appellant has no right to file the suit. If at all the appellant had any grievance, he should have filed a suit for declaration and other appropriate reliefs. At any rate a suit for recovery of possession simpliciter is not maintainable. At the most, the stipulations in Ext.A1 will create only a charge on the properties. The corpus is not dedicated for charity or spiritual benefits.

6. Heard Sri. S.R. Dayananda Prabhu, learned counsel for the appellant and Sri.Keerthivas Giri, learned counsel for the contesting respondent.

7. Sri.Prabhu mainly contended that the court below ought to have found that the plaint schedule property had been dedicated absolutely to the temple. Further, the trustees or their successors or beneficiaries have no power to sell the same against the covenants in Ext.A1. Court below ought to have found that as per Ext.A1 partition deed, the properties described in A schedule therein were exclusively set apart for meeting the expenses for religious festivals like Upakarma, Ashtamirohini, Anandhavrutham, Udhwanadhwadhasi, Samaradhana and Ahass for the fifth day of arattu festival in Varahadeva temple. Therefore, it was thought as impartiable and inalienable. Any transaction done in violation of the stipulations in Ext.A1 is void.

8. Per contra, Sri.Keerthivas Giri contended that the recitals in Ext.A1 would categorically show that there are many spiritual and other religious purposes for which the income from the property had to be spent, clearly indicating that the property in dispute was not vested in the idols. It is his contention that if at all the recitals in Ext.A1 amounted to a dedication, it could only be a partial dedication of profits and there is no dedication of the corpus.

9. In order to appreciate the rival contentions, it is essential to revisit the fundamental principles relating to Hindu religious and charitable endowments. The basic concept of a religious endowment under Hindu law is different from the concept of trust known to English law. Hindus made no distinction between religious and charitable purposes. In other words, amongst Hindus, there is no marked distinction between a religious and a charitable endowment. In **Ram Saroop Dasji v. S.P. Sahi (AIR 1959 SC 951)** following proposition is laid:

"Gifts to idols already installed and consecrated or to be installed and consecrated and for their worship, gifts for the worship of God, gifts for the building of temples, gifts for religious festivals with regard to idols, and gifts to Math, have all been held to be valid religious endowments. In essence, therefore in Hindu law, religious and charitable endowments are not confined to cases of public utility or benefit, but also acquisition of religious merit is one of the criterion. The halo, which perceivably envisages both types of endowments, is that the purpose should be one ordained by Shastras and Hindu tenets."

Mayne''s Hindu Law and Usage vividly explain the said concept in the following words:

"Gifts for religious and charitable purposes were impelled by the desire to acquire religious merit. They fall into two divisions, ishta and purta; the former meant sacrifices and sacrificial gifts and the latter meant charities. The former led to heaven and the latter to moksha or emancipation; charity was thus placed on a higher footing than religious ceremonies and sacrifices. Manu says:''Let him, without tiring always after sacrifices (ishta) and perform works of charity (purta) with

faith; for offerings and charitable works made with faith and with lawfully earned money procure endless regards. Let him always practise, according to his ability with a cheerful heart, the duty of liberality (danadharma) both by sacrifices (ishta) and charitable works (purta) if he finds a worthy recipient for his gifts''."

An interesting example as to what cannot be a Hindu religious endowment is stated by the Supreme Court in **Ramachandra Shukla v. Sree Mahadeoji (AIR 1970 SC 458)**. A Hindu, who was a wrestler himself, with the object of attracting wrestlers and promoting the game of wrestling, installed on the arch-gate of the grove an idol of Mahaveerji, a Shivalingam over a small room, which stood next to the gate and a tasweer of Hazrath Ali. The dominant object of the dedication was to attract wrestlers of both Hindu and Muslim communities to the akhara and provide for them the facility for invoking the divine benefaction before they participated in wrestling. In that case, the Supreme Court held that a dedication for promotion of a sport or a game was not a charitable object under the Hindu Law. Further it was observed that two Hindu idols and a tasweer of Hazrath Ali installed with an intention to be worshiped by the members of Hindu and Muslim communities without any distinction could not be classified as a Hindu religious endowment.

10. The word "dedication" means the act of dedicating and the word "dedicate" means to devote for a sacred purpose. Under Hindu Law, the word "dedication" includes donation, establishment, surrender or give up. All these are totally distinct. They have their separate essentials. Thus essentials of donation will depend on the nature of donation. Dedication to be made by Hindus are well regulated by Shastras.

11. Learned author V.K. Varadachari on Hindu Religious and Charitable Endowments (4th Edition) stated the essentials of valid dedication as follows:

"Three certainties are required for the creation of an endowment -

(1) a declaration of trust which is binding on the settlor,

(2) setting apart definite property and the settlor divesting himself of the ownership thereof, and

(3) a statement of the objects for which the property is thereafter to be held viz., the beneficiaries."

12. According to the principles of Hindu Law, partial dedication is only a charge on the income from the property in favour of the trust. The property retains its secular character and is inherited by natural heirs as any other property (see - **M. Dasaratharami Reddi v. D. Subba Rao - AIR 1957 SC 797**). The view taken by the Privy Council in **Hemanthakumari v. Gauri Shankar (AIR 1941 PC 38)** is that a partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object, but also where the owner retains the property himself, but grants the community an easement over it for certain specific purposes, for instance, a bathing ghat.

