

(2005) 11 KAR CK 0021

In the Karnataka High Court

Case No : R.P. No. 554 of 2005 in M.F.A. No. 5472 of 2001

Dr. Madhav Shankar Pandit and Others

APPELLANT

Vs

Dr. Ganapati Narayan Sabhahit and Others

RESPONDENT

Date of Decision : 14-11-2005

Acts Referred:

Karnataka Cinemas (Regulation) Rules, 1971 — Rule 117
Karnataka General Clauses Act, 1899 — Section 24, 6, 8
Karnataka Hindu Religious Institutions and Charitable Endowments Act, 1997 —
Section 23, 24, 25

Citation : (2006) ILR (Kar) 657 : (2006) 1 KCCR 373

Hon'ble Judges : V. Gopalagowda, J;Ashok B. Hinchigeri, J

Bench : Division Bench

Advocate : S.P. Kamath, for S.R. Hegde Hudlamane Suresh Bhat and C.V. Ramana, for the Appellant; U.L. Bhat, for Ravi G. Sabhahit, for R1 and R2 and R.K. Hatti, HCGP for R-3, Vyasa Rao K.S., for R-4 and 6 and K.M. Nataraj, for R-5, for the Respondent

Judgement

V. Gopalagowda, J.—This review Petition is filed by respondents 5 to 7 in M.F.A. No. 5472/2001 requesting this Court to review the judgment dt. 8/8/2005 passed by this Court in M.F.A. No. 5472/2001 and further requested to set aside the same and dismiss the appeal with costs urging various legal contentions.

2. In this judgment, for the sake of convenience, the rank of the parties is referred to, as has been assigned in the Misc. First Appeal.

3. The first ground urged in this petition is that no appeal lies u/s 72(4) of the Bombay Public Trust Act, 1950 (hereinafter referred to as the BPT Act) against the order dt. 24/9/2001 passed in Misc. No. 26/1998 on the file of the District Judge, Uttar Kannada District, Karwar, rejecting the claim of second appellant to appoint him as the Trustee of the Trust of SREE Vinayaka Devaru Temple, Idagunji. Therefore the order passed by this Court allowing the appeal is without jurisdiction, hence the judgment sought to be reviewed suffers from error apparent on the face of the record is the ground on which this petition is filed to

review the order passed in the appeal.

4. Sri Kamath, Learned Counsel placed strong reliance upon Section 72(1) of the BPT Act which is extracted hereunder:

72(1). Any person aggrieved by the decision of the Charity Commissioner u/s 40, 41, 70 or 70A or on the questions whether a trust exists and whether such a trust is a public trust or whether any property is the property of such Trust may, within sixty days from the date of decision, apply to the Court to set aside the said decision.

Emphasis is made upon the word "decision" to distinguish the phrase-word "order" in Section 72(4) of the Act. According to the Learned Counsel and the word decision occurred u/s 72(1) clearly indicates that order of appointment of a applicant as Trustee of a temple alone gives substantive statutory right of appeal u/s 72(4) of the Act before this Court. Therefore he submits that the judgment passed in the appeal is required to be reviewed.

5. The above said contention is seriously rebutted by the Leaned Senior Counsel Sri. U.L. Bhat on behalf of appellants 1 and 2 contending that Section 47(3) of the BPT Act confers power upon the District Court either to appoint a Charity Commissioner or any other person as the Trustee to fill up the vacancy after holding an enquiry. The provision not only confines to appointment but also includes an order of rejection of the application that is filed by a person seeking appointment as a Trustee of the Trust. Further he contends that the provisions of Section 47(3) and (6) of the BPT Act, shall be read together to understand the object of the Act to find out whether the aggrieved party has got right of Appeal against an order of rejection of the application. The counsel submits that the argument advanced on behalf of the respondents that no appeal lies to this Court u/s 72(4) of the Act against the rejection of the application for appointment of a person as a Trustee is not tenable in law.

6. The answer to the above legal contention will be subject to another legal contention urged by the respondents counsel. The contention is that after the Karnataka Hindu Religious Institutions and Charitable Endowments Act, 1997 hereinafter called "KHRI & CE Act" has come into force with effect from 1 /5/2003, whether the appeal filed against the order passed by the District Court on the application of the second appellant would still survive or not. u/s 78 of the Act of the KHRI & CE Act, the BPT Act is repealed. Nodoubt Section 6 of the Karnataka General Clauses Act, 1899 is applicable in respect of the repealed enactment in view of Sections 8 & 24 of the said Act. In view of the said provision no right either acquired or accrued by the second appellant to file or prosecute the appeal. The order passed by the District Court on his application is not saved. The KHRI & CE Act has got a different intention in so far the control, management and appointment of Managing Committee of the Religious institution. Therefore the right of appeal u/s 72(4) of BPT Act is not available.

