Sappani Mohamed Mohideen & Anr vs R. V. Sethusubramania Pillai & Ors on 7 December, 1973

Equivalent citations: 1974 AIR 740, 1974 SCR (2) 594, AIR 1974 SUPREME COURT 740, 1974 (1) SCC 615, 1974 2 SCR 594, 1975 (1) SCJ 246

Author: P.K. Goswami

Bench: P.K. Goswami, S.N. Dwivedi, Y.V. Chandrachud

PETITIONER:
SAPPANI MOHAMED MOHIDEEN & ANR.

Vs.

RESPONDENT:
R. V. SETHUSUBRAMANIA PILLAI & ORS.

DATE OF JUDGMENT07/12/1973

BENCH:
GOSWAMI, P.K.
BENCH:
GOSWAMI, P.K.
DWIVEDI, S.N.
CHANDRACHUD, Y.V.

CITATION:
1974 AIR 740 1974 SCR (2) 594
1974 SCC (1) 615

ACT:
Religious Endowment- Whether absolute or partial-Tests for determining

HEADNOTE:
In 1882, there was a partition of ancestral properties amongst 5 brothers by means of a partition deed Three of the 5 brothers took the properties mentioned in the relevant schedules for enjoyment severally, and certain properties were kept for enjoyment in common. Two brothers K and V were enjoying their shares jointly, Clause 1 of the deed excluded from partition the properties specified in certain clauses. One of the clauses is cl. 8 which describes certain charity purposes and provides that the properties mentioned in the 8th schedule and allotted for charity shall

be administered by K. Clause 9 makes a special provision in connection with three religious charities in relation to a temple. The clause mentions that a sum of Rs 45/- had been spent annually for these three purposes, that arrangement, had been made for contribution of sums amounting to Rs 13/- by three brothers that the dry lands mentioned in the 9th schedule shall be administered by K and from out of the income of the said properties and from out of their own funds K and V shall perform the aforesaid charities by spending the balance of Rs 32/without fail. The property mentioned in cl. 9 was not excluded from partition. At the time of the partition the income from the property in the 9th schedule was in fact not sufficient to meet the expenses of the three charities directed to be performed. The property having been alienated, the respondents filed a suit for a declaration that there was an absolute endowment of the property for the performance of the religious charities and that the alienation was invalid.

The trial Court decreed the suit. The first appellate Court held that there was no absolute dedication and the High Court, in second appeal, restored the decree of the trial Court.

Allowing the appeal to this Court

HELD : Whether an endowment is absolute or partial, primarily depends on the terms of the grant. If there is an express endowment, there is no difficulty, but if there is only an implied endowment, the intention has to be gathered on the construction of the document.as a whole. If the words of the document are clear and unambiguous, the question of interpretation would not arise. If there be ambiguity. the intention of the founders has to be carefully gathered from the scheme and language of the grant. Even surrounding circumstances, subsequent dealing with the property, the conduct of the parties to the document and long 'usage of the property and other relevant factors may have to be considered in an appropriate case. 1607D-F]

In the present case, it is clear from the terms of cl.9 and other material provisions of the deed that there was no absolute endowment of the property to the temple or a trust. The property, however, is impressed with the obligation or charge of performing the religious charities mentioned in cl.9 of the partition deed in the manner indicated therein. The alienation is therefore, not invalid and the obligation to perform the charity follows the property. [607F-G; 608A-C]

(1) While cl. 8 recites that 'the properties mentioned in the 8th schedule and allotted for charities shall be administered by K'. cl. 9 recites that dry land mentioned in the 9th Schedule shall be administered by K.' There is no reference in cl. 9 that the land was allotted for charity'. [602D]

(2) If the property was absolutely dedicated to the temple for the performance of the religious charities the intention

of the founders would have been defeated the income from the, property being little or nothing. A construction of a document which would frustrate the intention of the founders should be avoided. To gather such intention at the time when the document came into existence the Present value of or present income from, the property is irrelevant. [602H-603B]

595

(3) It is because of the obligation to keep alive the 3 charities that the property was not allotted to the temple, but was allotted to K and V, so that they may get some recompense out of its income some day. [602G-H]

(4) The present case is far from a case where the entire income of the property has been endowed to a trust to sustain a conclusion that the entire corpus belongs to the trust. [608 A]

(5) This conclusion drawn from the intrinsic evidence of the document itself, is reinforced by the subsequent conduct of the parties and the various transactions effected from time to time with respect to the property. [603 E-F; 607H]

Sree Sree Ishwer Sridhar Jew v. Sushila Bala Dasi and others, [1954] S.C.R. 407414 Menakuru Das aratharami Reddi v. Duddukuru Subba Rao,[1957] S.C.P. 1122, 1128 and Ram Kissore Lal v. Kamal Narain, [1963] Supp. (2) S.C.R. 417/424/428, followed.

