

(2011) 12 MAD CK 0330
In the Madras High Court
Case No : W.A. No. 849 of 2009

Narayanan

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 09-12-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 — Section 109,
114, 114(2), 115A, 21

Citation : (2011) 12 MAD CK 0330

Hon'ble Judges : Elipe Dharma Rao and the, J; D. Hariparanthaman, J

Bench : Division Bench

Advocate : T.V. Ramanujan, for M/s. T.C.A. Shrinivasan and T.C.A. Vijay Ananth in W.A. Nos. 1348 to 1355/2009, Ms. Chitra Sampath in W.A. No. 849/2009, M/s. V. Raghupathi and G. Devi in W.P. No. 10173/2010 and Mr. T.L. Rammohan, for Ms. G. Sumitra in W.P. No. 20487/2010, for the Appellant; V. Ramasamy A.A.G. for Mr. T. Chandrasekar Special Govt. Pleader (HR and CE) for Respondent-State and H.R. and C.E., Mr. K. Chandrasekaran for R4 in WA. 849/09 and WA. Nos. 1348 to 1355/2009 and Mr. S.D. Ramalingam for R4 in W.P. No. 20487/2010, for the Respondent

Final Decision : Dismissed

Judgement

Elipe Dharma Rao, J

1. The issue involved in all these matters is being intrinsically inter-connected, all were heard together and disposed of by this common judgment.

2. In all these matters the challenge is with regard to constitutional validity of Sections 78, 79(3) and 109 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (Act 22 of 1959) (in short "the HR & CE Act") as amended by Tamil Nadu Act 39 of 1996 as well as by amended Act 28 of 2003 as ultra vires the Constitution of India.

3. The appellants and the petitioner in W.P. No. 20487 of 2010 claim to be the

tenants / lessees in occupation of the land belonging to the Temple concerned for the past several years. According to the appellants / petitioner, while they are in lawful occupation, the authorities of the HR & CE Department had issued notice purported to be u/s 78(2) of the HR & CE Act to show cause as to why they should not be evicted. Admittedly, without offering any objections as contemplated in Section 78(4), the appellants as well as the petitioners have approached this Court to declare the various provisions of the HR & CE Act as unconstitutional.

4. Ms. Chitra Sampath, learned counsel appearing for the appellant in W.A. No. 849 of 2009 contended that the procedure contemplated u/s 78(1) and (4) is arbitrary and the authorities at their whims and fancies can evict any person out of possession. She has also contended that the Joint Commissioner has no jurisdiction to issue notice u/s 78(2) as the appellants are not encroachers. She has further contended that that prevention of moving the Civil Court u/s 79(2) has been curtailed by Section 79(3), which is illegal and it is liable to be struck down.

5. Mr. T.V. Ramanujan, learned Senior Counsel submitted that though he is not appearing for the encroachers he is appearing for the persons who are lessees, licencees or mortgagees or whose lease were not renewed. He has specifically contended that the power granted u/s 109 of the HR & CE Act, excluding the Limitation Act, 1963, would result in all old issues being raked up and, therefore, it has to be held as unconstitutional.

6. Mr. V. Raghupathi, the learned counsel for the petitioner in W.P. No. 10173 of 2010, submitted that the bar u/s 79(3) to approach the Civil Court in grant of injunction against the order of the Joint Commissioner is bad and should be interfered with.

7. Mr. T.L. Rammohan, Senior Counsel, appearing for the petitioner in W.P. No. 20487 of 2010 would contend that the procedure contemplated under Sections 78 and 79 in Chapter VII relates to encroachments and, since the possession of the petitioner by the Department is admitted, instead of issuing notice u/s 78(2), the procedure contemplated u/s 34 should have been followed. In support of such contention, he has placed reliance upon a Division Bench decision of this Court reported in 2007 (4) MLJ 1002 (C. Sathish Kumar v. Commissioner, Hindu Religious and Charitable Endowments Department, Chennai and Others).