7. It is further contended by the Learned Counsel for the review petitioners that

the preamble of the KHRI & CE Act states that the said Act is enacted for better provisions for management and administration of Hindu Religious Institutions in the State of Karnataka. The said Act has done away with all appointment of trustees or persons to manage religious institutions under the repealed Act. On the day when the Act has come into force the power of the District Court to appoint a person as a Trustee or Trustees cease to exist. Therefore the Learned Counsel for the review petitioners submit that the proceedings which were pending in this connection before the District Court are deemed to have been disposed off as the same does not survive for its consideration. Further he submits that District Court itself had no power for appointment of the Trustee in view of the KHRI and CE Act. Appeal being the continuation of the original proceedings the Appellate Court cannot exercise its power, as Section 6 of the General Clauses Act does not apply to the fact situation. The reason is the original jurisdiction of the District Court itself is taken away and appointment of Trustees/Managing Committee members in respect of religious institutions is conferred u/s 25 of the KHRI and CE Act upon the prescribed authority constituted by the State Government by a General or Special Order in respect of one or more notified Religious Institutions.

8. Sri Vinayaka Devaru Temple of Idagunji is a notified institution as per the Notification No. RD/77 MET-2003 Bangalore dt. 30/4/2003 issued by the State Government u/s 23 which is published in the Karnataka Gazette dt. 1/5/2003. The entire control of the said religious institution vests with the controlling authority. u/s 24 of the KHRI & CE Act Commissioner shall be the Chief Controlling Authority. Therefore Learned Counsel for respondents 5 to 7 submits that the right is not accrued to the second appellant and even if accrued it is not saved u/s 6(c) of the General Clauses Act. In support of this contention he has placed reliance upon the decision of the Supreme Court reported in Vishwant Kumar Vs. Madan Lal Sharma and Another, wherein the Apex Court after interpretation of Section 9 and 3(c) of the Delhi Rent Control Act 1958 with reference to Section 6(c) of the General Clauses Act and also referring to its earlier decision in the case of Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd., , wherein it is held that what is unaffected by repeal is a right acquired or accrued under the Act. The mere right existing on date of repeal to take advantage of the repealed provisions is not a right accrued within Section 6(c) of the General Clauses Act

(emphasis is made by us).

9. Learned Counsel submits that the above contention even though was not urged in the appeal, nonetheless, the same can be urged in this review petition. The order under review is a case for review as provided under Order 47 CPC. The Counsel submits that a legal ground not raised and considered by the Court is a case for review within the ambit of Section 47(1) of CPC. It is further submitted that the case of the respondents herein would fall within the ground mentioned in the said provisions of the CPC under the category of error apparent on record

or for any other sufficient reason. He has also placed reliance upon the decision of this Court reported in *Swastik Enterprises Vs. The District Magistrate and Others*, to substantiate the contention of the rights claimed by the appellants under the repealed Act are not saved u/s 6(c) of the General Clauses Act. The Learned Counsel has placed reliance upon a decision of the Apex Court reported in the case of *Common Cause, A Registered Society Vs. Union of India and Others*, in support of the case of respondents 5 to 7, that the above grounds urged warrant to review the judgment passed in Miscellaneous Appeal. The Apex Court in the said case has examined the power the review and laid down the law at paragraph 170.

10. Sri U.L. Bhat, Learned Counsel appearing on behalf of appellants 1 and 2 submits that the aforesaid decision has no application to the fact situation as it was a case of public law. Review power was exercised by the Supreme Court, while examining its power under Article 32, with reference to fundamental right guaranteed to a citizen under Article 21 and to do justice. It was held that power to review can be exercised is the law laid down by it and therefore the ratio laid down in the said case has no application to the fact situation of the case on hand. Therefore he has submitted this Court should not consider the said decision. He rebutted the submission of the Learned Counsel for respondents 5 to 7 with regard to the rights of the second appellant by placing reliance upon the Xerox copy of the Register of Public Trusts maintained in which it is clearly mentioned in Column No. 4 the mode of succession to trusteeship and managership of the Trust in question. Therefore he contends that it is an acquired right of the second appellant which was saved u/s 6(c) of the General Clauses Act, Despite the BPT Act was repealed, his right is required to be determined by the District Court. Therefore he has invoked his right of Appeal as provided u/s 72(4) of the Act and filed the Appeal questioning the correctness of the order.