Sri Sri Iswar Bhubaneswari Thakurani v. Barojo Nath Dey and Others, A.I.R. 1937 Privy Council 185, Gopal Lal Sett v. Purna Chandra Busak and others, A.I.R. 1922 Privy Council 2531254, Hulada Prasad Deghoria v. Kalidas Naik and others, A.I.R. 1914 Cal. 813/814-815, North-Eastern Railway Co., v. Lord Hastings, [1900] A.C. 260, Drammond v. Attorney General, (1849) 2 H.L.C. 837, The Attorney-General v. The Master Wardens, &c. of the wag Chandlers, (1873)Eng. & Irish Appeal, 6 L.R., 1/19, Dr. Villiam Jack, Principal and the Professors of the University and King's College of Aberdeen v. Sir Thomas Burnett, of Leys Bart. (1846) XII Clark & Finnelly, 812, and Mayre on Hindu Law and Usage 11th ed. P. 923, Section 792 and Halsbury's Laws of England, 3rd ed. Vo. 4, p. 306 , referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1555 of 1967.

Appeal by Special leave from the judgment and Decree dated the 5th January, 1967 of the Madras High Court in Second Appeal No. 82 of 1963.

K. S. Ramamurthi and B. R. Agrawala, for the appellants, M. K. Ramamurti and J. Ramamurti, for the respondents. The Judgment of the Court was delivered by GOSWAMI, J. In this. appeal we have

to go back to a period close upon a passing century to divine what a Hindu Joint Family that had separated at that distant date, thought, contemplated, did and above all intended not only then but also for the future. It was the year 1882 and precisely on 13th May of at year an instrument of partition was executed and registered amongst five brothers, namely, Sivarama krishna Pillai, Kailasam Pillai, Venkatachalam Pillai, Chidambaram Pillai and Namasivayam Pillai sons of Subramania Pillai. The family appears to be religiously disposed and was keen to perpetuate the pious ancestral ideology, A genealogy given in the statement of case by the appellants gives the appropriate picture for the purpose of this appeal:

Subramenia Pillai

---------- Shiverama kailasam Venkatachalam Chidambaram Navasiva krishna Pillai Pillai Pillai yam Pillai Pillai Sethusubramanya Pillai Kailasam pillai Venkatachalam Gopalakrishan Prianayagam (Junior) Pillai (Jr.) Pillai Pillai (died in 1950) (died in 1953) (D-6) (D-7) R.V. Sthusubramanya R.P. Sethusubramanya Pillai Pillai (1st plaintiff) (2nd plaintiff)

---------- To start with the deed of partition, it appears, the properties of the family were ancestral and were partitioned amongst the five brothers reserving some to be enjoyed in common and allotting certain properties to charities to be administered by one of their brothers, Kailasam Pillai. Reading the entire. document it appears that even after the partition Kailasam Pillai and Venkatachalam Pillai desired to enjoy their shares of the property jointly and were, in great cordiality while the other three brothers lived and enjoyed their properties separately. It also appears that the second and the third brothers, Kailasam and Venkatachalam were given to piety or, at any rate, were perhaps considered as responsible and solvent persons, who could be entrusted to administer the charities indicated in the deed. There is also reference to family debts and other amicable adjustments amongst the brothers and also to voluntary relinquishment of a share by Sivaramakrishna Pillai. With this brief synopsis we may now extract some material provisions of the partition deed (Ext. Al) which was written in Tamil and has been officially translated:

Clause 1: "Out of the entire properties worth Rs. 28,000/: belonging to our family and mentioned in the schedules herein, excluding the properties situate in Rasavallipuram held in common as detailed in para 6 and mentioned in the sixth schedule here, excluding the charity properties as detailed in para 8 and mentioned in the eighth schedule excluding the other wet, dry (lands) gardens and all the properties situate in Kattampulimanapadayur excluding the property, kept in common from October 1880 as detailed in para 7 and mentioned in the seventh schedule herein, situate in one crop cultivation village Gananthanparai, in the other properties, settled in favour of us in one month of September 1881, dry and wet lands, palmyra trees, etc. in Kilakadu situate in Alangulam Village attached to Naranammalpuram Jamabandi area, whereas Sivaramakrishna Pillai has

relinquished his share in favour of the other four persons as detailed in para 4 out of the aforesaid properties, excepting the properties held in common as detailed in para II and mentioned in the 10th schedule the other properties were divided among the other four persons with reference to good and bad by casting chits in the month of January 1882".