8. We have heard the learned counsel appearing for the parties and perused the materials placed on record.

9. The Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (Tamil Nadu Act 22 of 1959) has received the assent of the President on 19.11.1959 and was first published in the Gazettee on 2.12.1959. The object of the Act is to amend and consolidate the law relating to the administration and governance of Hindu Religious and Charitable Institutions and Endowments in the State of Tamil Nadu.

7.1. The said Act was further amended by Tamil Nadu Act No. 25/2003 after receiving the assent of the Governor on 1st July, 2003. The Statement of Objects and Reasons of such amended Act is as follows :

Statement of Objects and Reasons -The ground rent charged for the temple lands given on long term leases is abnormally low when compared to the present market rental values. The low rent and the absence of any periodical revision have adversely affected the income of the temples. Consequently, the maintenance of the temples and the performance of poojas, etc. have also been affected. Further, in the vacant lands belonging to religious institutions, the lessees have put up permanent structures with or without the permission of the authorities of the institutions. At present there is no specific provision in the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (Tamil Nadu Act 22 of 1959) to increase the lease rent and to take action against lessees when they refuse to pay the revised lease rent. The Government have, therefore, decided to amend the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (Tamil Nadu Act 22 of 1959) so as to make provisions to constitute a committee to determine and fix the lease rent payable for the lease of immovable property of religious institutions, to terminate the lease if the occupant refuses to pay the enhanced rent and to pay compensation to the lessee for the buildings, etc., erected in accordance with the terms of agreement or with the permission of the appropriate authority, on such termination of lease.

10. From a reading of the Statements of Objects and Reasons, the Legislature taking into consideration the various factors including the fact that the ground rent charged for the temple lands given on long term leases is very low, the lessees have put up permanent structures on the temple land and that there is no specific provision in the Act to increase the lease rent and to take action against lessees when they refuse to pay the revised lease rent.

11. Since Sections 78, 79 and 109 of the HR & CE Act have been under challenge, those provisions are extracted hereunder :

78. Encroachment by persons on land or building belonging to charitable or religious institution or endowment and the eviction of encroachers.-(1) Where the Assistant Commissioner having jurisdiction either suo motu or upon a complaint made by the trustee has reason to believe that any person has encroached upon (hereinafter in this section referred to as ""encroacher") any land, building, tank, well, spring or water-course or any space wherever situation belonging to the religious institution or endowment (hereinafter referred to as ""the property"), he shall report the fact together with relevant particulars to the Joint Commissioner having jurisdiction over the division in which the religious institution or endowment is situated.

Explanation.-For the purpose of this section, the expression ""encroacher" shall mean any person who unauthorisedly occupies any tank, well, spring or water-course or any property and to include-

(a) any person who is in occupation of property without the approval of the competent authority (sanctioning lease or mortgage or licence) and

(b) any person who continues to remain in the property after the expiry or termination or cancellation of the lease, mortgage or licence granted to him.

(2) Where, on a perusal of the report received by him under sub-section (1), the Joint Commissioner finds that there is a prima facie case of encroachment, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling on him to show cause before a certain date why an order requiring him to remove the encroachment before the date specified on the notice should not be made. A copy of the notice shall also be sent to the trustees of the religious institution or endowment concerned.

(3) The notice referred to in sub-section (2) shall be served in such manner as may be prescribed.

(4) Where after considering the objections, if any, of the encroacher received during the period specified in the notice referred to in sub-section (2) and after conducting such inquiry as may be prescribed, the Joint Commissioner is satisfied that there has been an encroachment, he may by order and for reasons to be recorded, require the encroacher to remove the encroachment and deliver possession of the property (land or building or space) encroached upon to the trustee before the date specified in such order.

(5) During the pendency of the proceeding, the Joint Commissioner shall order the encroacher to deposit such amount as may be specified by him in consideration of the use and occupation of the properties in question in the manner prescribed.