11. The Learned Counsel appearing for respondents 2 to 4 & 8 have adopted the submission of the Learned senior Counsel to sustain the judgment sought to be reviewed. He further contended that the judgment is passed after considering the rival legal contentions urged in the Appeal and therefore review is not warranted.

12. On the basis of the rival legal contentions urged by the Learned Counsel for the parties, the following points arise for consideration in this review petition:-

- i) Whether the review petition is maintainable?
- ii) Whether the order passed by the District Court on the application of appellant No. 2 survived for challenge on the ground that his acquired right is saved u/s 6(c) of the General Clauses Act?
- iii) Whether the appeal against the order of rejection of the application of appellant No. 2 u/s 72(4) of the BPT Act is maintainable?

iv) What order?

We have taken up all the points together as the same are interrelated and answered in favour of respondents 5 to 7- petitioners herein for the following reasons:

13. The claim made by the second appellant is under the provisions of the BPT Act to appoint him as one of the Trustees of the Trust after accepting the resignation of first respondent. Common application was submitted by appellants 1 and 2 before the District Court, Karwar, under the provisions of BTP Act requesting the said Court to accept the resignation of appellant No. 1 to his Trusteeship of the Trust and fill up that vacancy by appointing appellant No. 2 as a Trustee. Nodoubt, the right claimed to the Trusteeship by the second appellant is on the basis of succession to the Trust. On the basis of said application proceedings were commenced before the District Court on 15/9/1997. As on that date, though the Karnataka Hindu Religious Institutions and Charitable Endowments Act, 1997 (Act No. 33/01) was enacted, it had not come into force till the notification as required in law was published. It is an undisputed fact that KHRI & CE Act came into force with effect from 1/5/2003 vide Notification dt: 30/4/2003 published in the Karnataka Gazette by the State Government as required u/s 1 (3) of the Act. In that Act, the BPT Act is repealed u/s 78 of the Act. Nodoubt proviso to the said Section is incorporated stating that Section 6 of the Karnataka General Clauses Act shall be applicable in respect of the repeal of the said enactment. Section 6 of the General Clauses Act clearly states that unless a different intention appears in the substituted Act enacted in its place, the right accrued in favour of a person under the repealed Act is not saved under the provisions of the substituted Act as provided under Clause (c) of Section 6.

14. We have to see whether there is different intention in enacting KHRI & CE Act than the intention and object under the repealed Act in so far as appointing persons as Managing Committee members/ trustees of the notified religious institutions and whether acquired or accrued right under the repealed Act is saved or not. The legal position is that right is not accrued till decree is passed by the Competent court, as held by the Supreme Court in the case reported in Vishwant Kumar Vs. Madan Lal Sharma and Another, (referred to supra). Relevant portion at paragraph 4 of the case is extracted hereunder:

There is a difference between a mere right and what is right acquired or accrued. We have to examine the question herein with reference to Sections 4,6 and 9 of the Act. It is correct that u/s 4 of the Rent Act, the tenant is not bound to pay rent in excess of the standard rent, whereas u/s 9 he has a right to get the standard rent fixed. Such a right is the right to take advantage of an enactment and it is not an accrued right. In case of D.C. Bhatia and Others Vs. Union of India (UOI) and Another, , it has been held that right of a statutory tenant to pay standard rent is a right to be governed by the Act and if the legislature repeals the Act or a part of it, the statutory tenant can do nothing about it. It is a mere right and not a vested right. To the same effect is the judgment of this Court in

the case of They seen Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd., , in which it is held that right to be governed by the Act is not a right of an enduring nature. What is unaffected by repeal is a right acquired or accrued under the Act. That till the decree is passed, there is no accrued right. The mere right existing on date of repeal to take advantage of the repealed provisions is not a right accrued within Section 6(c) of the General Clauses Act.

15. It is also relevant to refer to the decision of this Court in the case of SWASTIK ENTERPRISES v. DISTRICT MAGISTRATE, (Supra) wherein this Court with reference to Rule 117 of Karnataka Cinemas (Regulation) Rules 1971 and Section 6(c) of the General Clauses Act 1899 examined the effect of the repealed Rule and held that the application of the petitioner in that case should have been disposed of in accordance with the rules that are in force at the time of its disposal.