Clause 2 refers to family houses which need not be quoted.

Clause 3 :"As division was effected as detailed in paras 1 and 2, the first Schedule properties fell to the share of Sivaramakrishna Pillai amongst us, the second and third schedule properties to two persons Kailasam Pillai and Venkatachalam Pillai the fourth schedule properties to Chidambaram Pillai and the fifth schedule properties to Namasivayam Pillai. Ever since the properties were allotted as aforesaid, Kailasam Pillai and Venkatachalam Pillai were enjoying the two shares of their properties in common and the other three persons were enjoying all the other shares of properties separately. That is the second item of Kattampuli land mentioned in fourth schedule which fell to the share of the Chidambaram Pillai and the second item of Kattampuli land mentioned in the fifth schedule which fell to the share of Namasivayam Pillai were enjoyed by Kailasam Pillai under usufructuary mortgage rights". Clause 6: "As the Kulukuthurai Inam Palmyrah trees situate in Rasavallipuram mentioned in the sixth schedule here and one-third share belonging to us five persons could not be conveniently enjoyed by division, it was to be enjoyed in common and the income derived therefrom should be given to the early morning pooja of the seventh day festival in the month of "Thai" of Sabhapati Naicker Deity in the Siva Temple situate in Rasavallipuram for expenses for Archana on the 4th Thai Friday every year Clause 7: "The dry lands, palmyrah trees, gardens and other buildings situate in Gangathanaprai mentioned in the 7th schedule herein should be enjoyed in common. The income from the said dry lands and palmyrah groves should be divided into five shares and two such shares should be enjoyed in common. by Kailasam Pillai and Vankatachalam Pillai and the other three shares by the other three persons independently".

Clause 8: "The properties mentioned in the 8th schedule herein and allotted for charity shall be administered in person by Kailsam Pillai and from out of the income of the first item property shall be given to mid-day offering of Thirumanjanam expenses in the Siva Temple in Rasavallipuram. From the second item properties the expenses for the evening pooja of the said temple shall be met, from the third item property the expenses for pooja of Lord Siva at Sepparai on "ani" Uttiram day should be met and from the 4th item of the property. They shall feed four brahmins in the Siva Temple Sepparai during Dwadashi days The next clause No. 9 which is the bone of contention between the parties may now be quoted:

Clause 9: "In the Sepparai Siva Temple established by our parents, for meeting expenses of lamp burning for ever and one measure of rice for daily offering to God

and Archana expenses, a sum of Rs. 451- is spent annually. Out of this a sum of Rs. 5 per year which shall be paid by Sivaramakrishna Pillai, Namasivayam Pillai and a sum of Rs. 3 per year by Chidmbaram Pillai to Kailasam Pillai and excluding the sum of Rs. 13/- as given in the three items aforesaid for the balance of Rs. 32 the dry land mentioned in the 9th schedule shall be administered in person by Kailasam Pillai and spent from out of the income of the said properties and from out of their own funds Kailasam Pillai and Venkatachalam Pillai shall perform the aforesaid charity without fail".

Clause 12: "Kailasam Pillai and Venkatachalam Pillai shall in respect of their properties in common and the other three in respect of their respective properties separately and absolutely enjoy with powers of alienation by way of gift, exchange, sale etc. In the share of properties allotted to Kailasam Pillai and Venkatachalam Pillai the other sharers have no right and similarly in the share of properties of the other sharers the aforesaid two persons have no right. Likewise in the property held by the other three persons, in the property of which one of them the others have no manner of right".

Then nine schedules are given showing the properties that have fallen to the shares of different brothers. The ninth schedule property, which is the suit property, is described in Ext. A-1 as follows:

The 9th schedule situate within the jurisdiction of the aforesaid Sub-District Naranathanapuram Jamabandi attached to Alangulam village and Cilakadu wet irrigated by well, tamarind trees and dry and the particulars of these are as follows:-

Extent Dry Wet Survey Letter Acres De.