79. Mode of eviction on failure of removal of the encroachment as directed by the Joint Commissioner.-Where within the period specified in the order under sub-section (4) of section 78, the encroacher has not removed the encroachment and has not vacated the property, the Assistant Commissioner having jurisdiction over the division may remove the encroachment and obtain possession of the property encroached upon, taking such police assistance as may be necessary. Any Police Officer whose help is required for this purpose shall render necessary help to the Assistant Commissioner.

(2) Nothing in sub-section (1) shall prevent any person aggrieved by the order of the Joint Commissioner under sub-section (4) of section 78 from instituting a suit in a Court to establish that the religious institution or endowment has no title to the property.

Provided that no Civil Court shall take cognizance of any suit instituted after six months from the date of receipt of the order under sub-section (4) of section 78.

Provided further that no such suit shall be instituted by a person who is let into possession of the property or who is a lessee, licensee or mortgagee, of the

religious institution or endowment.

(3) No injunction shall be granted by any Court in respect of any proceeding taken or about to be taken by the Joint Commissioner u/s 78.

79-A. Encroachment by group of persons on land belonging to charitable religious institutions and their eviction.-(1) Where the Joint Commissioner knows or has reason to believe that a group or groups of persons without any entitlement and with the common object of occupying any land, which is the property belonging to a charitable or religious institution or endowment, are occupying or have occupied any such land and if such group or groups of persons have not vacated the land on demand by the Joint Commissioner or any officer authorised by him in this behalf, the Joint Commissioner shall, notwithstanding anything contained in this Act, order after giving due notice, the immediate eviction of the encroachers from the land and the taking of possession of the land and thereupon, it shall be lawful for any officer authorised by the Joint Commissioner in this behalf to evict the encroachers from the land by force, taking such police assistance as may be necessary and take possession of the land. Any police officer whose help is required for this purpose shall be bound to render the necessary help to the Joint Commissioner or to such officer authorised by him.

(2) Where, in any proceedings taken under this section, or in consequence of anything done under this section, a question arises as to whether any land is the property of the charitable or religious institution or endowment, such land shall be presumed to be the property of the charitable or religious institution or endowment until the contrary is proved by the encroacher.

(3) Any order of eviction passed by the Joint Commissioner under sub-section (1) shall be final and shall not be questioned in any Court.

79-B. Penalty for offences in connection with encroachment.-(1) No person, on or after the commencement of the Tamil Nadu Hindu Religious and Charitable Endowments (Amendment) Act, 1996 (Tamil Nadu Act 39 of 1996) shall occupy, otherwise than by lawful possession, any property belonging to a charitable or religious institution or endowment.

(2) Whoever contravenes the provisions of sub-section (1), shall, on conviction, be punished with imprisonment for a term which shall not be less than three months but which may extend to five years and with fine which may extend to five thousand rupees.

(3) No Court shall take cognizance of an offence punishable under sub-section (2) except on the complaint in writing of the Commissioner.

(4) No offence punishable under sub-section (2) shall be inquired into or tried by any Court inferior to that of a Judicial Magistrate of the First-Class.

79-C. Recovery of moneys due to religious institution, as arrears of land revenue.-

Without prejudice to any other mode of recovery which is being taken or may be taken under this Act or any other law for the time being in force, any moneys due to a religious institution may be recovered as if it were an arrear of land revenue and for the purposes of such recovery, the Commissioner of the Hindu Religious and Charitable Endowments (Administration) Department or any officer not below the rank of Deputy Commissioner authorised by the Commissioner in this behalf, shall have the powers of a Collector under the Tamil Nadu Revenue Recovery Act, 1864 (Tamil Nadu Act II of 1864).

109. Central Act 36 of 1963 not to apply for recovery of properties of religious institution.-

Nothing contained in the Limitation Act, 1963 (Central Act 36 of 1963) shall apply to any suit for possession of immovable property belonging to any religious institution or for possession of any interest in such property.

