
(2012) 08 GUJ CK 0052

In the Gujarat High Court

Case No : Letters Patent Appeal No. 2507 of 2010 in Spl. C.A. No. 13838 of 2009

Pankajkumar Dwarkadas Shah and Others

APPELLANT

Vs

Patel Dahyabhai Punjabhai and Others

RESPONDENT

Date of Decision : 13-08-2012

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 2(10), 2(30), 36, 36(3), 50

Constitution of India, 1950 — Article 12, 226

Criminal Procedure Code, 1973 (CrPC) — Section 92, 93

Citation : (2013) 1 GLR 172

Hon'ble Judges : P.B. Majmudar, J;C.L. Soni, J

Bench : Division Bench

Advocate : S.N. Shelat with Mihir Thakore with Shital R. Patel, for the Appellant; Mihir Joshi with V.M. Pancholi for Respondent Nos. 1 to 3, R.H. Pupareliya, A.G.P. for Respondent Nos. 4 to 6 and Ms. Sneha A. Joshi, for the Respondent

Final Decision : Allowed

Judgement

C.L. Soni, J.—This appeal, under Clause 15 of the Letters Patent, is directed against the judgment and order dated 15-2-2010 passed in Special Civil Application No. 13838 of 2009. The Special Civil Application under Art. 226 of the Constitution of India was filed by the respondent Nos. 1, 2 and 3, who claimed to be the President, the Secretary and the Vice-President respectively of Shri Modasiya Kadva Patidar Boarding Trust. Shri Modasiya Kadva Patidar Boarding is stated to be a registered Trust under the provisions of the Bombay Public Trusts Act, 1950 (hereinafter referred to as "the Act" for short). The Special Civil Application was filed joining the State of Gujarat, Collector, District Superintendent of Police, Sabarkantha and the Charity Commissioner as also the Chief Officer of Modasa Nagarpalika as respondent Nos. 1 to 5 respectively as well as against the present appellants. The prayers made in Para 8 of the Special Civil Application are reproduced as under:

(A) Your Lordship may be pleased to admit this petition.

(B) Your Lordship may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction, and thereby, be pleased to direct the concerned respondent authorities including respondent Nos. 2 and 5 with the help of the respondent No. 3 to demolish the illegal construction made in Survey No. 491/2 at Modasa Nagarpalika and/or direct the respondent Nos. 2, 3 and 5 to take vacant possession of the shops in question from the respondent Nos. 6 to 17, and therefore, be pleased to permit the petitioners to demolish the said illegal constructions.

(C) During the pendency and final disposal of this petition, Your Lordship may be pleased to direct the respondent Nos. 2 and 5 to seal the premises i.e. the shops, which are in illegal possession of the respondent Nos. 6 to 17 situated in Survey No. 491/2 at Modasa Nagarpalika.

(D) Your Lordship be pleased to pass such other order and further orders as may be deemed just and proper in the interest of justice.

2. The case put up in Special Civil Application, in short, is to the effect that the trust is owner of the land bearing Survey No. 491/2 at Modasa, admeasuring 3,440 sq. mtrs. One Pravinbhai B. Patel claimed to be the Secretary of the trust. On 7-1-1985, he made application for obtaining raja-chitthi (permission for construction) for construction of 15 shops without informing the trustees or the Charity Commissioner. Without waiting for raja-chitthi, he put up the construction of 15 shops on the land of the trust and shops were given on rent to different person for commercial purpose, contrary to the object of the trust. Two persons, namely Ramanbhai Motibhai Patel and Natubhai Jesingbhai Patel filed an application, bearing Application Nos. 36 and 37 of 2007 before the Charity Commissioner under Sec. 36 of the Act with a prayer to grant approval for letting the shops on rent with retrospective effect. In the said application, the trustees filed their objections and after hearing all the parties, the Charity Commissioner passed order dated 11-6-2008, whereby the applications of the above said two persons was rejected and the Charity Commissioner was further pleased to pass an order directing the trustees of the trust to take possession of the shops within 60 days after following the legal procedure. The Gujarat Revenue Tribunal confirmed the said order. At that stage, respondent No. 1-President of the trust issued notice dated 14-6-2008 to the shop holders-appellants, asking them to give possession of the land bearing Survey No. 491/2 within a period of 7 days. The shop holders, therefore, filed Regular Civil Suit Nos. 65 to 77 of 2008 and prayed for interim injunction. The said applications were dismissed, against which Special Civil Application No. 4545 of 2009 and Special Civil Application Nos. 5103 to 5113 of 2009 were preferred which came to be rejected by learned Single Judge of this Court. Against the abovesaid order rejecting the petitions, the shop holders preferred Special Leave Petitions before the Hon''ble Supreme Court. The Hon''ble Supreme Court vide order dated 28-8-2009, dismissed all the Special Leave Petitions and confirmed the order passed by this Court.