No. Wet 866 A-2 0-47 The number of tama- Dry 890 C-2 1-00 rind trees stand-

	343	c	0-30	ing near the tank
	360	D	0-83	bund of the afore-
	376	A-2	1-22	said village, 72
Dry	377	A	0-68	
	428		9-37	
	845	B-6	1-21	
	901	C-2	0-35	
	902	A-2	0-40	
	903	c-	0-20	
In all wet and Dry			16-05	

This ninth schedule property is the suit property. It appears that Kailasam Pillai in the meantime died as is apparent from the partition deed (Ext. A-3) executed between Venkatachalam Pillai and Thirumalai Vadvammal widow of Kailasam Pillai on 21-1-87. Clause 19 of this deed may be quoted:

> "Sivaramakrishna Pillai, Chidamabram Pillai, Venkatachalam Pillai, son of Namasivaya Pillai, these persons were contributing a sum of Rs. 13/- every year to the said Kailasam Pillai for perpetual burning of lamp at Chepparaiswami Nataraja Sannathi. Henceforth the said Venkatachalam Pillai shall receive the said amount and perform the charity". In this partition deed, the properties of Kailasam Pillai and Venkatachalam Pillai were divided and Venkatachalam Pillai took the responsibility of performing the charities entrusted to Kailasam Pillai under clause 9 of the first partition deed of 1882. It appears from Ext. B-1 dated 8-9-1937, which is a sale deed in favour of S. Srinivasa Iyengar, that on 8th November, 1921, the suit properties had been "usufructually mortgaged for Rs. 11,000/- in favour of one Maragathammal by Gomathi Ammal for the purpose of discharging the family debts for a period of five years. The period was extended by a further usufructuary mortgage of the properties for a sum of Rs. 7350/- on 26th April, 1923. It also appears that the rights under the two usufructuary mortgage deeds were assigned to S. Srinivasa Iyengar by a deed of' assignment in November, 1962, executed by the said Maragathammal for a consideration of Rs. 18,350/-. Since S. Srinivasa Iyengar made repeated demands for clearing up the debts due under the usufructuary mortgages the said properties along with some other land were sold to him by Kailasam Pillai (Jr.), Venkatachalam Pillai (Jr.), Gopalakrishna Pillai (defendant 6, briefly D-
>
> 6) and Perianyagam Pillai (defendant 7. briefly D-7) for a consideration of Rs.

18,350/-. So this sale in favour of Srinivasa Iyengar was in "discharge of the said othi (usufructuary mortgage) debts" and the properties which had already been in possession of Srinivasa Iyengar continued to remain in his possession now as owner of the properties with "power of alienation by way of gift, exchanges, sales, etc. absolutely".

A third partition deed (Ext. A-10) had been executed on 19th October, 1936, amongst Kaliasam Pillai (Jr.), Venkatachalam Pillai (Jr.), Gopalakrishna Pillai (D-6, and Prianayagam Pillai (D-7) in order to later facilitate absolute sale of the properties in favour of S. Srinivasa Iyengar in 1937. It was stated in this deed (Ext. A-10) that "from the property endowed to the temple of Sepparai Algiakootha we shall keep the eternal lamps burning, collect the sums which our grandfather endowed for our family and use special efforts to perform the charities". In clause 14(1) of this deed it was stated as follows:-

> "In as such as sharer No. 1, Kailasam Pillai (reference to Kailasam Junior) has voluntarily relinquished in favour of the other 3 sharers the right to perform and administer the family charities and the properties endowed for the same; sharer No. 1 shall not have at any time any right to said charities or endowments. . . . "

Thus on 8th September, 1937, a sale deed for the suit property and other lands (Ext. B-1) was executed in favour of S. Srinivasa Iyengar Avergal by Kailasam Pillai (Jr.), Venkatachalam Pillai (Jr.),Gopalakrishna Pillai (D-6) and Perianayagam Pillai (D-7) for a consideration of Rs. 18350/-. Srinivasa Iyengar also got his name recorded in the patta. On 10th June, 1943, S. Srinivasa Iyengar

sold by Ext. B-2 the suit property, etc. to Sappani Ahmad Mohideen, father of the two appellants herein, for a consideration of Rs. 22600/-. Sappani Ahmed Mohideen got his name recorded in the patta in due course. The second appellant, who is the brother of the first appellant, sold some portion of the suit property to Defendants 3 to 5 on 7th April, 1960. This appears to be the history and background of the litigation.