16. Further in view of the provisions of Sections 23, 24 and 25 of the Khri and CE Act the BPT act was repealed. u/s 23 of the Act the temple in question is included as one of the religious institution under the Act. Under the provisions of the said Act the Commissioner shall be the Chief Controlling Authority u/s 24 of the Act. The management and constitution of the committee of the notified religious institution shall be vested with the prescribed authority. Therefore the intention of the Khri and CE Act regarding the management and administration of the notified religious institutions, including the temple in question is different from the intention of the provisions regarding management, administration and appointment of trustees of the Trust under the repealed BPT Act. For the appointment of Managing Committee members/Trustees of the religious institution in question there must be either acquired right or accrued right as contended by the Learned Counsel on behalf of second appellant, such a right is not saved u/s 6(c) of the General Clauses Act. This factual position is abundantly made clear by this Court in its operative portion of the judgment sought to be reviewed, which reads thus:

The application filed by the appellants is allowed and we direct the appointment of the second appellant as a Trustee who shall be the Managing Trustee of Vinayaka Devaru Temple, Idagunji subject to the changes that will take place in accordance with law and in accordance with the provisions of Karnataka Hindu Religious Institutions and Charitable Endowments Act, 1997.

(Emphasis supplied)

17. From the reading of the operative portion of the judgment it is abundantly clear that the said appointment of second appellant is subject to the provisions of the KHRI and CE Act. Apart from the factual position this Court has not considered the nature of the right as claimed by the second appellant with reference to the provisions of

Sections 23, 24 and 25 of the Act 1997 as the temple in question is a notified religious institution.

18. The above legal contention urged in this review petition is not pressed into service by the above respondents counsel at the time of addressing argument in the Appeal. The same is urged in this review petition which squarely falls under Order 47 Rule 1 CPC extracted hereunder:

1. Application for review of judgment- (1) Any person considering himself aggrieved.

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, against the same from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

(Emphasis is made by this Court)

19. In this case both the grounds viz error apparent on the face of record, on account of some mistake crept in the order or for any other sufficient reasons are available for this Court to review the judgment. The acquired right of the second appellant is not saved in view of Sections 23 and 25 of the KHRI and CE Act. Therefore the order passed by the District Court rejecting the application of the appellants should not have been interfered by this Court in the Appeal.

20. The constitutional validity of the KHRI and CE Act has been upheld by this Court in the decided case reported in B.M. Sukumar Shetty and Ors. v. State 2005(5) KLJ 481. The provisions of said Act are applicable to the institution in question as it is one of the notified religious institutions and committee of management of such religious institutions shall be constituted by the prescribed authority. The combination of committee and appointing authority, Management of the notified religious institution are entirely different from that of the BTP Act in respect of religious institutions and therefore there is different intention and object in the substituted Act other than BPT Act. In view of Section 25 of KHRI and CE Act Section 72(4) is not available to appellant No. 2. Therefore exercise of that power under the repealed Act by this Court in the Appeal in which the judgment passed is sought to be reviewed is certainly an error apparent on the face of the record to exercise the power of this Court to review the same. The mistake that has been committed by this Court in passing the judgment without considering the relevant provisions of the KHRI and CE Act warrants this Court to exercise its review power to correct the same as held by the Apex Court in Common Cause, A Registered Society Vs. Union of India and Others, (referred to supra) at paragraph 170 wherein it has rightly referred to S. Nagaraj's case (supra) and the observation made in that case is extracted which reads thus:

Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way, the order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before

justice. Entire concept of writ jurisdiction exercised by the higher Courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order.

The Court also observed:

Review literally and even judicially means re-examination or reconstruction. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the Courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provisions and no rules were framed by the highest Court indicating the circumstances in which it could rectify its order the Courts culled out such power to avoid abuse of process of miscarriage of justice.

The Court further observed:

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality.

The observations made in Nagaraj's case (supra) which are referred to by the Apex Court in the said Common Causes case (supra) in exercise of its Judicial review power to do complete justice under Article 142 of the Constitution of India with all facts applicable to the fact situation of the case on hand. Therefore, we have to hold that the respondents 5 to 7 have made out a strong case for review of the judgment to correct the mistake which is an error apparent on the face of the record crept in and therefore the judgment passed in the Appeal is required to be reviewed.