3. The petition was opposed by the appellants-shop holders, by filing reply

affidavit. They stated that since there is dispute between two groups of trustees, one group of the trustees wanted to settle the score with the shop holders and the shop holders in fact became scapegoat and victims of the inter-se dispute between the trustees. The Charity Commissioner had not issued notice to them. The impression was created from the averments made in the Special Civil Application that the Collector had ordered to remove construction of all the shops but such assertion of fact was not correct and as a matter of record, the Collector ordered to remove only that part of the construction which was de hors the plan or de hors the raja-chitthi and it was never for removal of all the shops occupied by them. They have produced on record the copy of the panchnama about removal of the offending construction. They have stated that against the order rejecting the Special Civil Applications, the shop holders had approached the Hon"ble Supreme Court, wherein upon assurance given by the learned Counsel appearing on behalf of the trust to the effect that, "the trust has no intention to dispossess the petitioners otherwise than in accordance with law", Hon"ble Supreme Court was pleased to reject the Special Leave Petitions of the shops holders. It is further stated that in 1960, the land in question was much far and interior from the village/town and in 1962, the authority sanctioned five shops and those shops were regularised and in 1972, eight other shops were sanctioned and authorised by the District Development Officer. Therefore, in total 13 shops were sanctioned on the land. In 1962 and 1972, when the shops were sanctioned and regularised, one Jesingbhai Revalbhai Patel was trustee, and the President of the trust. The other trustees were not taking active part in the management. The trust wanted to generate income from the property and the then Trustee and the President had given shops on rent to the shop holders.

4. The Collector also filed reply. From the Collector's reply, following Paragraphs are required to be reproduced:

5.1. I say and submit, the suit property in question is of private ownership and belongs to the trust viz. Shri Modasiya Kadva Patidar Boarding, represented by the present petitioner. I say and submit that, the shops owners i.e. present respondents Nos. 6 to 17 which operate in the property through shops on the same, have being built taking into consideration the permission given by the appropriate authority on 7-1-1985. annexed herewith and marked as Annexure-R-I is a copy of the said permission.

5.2. It is submitted that, on representation made to the present respondent, it was found that some construction was made which was beyond the permission granted for built-up area, and therefore, the said illegal construction was demolished. Annexed herewith and marked as Annexure-R-II is a copy of the Panchnama of the said property showing removal of construction dated 26-6-2008. I say and submit that, multiple proceedings were initiated before the relevant authorities viz. present respondent No. 4 as well as before the Hon"ble Gujarat Revenue Tribunal which has attained finality, and before the Hon"ble Civil Court. It is submitted that, civil suit being Regular Civil Suit No. 65 of 2008 to

Regular Civil Suit No. 77 of 2008 interim injunction under at Exh. 5 was rejected within which appeal was carried to the Hon''ble Supreme Court. The Hon''ble Supreme Court vide order dated 28-8-2009, annexed at Annexure-H page No. 99 to the petition was pleased to dismiss the SLP taking into consideration the statement on behalf of the present petitioner that the present respondents Nos. 6 to 17 would not be removed, otherwise than in accordance with the law.

5.3. It is submitted that, the present petitioners have made multiple representation to the present respondent as well as respondent No. 3 for removal of the construction of property belonging to the petitioner. The same was replied to by way of communication dated 7-10-2009 amongst other, addressed by the present respondent to the petitioners pointing out that since the present property in question was private property as well as that the dispute was by way of private dispute it would not be possible to assist the present petitioner in removal of construction especially in absence of any decree of a competent Court and appropriate application should be made to the concerned authority.