The plaintiffs (the first two respondents) herein are the great grandsons of Venkatachalam Pillai son of Subramania Pillai. They instituted a suit in the court of munsif Tirunelveli on 5th September, 1960, impleading the purchasers of the suit property as Defendants 1 to 5 and Gopalakrishna Pillai, uncle of the plaintiffs and Perianayagam Pillai, father of the 2nd plaintiff, as the defendants 6 and 7 respectively, praying for declaration that the suit properties belong to the trust and that all alienations in respect of them are not binding on the trust and for possession of the suit properties from defendants 1 to 5 to "the lawful trustees". One written statement was submitted on behalf ,of the defendants 1 to 5 and the suit proceeded ex-parte against defendants 6 and 7, who were not even examined as witnesses in the trial.

Two points were in dispute during the trial, namely, whether the suit was barred by limitation (issue No. 2) and whether the deed dated 13th May, 1882, creates an absolute dedication of the suit property or only a charge on the income of the said property (issue No. 3). The 1st plaintiff Who was a young man of 28 years on the date of his giving evidence, examined himself and two other witnesses. The defendants examined only the first defendant. The trial court answered both the above issues in favour of the plaintiffs and decreed the suit. On appeal the Subordinate Judge, Tirunelveli, affirmed the finding of the Munsif on the question of limitation but reversed that relating to issue No. 2. He held that the entire income of the suit property was not sufficient even to meet a minute fraction of the expenses and, therefore, the question of absolute dedication of the property did not arise. It may be noted here that the trial court as well as the Subordinate Judge held that the income from the property was not sufficient to meet all the expenses of the charities directed to be performed. The value of the suit land in 1882 was found by the Subordinate Judge to be only 40/- after elaborate discussion of the value of the neighboring properties which were subject matters of different sales at the relevant time. When the matter was taken to the Madras High Court in second appeal, the High Court held that the family had divested itself of the ownership of the suit property and that the deed of partition created an absolute endowment of the suit property for the purpose of performing the charities mentioned therein. It further held that the suit property was not allotted to Kailasam Pillai's share and he was only made a trustee of the properties. In the view the High Court took, the second appeal was allowed and the trial court's decree was restored. Hence this appeal with special leave.

The only question that has been canvassed in this appeal before us by the learned counsel for the appellants is that the deed of partition (Ext. A-1) did not create an absolute endowment of the suit properties for performing the three kattalis (endowment for religious charities) mentioned therein, This takes us to the construction of the document as a whole with particular reference to the clauses which we have set out earlier therefrom. The deed of partition discloses a scheme of partial division of the ancestral properties amongst the brothers. Three of the five brothers have taken properties mentioned in the relevant schedules for enjoyment severally and certain properties were kept for

enjoyment in common. Two brothers, Kailasam Pillai and Ven- katachalam Pillai were enjoying their shares of the properties jointly. Provision was made for discharge of family debts and different mutual adjustments have also been recorded. Clause I of the deed, which we have set out earlier, is very significant. it excludes from partition properties specified in certain clauses including the charity properties as detailed in para 8 and mentioned in the eighth schedule. Property mentioned in clause 9 is not excluded from partition. When we look to clause 8 in this context, we find that the properties mentioned in the eighth schedule are "allotted for charity" and "shall be administered in person by Kailasam Pillai"(emphasissupplied).Inthisclause four objects of charity have been mentioned, the expenses of which have to be met from four items of property allotted for them. Besides clause 8 refers to mid-day offering of Thirumanjanam expenses in the Siva Temple in Rasavallipuram, and also to the evening pooja of the said temple. There is reference in this clause also to the expenses for pooja of Lord Siva at Sepparai on "Ani" Uttiram day and also for feeding four brahmins in the Siva Temple Sepparai during Dwadashi days. What is, therefore, excluded for charity purposes in clause I is clearly described in clause 8 of the partition deed. Having provided for all these ,charities in clause 8, clause 9 makes a special provision in connection with the same Sepparai Siva Temple "for meeting all expenses of lamp burning for ever and one measure of rice for daily offering to God and Archana expenses. . . ". Clause 9 takes note that a sum of Rs. 45/- has been spent annually for these kattalais'. Arrangement has been made therein for contribution by two brothers of Rs. 51 each per year and a sum of Rs. 3/- per year by another brother, totalling a sum of Rs. 13/- which has to be given by them to Kailasam Pillai. it may be noted that these two brothers are unconnected with the suit property after partition. Clause 9 thereafter recites that "for the balance of Rs. 32/- the dry land mentioned in the ninth schedule shall be ad- ministered in person by Kailasam Pillai and spent from out of the income of the said properties and from out of their own funds Kailasam Pillai and Venkatachalam Pillai shall perform the aforesaid charity without fail". (emphasis supplied). The draftsman, who prepared this deed, had good reasons to mention in clause 8 that "the properties mentioned in the eighth schedule and allotted for charities shall be administered in person by Kailasam" while in clause 9 he chose to record that "dry land. mentioned in the 9th schedule shall be administered in person by Kailasam Pillai". There is no reference in clause 9 that this land shall be "allotted for charity" whereas those words clearly appear in clause 8 of the deed. In the entire scheme of the deed there must be a legitimate justification for not allotting the lands mentioned in the ninth schedule for charity. Besides, it is clear on the findings of the courts below that the value of the property in 1882 was in- considerable and the income out of it was not sufficient to meet tile expenses for the charities. A device had, therefore, to be made to keep alive the sacred memory of their parents who were keen to continue these charites out of the ancestral property. Having divided the properties in the manner done in the partition deed, each of the brothers contributed according to his capacity and by mutual adjustment a very substantial share of the expenses was to be borne by Kailasam Pillai and Venkatachalam Pillai, who were entrusted to perform the charities without fail, if necessary, which was even inevitable at the time, out of their own funds. Since it is a common ground that the charities have been performed for years, the burden of the liability must have fallen on kailasam Pillai and thereafter on Venkatachalam Pillai, It is because of this feature in keeping alive the three charities mentioned in clause 9 that the lands in the ninth schedule were allotted to Kailasam Pillai and Venkataclaalam Pillai so that they may get some recompense out of the income of the property if it may somehow or some day be forthcoming. The entire income from the property was little or nil and was not absolutely dedicated to the Temple