21. The contention urged by the Learned Senior Counsel on behalf of the second appellant that the above said principle as laid down by the Apex Court in the case referred to supra is not applicable to the fact situation, cannot be accepted by this Court. The reason is that we are concerned about the legal principle enunciated by the Supreme Court in the case of Nagaraj (supra) which principle has been subsequently reiterated in the Common Causes Case (supra). The case may be a public law review case but still the legal principle laid down by the Apex Court has to be applied to the fact situation. The alleged acquired right on the basis of which appellants 1 and 2 filed common application before the District Court, Karwar, seeking acceptance of resignation of first appellant and filling up the said vacancy by appointment of appellant-2 as Trustee of the Trust was not available to them in view of repeal of BPT Act and enactment of KHRI and CE Act and the same has come into force, its constitutional validity is upheld by this Court in the cases referred to supra. Therefore, appeal could not have been filed by appellants against the order or even if it was filed, since the constitutional

validity of Act of 1997 has been upheld and the acquired right of the second appellant as claimed by him is not accrued right till the decree is passed and in view of the provisions of Sections 23, 24 and 25 of the KHRI and CE Act the acquired right claimed by second appellant is not saved.

22. No doubt as on the date of filing of the Appeal by the appellants against the rejection order of the District Judge, Karwar, certain provisions of the Act are stayed but subsequently the stay has been vacated in some of the petitions in so far as some of the petitioners appointments as Trustees were allowed to continue beyond their terms fixed in the appointment orders. In view of the fact that BPT Act is repealed by Act of 1997 and the same has come into force and the right claimed by the appellants 1 and 2 are not saved. This conclusion of ours is supported by the decision of the Supreme Court referred to supra. Therefore the reliance placed upon the decision in VISH WANT KUMAR v. MADANLAL SHARMA (referred to supra) is well founded and the same must be accepted by us in support of the contention of the respondents 5 to 7.

23. For the reasons stated supra, respondents 5 to 7 must succeed. Accordingly, we allow the review petition and review the judgment and decree passed in MFA No. 5472/2001 by dismissing the appeal. Even otherwise also the appeal filed stood abated upon the death of first appellant.

24. After dictating the judgment, Learned Counsel Sri. Ravi.G. Sabahit appearing on behalf of appellants 1 and 2 submits that the appellant No. 2 has already assumed charge as Managing Trustee of the Trust in question and he has been functioning as such and he has got instructions to challenge this order before the Apex Court by filing a Special Leave Petition. Therefore he requests this Court to stay the order passed in this review petition as otherwise, the Trust of the temple cannot function and the day to day activities cannot be cared out by the Trust. That apart the appellant No. 2 would be affected as he has been functioning as the Managing Trustee by virtue of the judgment and decree passed in the MFA.

25. The above said contentions have been seriously contested by Sri S.R. Hegde Hudlamane Learned Counsel appearing on behalf of respondents 5 to 7 contending that 2nd appellant has not taken charge as Managing Trustee the question of taking over charge as Managing Trustee of the Trust does not arise as the said post is not at all in existence and since temple is notified by the State Government and appointment of Trustee should be done by the prescribed Authority the question of appellant No. 2 continuing as the Managing Trustee does not arise. Therefore, he has requested this Court to reject the prayer made in this regard.

26. After hearing the Learned Counsel for the parties, it is noticed that 2nd appellant is appointed as the Managing Trustee which post does not exist in the Trust of the Institution and under the scheme of the Trust also such post is not existing. That being the position, question of assuming charge as the Managing Trustee does not arise. Further, we have also held that no rights of the appellants

are saved after the repeal of BPT Act and KHRI and CE Act came into force. Constitution of the Committee and appointment of the Committee members vests with the prescribed authority. The appointment of 2nd appellant is contrary to the provisions of KHRI and CE Act and it was made without considering the provisions of the Act and power to appoint a person as Managing Committee member of a Trust absolutely vests with the prescribed Authority. Hence his appointment as Managing Trustee by this Court in the Appeal is bad in law. Therefore it is not proper for us to stay the order passed in this petition.

27. We make it very clear that till the new Managing Committee is constituted and appointed by the prescribed authority under the provisions of the Act, 1997, the Trustees who were there as on the date of death of first appellant alone shall continue the affairs of the Trust and the temple.