13. Authorities on the point show that application of income alone to the purposes of a trust would normally indicate a charge and not a dedication.

14. With the above principles in mind, I shall try to analyse the case on hand. The relevant clause in Ext.A1 reads as follows

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The rituals to be performed and the expenses to be incurred therefor and the obsequies of ancestors to be performed are clearly indicated in Ext.A1. Further recitals in Ext.A1 would show that the persons, who were entrusted with the management of certain properties for spiritual benefit, were to spend the same for the specific object. and surplus, if any, left behind were to be utilised by the persons in management for the augmentation of the income. It is also mentioned in Ext.A1 that they have to account for the income and expenditure to the remaining members in the family .

15. Learned counsel for the contesting respondent contended that on a reading of Ext.A1 in its entirety, it will be evident that there is no dedication of the corpus for religious or charitable purposes. What is directed in Ext.A1 is only the manner of appropriating the profits from certain properties and that should be done strictly adhering to the stipulations therein. The persons in management are liable to account for the income and the expenditure. It is therefore contended that the clauses in Ext.A1 could only create a partial dedication.

16. In M. Dasaratharami Reddi''s case (supra), the following proposition of law is laid down by the Supreme Court:

"Now it is clear that 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.

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If the income of the property is substantially intended to be used for the purpose of the charity and only an insignificant and minor portion of it is allowed to be used for the maintenance of the worshipper or the manager, it may be possible to take the

view that dedication is complete. If, on the other hand, for the maintenance of public charity a minor portion of the income is expected or required to be used and a substantial surplus is left in the hands of the manager or worshipper for his own private purposes, it would be difficult to accept the theory of complete dedication.

It is naturally difficult to lay down a general rule for the solution of the problem. Each case must be considered on its facts and the intention of the parties must be determined on reading the document as a whole."

Following the decision in M. Dasaratharami Reddi''s case, the Supreme Court in **S.S. Pillai v. K.S. Pillai (AIR 1972 SC 2069)** held as follows:

"The 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 a charity is created. If the dedication is partial, a trust in favour of a 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 a dedication is complete is a question of fact to be determined in each case on the terms of the relevant document if the dedication was made under a document. In such a case it is always a matter of ascertaining the true intention of the parties. Such an intention must be gathered on a fair and reasonable construction of the document considered as a whole. ....."

17. The Supreme Court in **Jadu Gopal v. Pannalal (AIR 1978 SC 1329)** quoted from the renowned work by Justice B.K. Mukherjea on "The Hindu Law on Religious and Charitable Trusts". It reads as follows:

" ..... there are cases where although the document purports, on the face of it, to be an out and out dedication of the entire property to the deity, yet a scrutiny of the actual provisions reveals the fact that the donor did not intend to give the entire interest to the deity, but reserved some portion of the property or its profits for the benefit of his family relations. In all such cases, the Debuttar is partial and incomplete and the dedicated property does not vest in the deity as a juridical person. It remains with the grantees or secular heirs of the Settlor subject to a trust or charge for the religious uses."

18. A Division Bench of this Court in **Ramaswamy Iyer v. Suppalu Ammal (1964 KLT 1098)** took a view that a direction to pay annuities from a small portion of the income from the properties dedicated does not take away from or cut down or is not repugnant to the absolute estate. On a reading of the terms and conditions in Ext.A1, in the light of the legal principles mentioned above, I am of the view that the trial court is right in holding that there was only a dedication of the profits for religious and charitable purposes, without tying down the corpus.

19. On a careful scrutiny of Ext.A1, it can be seen that item No. 19 in A schedule had been set apart to the share of Kesava Pai (executant No. 1). Other properties in A

schedule had been set apart to Madhava Pai (executant No. 1). It is clear that Madhava Pai was bound to conduct the festivals in the temple by utilising the income from the properties. It has come out in evidence that by certain documents said Madhava Pai and Narayana Pai had assigned the properties to different persons. The court below appreciated the evidence correctly and held that the recitals in Ext.A1 amounted only to a partial dedication for the purpose of spiritual salvation of the parties. Further, the court below rightly discarded the oral evidence of the appellant. PW1 was aged only 24 years at the time of deposition. He is incompetent to speak about the intention of the parties in Ext.A1 which was executed in 1117 ME (1937). PW2 admitted in cross-examination that he has not even seen Ext.A1 document. On going through his testimony, it is evident that he is also not competent to speak about the intention of the executants in Ext.A1. Therefore, it is clear that the oral evidence adduced in this case has no relevance and no weight can be attached to the same. The trial court is right in holding, in the light of the evidence available, that there is only a charge on the properties created by the recitals in Ext.A1 document, that too by a partial dedication. It goes without saying that whoever holds the property could hold it only subject to the charge created. The trial court for valid reasons disallowed the prayers in the suit.

20. I find no reason to interfere with the finding of the trial court. Hence the appeal is dismissed.

21. All pending interlocutory applications will stand closed.