for the charities. We have got to look at the matter from what the founders intended in the year 1882 and no construction. can be given to the document which would frustrate the intention of the founders to keep alive the charities by appropriate performance. If these dry and then barren properties of the ninth schedule were absolutely dedicated to the Temple for performance of the three kattalais the intention of the founders would have been defeated. It would have been nobody's business, income being little or nil. We are, therefore, clearly of opinion that there is no ambiguity about any of the provisions of this deed which clearly go to show that there was no intendment to create an absolute endowment of the suit property to the Temple or the trust.

The present value of the property and the present income therefrom will, in our view, not be relevant nor a safe aid to gather the intention of the parties in 1882. We are unable to agree with the High Court that "the wording" of the deed makes it 'clear beyond doubt' that there is an absolute endowment of the property. We are also unable to hold, as the High Court has done, that "the family has divested itself of. the ownership and Kailasam has been created trustee therefore". Ext. A-3 on which the High Court relied to reach its conclusion does not, in our opinion, make any departure from the nature of the transaction nor from the original intention of the parties, particularly in view of clause 19 thereof already quoted above. Similarly Ext. A-10 executed in 1936 on which the High Court relied does not unerringly point to any different intention even of the succeeding generation. The first extract quoted earlier from Ext. A-10 does not, in our opinion, relate to the ninth schedule property when the charity has been specifically endowed in the eighth schedule to Ext. A-1. Again ,the second extract from Ex t. A-10, namely, clause. 14(1), earlier set out, does not, in our view, run counter to the original intention of their ancestors. The initial intention to be gathered from an ancient document when the provisions are reasonably clear cannot be readily altered to suit changing conditions over the ears. Even so, if somehow it is possible to hold that the subsequent dealing with the property is consistent with the intention of the original parties to the document, as interpreted by us on the terms of the original deed, that course has to be preferred by the court. Besides, in interpreting ancient documents courts have to be cautious to guard against warping of the issue by reference to subsequent conduct of parties or their representatives which may vary for imponderable reasons, bona-fide or otherwise. Clause 3 of the partition deed mentions only such properties as have- been allotted to the brothers in full ownership. it could not mention the property specified in clause 9 because it is burdended with a charge in favour or kattalais. We may now refer to some decisions cited at the bar. In Sree Ishwar SridharJew v. Sushila Bala Dasi (1) and others, it was observed :

> "It is quite true, that a dedication may be either absolute or partial. The property may be given out and out to the idol, or it may be subjected to a charge in favour of the idol. 'The, question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or that, on the other (1) [1954] S. R. 407-414.

hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will' Pande Har Narayan v. Surja Kunwari(1)".