12. Chapter VII of the H.R. & C.E. Act deals with Encroachments. Sections 78, 79, 79-A & 79-B were brought into the statute book on 9.12.1996 by Tamil Nadu Act 39 of 1996. As per Section 78(1), the Assistant Commissioner having jurisdiction either suo motu or upon a complaint made by the trustee has reason to believe that any person has encroached upon the property belonging to the religious institution, he should report the fact with particulars to the Joint Commissioner. The Explanation to Section 78(1) makes it amply clear the expression "encroacher" as per which any person who is in occupation of property without the approval of the competent authority and who continues to remain in property after the expiry or termination or cancellation of the lease is termed as "encroacher". After the report received from the Assistant Commissioner under sub-section (1) of Section 78, the Joint Commissioner if comes to a conclusion that there is a prima facie case of encroachment, he shall cause a notice, in a prescribed form, calling upon him to show cause requiring him to remove the encroachment before the date specified in the notice. Thereafter, after considering the objections if any, and after conducting an inquiry, if he satisfies that there has been an encroachment, after recording such reasons, he is required to remove the encroachment and deliver possession of the property. This is the procedure contemplated u/s 78 of the HR & CE Act for removal of the encroachers.

13. Learned counsel appearing for the appellants / petitioner in one voice have contended that the appellants / petitioner are not the encroachers as described in Section 78 since they have been in possession of the religious institution for several decades and they are paying rent for their occupation. However, in course of hearing, they have admitted that their occupation as tenants / lessees is not by way of any lease / mortgage / licence. When the occupation of the appellants / petitioner is without the approval of the competent authority, they fall under the category (a) of the Explanation to Section 78(1) and they can only be termed as encroachers. Even assuming that some of the appellants have been admitted as tenants / lessees as per lease agreement, even then, when such

lease or tenancy has expired or terminated or cancelled and they continue to remain in the property, they come under the category of (b) to be called as encroachers. There is no material on record to show that any person has been put in possession of the land belonging to the religious institution as a tenant / lessee. In the absence of any material on record, we have no other option then to come to a conclusion that the appellants / petitioner are encroachers.

14. When such a conclusion is arrived at, then the procedure contemplated u/s 78(2) and (4) has to follow, that is to say, the Joint Commissioner has to issue the show cause notice for removal of encroachment and thereafter considering the objections and conducting an enquiry, after recording the reasons has to pass an order of eviction. The Joint Commissioner could not pass an order according to his whims and fancies. Before passing the order of eviction, he has to consider the objections raised by the encroachers and should conduct an enquiry after giving an opportunity of hearing to the parties and, after recording the reasons for coming to such a conclusion, he has to pass the order.

15. Ms. Chitra Sampath, learned counsel for the appellant in W.A. No. 849 of 2009, in this context, has contended that any order of eviction passed by the Joint Commissioner is the final and no injunction would be granted by any Court in respect of any proceeding taken or about to be taken by the Joint Commissioner u/s 78.

16. It is true that Section 79(4) of the Act is a bar for the Civil Court in entertaining any suit or granting any injunction in respect of the proceedings taken by the Joint Commissioner u/s 78. But, a reading of the entire Section 79 makes it clear that the bar is for the encroachers not to approach the Civil Court, but not the person who is under lawful possession by way of lease / license. Therefore, the bar is for the persons who continues to remain in the property after the expiry or termination or cancellation of the lease, mortgage or licence granted to him. Hence, it cannot be said that the procedure contemplated u/s 78 is repugnant to the procedure contemplated u/s 79.