Observations to the same effect have also been made by the Privy Council in Sri Sri Iswari Bhubaneshwari Thakurani v. Brojo Nath Dey and others.(2) in Menakuru Daseratharami Reddi v. Duddukuru Subba Rao,(3) this Court observed as follows :-

> "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 whole."

in Ramkishore Lal v. Kamal Narain,(4) this Court observed :

> "The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used".

it was further observed(4) :

> "What was said in this case in connection with the construction of a wilt appl ies with equal force to the construction of every other document by which some property is disposed of In Gopal Lal Sett v. Purna Chandra Basak and other(5), the Privy Council observed as follows -
>
> "The first. question that arises is whether the gift is a gift to the Idols, or whether there was a gift to any other person or persons charged with the maintenance of the Idols. The will is most obscure, but their Lordships think that there is certainly no direct gift of the whole property to the Idols, nor in the circumstances ought one to be implied. It is consequently necessary to see in what capacity and by virtue of what right the worship of the Idols is to be carried out. The person on. whom (1) 1921 LR 48 I.A. 143, 145-146.
>
> (2) A.I.R. 1937 P.C. 185.
>
> (3) (1957) S.C.R. 1122,1128.
>
> (4) [1963] Supp. 2 S.C.R. 417,424,428. (5) A.I.R. 1922 P. C. 253-54.

the duty was cast was undoubtedly Udoy Chand, and the conclusion which their Lordships have reached, is that if, as they think, there is no gift to the Idols it is only possible to give effect to the provision of the will by treating it as conferring the property upon Udoy Chand. The will is addressed to him;

upon him throughout all the burdens of performing different duties are cast, and this necessarily involves the ownership of the property".

It may be appropriate to refer to a passage in Mayne on Hindu Law and Usage, eleventh edition (Reprint) at page 923 (Section 792) which reads as under

> "A dedication of property for religious or charitable purposes may be either absolute or partial (1). In the former case, the property is given out and out to an idol or to a religious or charitable institution and the donor divests himself of all beneficial interest in the property comprised in the endowment (2). Where the dedication is partial, a charge is created on the property or there is a trust to receive and apply a portion of the income for the religious or charitable purposes (3). In such a case, the property descends and is alienable and partible in the ordinary way, th e only difference being that it passes with the charge upon it"(4).
>
> In this context we may also note a decision of the Calcutta High Court in Hulada Prasad Deghoria v. Kalidas Naik and others,(5) where the court had to deal with interpretation of an ancient document:
>
> "The matter may be put briefly in the word of Sugdan, L. C., in Attorney-General v. drummond (6) : 'One of the most settled rules of law for the construction of ambiguities in an ancient instrument is that you may resort to contemporaneous usage to ascertain the meaning of the deed ; tell me what you have done under such a deed, and I will tell you what that deed means'. To this must be added the qualification formulated by Lord Cranworth, L. C., in Sadlier v. Biggs (7), in the following terms : 'If there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something else, merely because the parties have gone on for long time so understanding it".

We have referred to this case although in the case before us the terms of the deed are not at all ambiguus while the Calcutta High Court had to consider an instrument the terms of which were "at best inconclusive" The principle that the court may call in aid acts under the deed as a clue to the intention, as was pointed out by Lord Halsbury, L. C., in North- Western Railway Co.v.Lord Hastings,(8) "does not apply unless there is an ambiguity, for even usage does not justify deviation

(1) (1937) 64 I.A. 203/211.

(2) (1904) 31 I.A. 203.

(3) (1859) 8 M.I.A. 66.

(4) (1878) 4 Cal. 56.

(5) AIR 1914 Cal. 813/814-815.

(6) (1842) 1 Dr. & W. 358.

(7) (1853) 4 H.L.C. 436.

(8) (1900) A. C. 260.

M 602 Sup. C I/75 from terms which are plain : Attorney-General v. Bochester Corporation"(1). It was observed by the House of Lords in Drammond v. Attorney General(2) :

> " Consequently, while in a case of ambiguity, the court will uphold that construction of a deed which justifies a long usage as to the application of trust funds, the court will not, where there is no ambiguity, accept an erroneous interpretation though consistent with usage, so as to sanction a manifest breach of trust".