17. Moreover, as contended by the learned counsel, the order of the Joint Commissioner is not final. Section 21 of the HR & CE Act empowers the Commissioner to call for records and examine the record of any Joint or Deputy or Assistant Commissioner and take a decision or pass an order by modifying, annulling, reversing or remitting for reconsideration the order of the Joint Commissioner. Therefore, it is not as if the order of the Joint Commissioner is final. Moreover, Section 114 contemplates review of the order passed by the Commissioner u/s 21. Section 114(2) provides for stay of the execution of any such decision or order passed by the Commissioner/Addl. Commissioner. Further, Section 115-A gives the power of Review to the Government. Even when the competent authorities fail to follow the mandate of section 78, judicial review under Article 226 is always available to the appellants. Therefore, as contended by the learned counsel for the appellants it is not as if the parties are not without any remedy. In *S.N. Mukherjee Vs. Union of India*, , the Supreme Court has

observed that irrespective of the fact whether the decision is subject to appeal, revision or judicial review, the recording of reasons by an administrative authority by itself serves a salutary purpose and ensures a degree of fairness in the process of decision-making. Ultimately, the Supreme Court observed that the remedy of judicial review under Article 226 is an adequate protection against arbitrary action in the matter of exercise of power by the appropriate Government or authority. Therefore, as contended by the learned counsel court is not powerless to interfere with the finding of the authorities, when such finding is arbitrary or illegal.

18. Ms. Chitra Sampath has specifically contended that the notice u/s 78(2) has been issued to the appellant alone and not to the similarly situated persons, though such appellant continues to pay the rent till date. She has also contended that since the appellant is paying the rent and he is willing to deposit the enhanced rent as fixed by the authorities, his possession may be legalised.

19. In all these cases, only notice u/s 78(2) has been issued. It is not the case of the appellants / petitioner that they had submitted their objections or they had participated in the inquiry as contemplated under 78(4). When no objections had been given or raised, how the Joint Commissioner would be in a position to pass an order. Whether the appellants are paying rents as contended by them or they have been in possession under any lease / licence or whether such lease / licence had expired or terminated or renewed are all the material facts to be decided by the Joint Commissioner before passing an order of eviction. If the original authority fails to consider the case on merits, the Commissioner can exercise its power u/s 21 to nullify such order and the Review power is available before the Government and, further, the judicial review is always there. Therefore, taking into consideration the fact that the appellants had approached this Court at a premature stage i.e., at the stage of issuance of notice, we are not in a position to entertain the contention of the learned counsel that Sections 78 and 79 are ultra vires and unconstitutional. It is also made clear that the Department should not misuse the power granted under the amended Sections by taking vindictive action on a particular person and the action taken should not be in a discriminatory manner.

20. In view of the above, the appellants / petitioner are directed to submit their explanation for the show cause notice issued by the Joint Commissioner within a period of two weeks from the date of receipt of a copy of the judgment and, thereafter, six weeks time is granted for the Department to pass appropriate orders in accordance with law. The appellants are at liberty to raise all contentions now raised before the Joint Commissioner and it goes without saying that while passing the order the Joint Commissioner has to take into consideration the objections raised by the parties concerned.

21. So far as the contention relating to introduction of Section 109 of the HR & CE Act is concerned, we uphold the amendment brought into existence by way of Tamil Nadu Amendment Act 28 of 2003. As rightly held by the learned single

Judge since Section 109 is only akin to Section 10 of the Limitation Act, no exception could be taken for the removal of limitation for taking action in restoring the temple properties. The decisions relied on by the learned counsel in this aspect are not applicable to the facts of the present case.

22. Coming to the contention raised by Mr. T.L., Rammohan, Senior Counsel appearing for the petitioner in W.P. No. 20487 of 2000 to the effect that the petitioner as well as the appellants would come under the provisions of Section 34 and not u/s 78, it has to be stated that the petitioner would not come under the purview of Section 34. Before dealing with the decision relied on by the Senior Counsel in support of such contention, it would be appropriate to extract Section 34, which is as follows :

34. Alienation of immovable trust property.-(1) Any exchange, sale or mortgage and any lease for a term exceeding five years of any immovable property, belonging to, or given or endowed for the purposes of any religious institution shall be null and void unless it is sanctioned by the Commissioner as being necessary or beneficial to the institution:

Provided that before such sanction is accorded, the particulars relating to the proposed transaction shall be published in such manner as may be prescribed, inviting objections and suggestions with respect thereto; and all objections and suggestions received from the trustee or other persons having interest shall be duly considered by the Commissioner:

Provided further that the Commissioner shall not accord such sanction without the previous approval of the Government.