Our attention was drawn to a decision of the House of Lords in The Attorney-General v. The Master, Wardens, & C. of the Wag Chandlers' Co.3 wherein it was held :

> "There is one well-known class of authorities of this sort. A testator devises to a corporate body or to an individual, landed property, and he affixes to that devise a condition that the corporation or the individual shall at their or his own peril, and if necessary out of their own funds, make certain payments, or a certain payment, to some object of his bounty. In a case of that kind the devise is said to take the land upon condition. If the devise is accepted, the condition must be fulfilled, and the money must be paid, whether the land devised is, or is not, adequate to make the payment. The very statement of a case of that kind implies that the land is the land of the devise, and that every accretion to the value of the land belongs to the devise ; and that the person or the charity which has the benefit of the condition, which receives the payment mentioned in the condition, has a right to nothing more than that payment".

This case meets the requirements of the present case before us. To the same effect there is a passage in Halsbury's Laws of England edition, volume 4, at page 306 :

> "Speaking generally, the increase will belong to the donee, first, if the gift be to the donee subject to certain payments to others ; secondly, if the gift be upon condition of making certain payments subject to a forfeiture upon non-performance of the condition ; or, thirdly, if the donee might be a loser by the insufficiency of the fund". (4) .lm0 The case referred to in Halsbury is Dr. Villiam Jack, Principal, and the Professors of the University and King's College of Aberdeen v. Sir Thomas Burnett, of Leys, Bart. (1846) XII Clark & Finnelly, 812,(5)wherefrom the following passage is

apposite :

"in searching for the intention of a donor, which is the standard to govern the construction of a deed of gift, the facts, first, that the gift is subject to the condition of making certain payments to others,--secondly, that forfeiture will be in- curred by non-performance of that condition,- and, thirdly, that (1) 5 De G.M. & G. 797. (2) (1849) 2 HLC

837. (3) (1873) Eng. & Irish Appeal, 6 LA., 1119. (4) (1846) 12 Cl. & Fin. 812, H.L. 828. per Lord Cottenham.

(5) 8 English Reports, H.L., Cl. & Fin 8-12, p. 1632.

the donee may be subjected to loss by the performance of that condition, are sufficient to raise the presumption that in case of the increase of the fund, the donor intended to give to the donee the benefit of that increase".

It was held by the House of Lords in that case "that this was a grant upon condition, and not a mere trust, and that the Principal and Processors were entitled, after satisfying the conditions of the deed of gift, to appropriate to themselves any surplus arising from the lands thus given". Argument was addressed at the bar with regard to the surplus income from the suit property since with progress of time the value of the property has increased and necessarily its income. We are, however, of the view that for the reasons already discussed in this particular case we will not be required to examine the rule of surplus income in charities for the purpose of discovering the intention of the parties at the time of initial partition.

The principles that emerge from the above decisions so far as. appropriate to the case at hand may briefly be stated. Whether the endowment is absolute 'or partial, primarily depends on the terms of the grant. If there is an express endowment, there is no difficulty. If there is only an implied endowment, the intention has to be gathered on the construction of the document as a whole. If the words of the document are clear and unambiguous, the question of interpretation would not arise. If there be ambiguity, the intention of the founders has to be carefully gathered from the scheme and language of the grant. Even surrounding circumstances, subsequent dealing with the property, the conduct of the parties to the document and long usage of the property and other relevant factors may have to be considered in an appropriate case. 'As pointed out earlier, we have a document in the instant case where there is an express endowment of certain specified properties as recited in-clause 8 of the deed. Significantly, there is complete omission to create an absolute endowment of the property in the ninth schedule although the same is referred to in clause 9 of the deed and has been dealt with in a very special manner therein. There is absolutely no doubt on the terms of clause 9 read with the other material provisions of the deed that there is no absolute endowment of the suit property in favour of the temple or for the charities as claimed by the planitiffs/respondents. We may, however, add that the conclusion we have reached from the intrinsic evidence of the document itself is reinforced by the subsequent conduct of the parties and the various transactions effected from time to time with regard to the suit properties. To boot, it is far from a case where the entire

income of the property has been endowed to the trust to sustain a conclusion that the entire corpus belongs to the trust.

Having regard to the principles set out above, it is clear that in the present case there was no absolute endowment of the suit property to the temple or the trust. The property, however, is impressed with the obligation or charge of performing the three kattalais mentioned in clause 9 of the partition deed in the manner indicated therein. The alienation of the property is, therefore, not invalid and the obligation to perform the above mentioned charities follow with the property.

In the result the appeal is allowed and the judgment of the High Court is set aside and that of the Subordinate Judge is restored subject to the direction that the suit property will be impressed with the obligation to perform the charities mentioned in clause 9 of the partition deed of 1882 and the plaintiffs' suit stands dismissed. The parties will bear their own costs in this Court.

V.P.S. Appeal Allowed.