Explanation.-Any lease of the property above mentioned though for a term not exceeding five years shall, if it contains a provision for renewal for a further term (so as to exceed five years in the aggregate), whether subject to any condition or not, be deemed to be a lease for a period exceeding five years.

23. Section 34 enables the Commissioner to grant lease or accord sanction in respect of the any religious institution for a term not exceeding five years, after inviting objections and suggestions with respect thereto, of course with the approval of the Government. While granting such lease, he may give certain direction regarding the utilisation of the amount raised by the transaction. Section 34-A deals with the fixation of lease rent, which shall be fixed by a Committee consisting of the Joint Commissioner, the Executive Officer or the Trustee or the Chairman of the Board of Trustees of the religious institution and the District Registrar of the Registration Department in the district concerned taking into account the prevailing market rental value and the guidelines. Section 34-B relates to termination of the lease granted by the Commissioner u/s 34.

24. In the decision reported in (2007) 4 MLJ 1002 (cited supra), the facts are entirely different. In the reported case, the Department has admitted that the petitioner was in possession of the suit schedule property and initiated revenue

recovery proceedings for recovery of the arrears of rent by filing the suit and, therefore, the Division Bench considering the subsistence of the lease, which was admitted by the Department, held that recovery of the property from the lessee was not in accordance with the procedure contemplated u/s 34-B of the Act. In the present case, the appellants / petitioner are not in possession of the property by way of any lease / licence and they are found to be the encroachers and, therefore, the decision relied on by the learned Senior Counsel is not applicable.

25. In the above context, Mr. T.V. Ramanujan, learned Senior Counsel and Ms. Chitra Sampath appearing for the appellant in W.A. No. 849 of 2009 contended that though the Act was amended by Act 25 of 2003 on 10.5.2003, the Commissioner has not taken any steps to grant any lease to the persons who are in occupation for several decades and, therefore, they should not be treated as encroachers as contemplated u/s 78 of the HR & CE Act.

26. Though the learned counsel for the appellants and the petitioner have vehemently contended that the authorities / State have not taken any steps to execute the lease deed, they have not produced any material to show that they have made any representations to the authorities or the Government requesting them to execute the lease deed as contemplated u/s 34 or to fix the rent as provided u/s 34-A. In the absence of any material on the side of the appellants, we are not able to accept the aforesaid contention of the appellants.

27. When this Court has put the question to the learned Addl. Advocate General as to whether any lease agreement has been entered upon by the Commissioner and approved by the Government after coming into existence of Tamil Nadu Act 25 of 2003 from 10.5.2003, no satisfactory explanation has come from him. Neither the learned Addl. Advocate General nor the learned counsel for the Department is in a position to place any material to show any lease agreement has been executed after the Act has been amended and what are the steps taken or the proceedings issued in this regard. Therefore, it is apparent that the State Government or its officers, who are at the helm of affairs of the Temples, have not taken any steps to enter into lease deeds as contemplated under Sections 34, 34-A, 34-B or 34-C of the HR & CE Act after the amendment Act has come into force. It is a sorry state of affairs to mention that the State Government / HR & CE are not serious in protecting the property of the religious institutions and the snail-paced action would not help in any way from recovering the property of the religious institutions from the hands of the encroachers.

28. Considering the submissions made by the learned counsel for the parties and the reply made by the learned Addl. Advocate General, as the responsibility to protect the temple properties vests with the Court, we hereby direct the Commissioner, H R & CE Department as well as the State to immediately implement the provisions of Section 34 by executing lease deeds after fixing appropriate rent as per the prevailing market rate and the guideline value within a period of eight weeks from the date of receipt of a copy of this judgment.

29. In the result, all the writ appeals and the writ petitions fail and the same are dismissed, subject to the directions given in paras 17 and 25 of this judgment. There would be no order as to costs.