5.4. It is submitted that, the post the communication addressed by the present respondent as annexed with the petition, no further action has been taken in order to demolish the property in question on the property land of the present petitioners. I say and submit that, this is in line with the decision of the Hon''ble Supreme Court in P.R. Murlidharan and Others Vs. Swami Dharmananda Theertha Padar and Others, . I say and submit that, it would be improper on the part of the present respondent to enter and demolish the said shops since the same is essential by way of private dispute for which the suit is pending before the learned Additional Senior Civil Judge, (J.D.), more particularly when there is no decree of any of the Competent Court directing the present respondent as well as respondent No. 3 to enter into and demolish the property. It is submitted that the rights of the petitioners as well as private respondent Nos. 6 to 17 with regard to the property shops is the subject-matter of dispute pending which and without appropriate decree it was not be appropriate on the part of the respondent authority to demolish the property in question.

5. Learned Single Judge has issued final direction in Para 6.3, as under:

6.3. In view of the above and for the reasons stated above, present petition succeeds. The respondent Nos. 2 and 5, more particularly, the Collector, Sabarkantha and Chief Officer, Modasa Nagarpalika, are hereby directed to provide all help and assistance to the petitioners herein and the trust, inclusive of sufficient police protection on receipt of the application for the same from the petitioners herein, in getting back the vacant possession of the shops in question from the respondent Nos. 6 to 17, so as to avoid disturbance of law and order situation and any untoward incident. The petitioners herein to approach the respondent Nos. 2 to 5 for the aforesaid help and assistance, one week in advance and with a further notice to the respondent Nos. 6 to 17 herein informing the date on which the petitioners propose to vacate the respondent

Nos. 6 to 17 from the suit shops in question, and thereafter, to demolish the same if they so choose. Rule is made absolute accordingly to the aforesaid extent. No costs.

The appellants-shop holders are seriously aggrieved by the above directions issued by the learned Single Judge. In appeal, the appellants have posed as many as 14 questions for consideration of this Court. Two of them are as under:

(1) Whether the learned Single Judge has rightly interpreted the words "to dispossess the petitioners otherwise than in accordance with law" means providing police protection to the trust and to demolish the shops of the appellants?

(2) Whether the reliefs as prayed for in the petition under Art. 226 of the Constitution could have been granted when there is neither violation of any statute nor is there failure to do the duty in accordance with the provisions of the statute?

6. We have heard learned Senior Counsel Mr. S.N. Shelat and Mr. Mihir Thakore with learned Advocate Mr. Shital Patel for the appellants and learned Senior Counsel Mr. Mihir Joshi with learned Advocate Mr. V.M. Pancholi for respondent Nos. 1 to 3, learned Assistant Government Pleader Mr. R.H. Rupareliya for respondent Government and learned Advocate Mr. Snehal Joshi for respondent No. 8.

7. Learned Senior Counsel for the appellants have submitted that the original petitioners were not entitled to invoke the jurisdiction of this Court under Art. 226 of the Constitution of India for private dispute between the parties. The appellants have been in possession of the shops constructed on the land of the trust for last more than 30 years and it is because of the rivalry between two groups of the trustees, the appellants have been made to suffer for no fault on their part. They further submitted that there was total misrepresentation before the learned Single Judge to the effect that the Collector had ordered for demolition of all 15 shops occupied by the appellants. They pointed out that the order of demolition of the Collector was for very small construction, which was de hors the permission and the same was removed but so far as 15 shops are concerned, the Collector had not passed any order for demolition of these 15 shops because the construction of 15 shops was already regularised long before. Therefore, the observation made by the learned Single Judge that Collector, Sabarkantha passed order to demolish the shops in question is factually not correct and is contrary to the record. The construction of the shops held by the appellant is not found to be illegal or unauthorised by the Collector.

7.1. Learned Senior Counsel further submitted that the rights of the parties in respect of the shops in question have never been decided by the competent Court. Unfortunately, when for the first time, an application was made in the year 2007 for giving permission from retrospective effect under Sec. 36 of the Act, to regularise the occupation of the appellants, the Charity Commissioner passed

order dated 11-6-2008 refusing to give such permission on the ground that the shops were let out in breach of the provisions of Sec. 36 of the Act. On the basis of this order, the trustees were required to initiate legal proceedings in order to get back the possession from the appellants but, they did not initiate any legal proceedings and but issued notice to the appellants for vacating the shops, and therefore, the appellants were constrained to file suits and pray for injunction. Therefore, there was no order or decree from any Court to hand over the possession to the trustees.

7.2. Learned Senior Counsel next contended that though the injunction was refused by the Civil Court, the parties would be governed by the order passed by the Hon'ble Supreme Court in SLP filed against the order of the learned Single Judge refusing to grant injunction as prayed for by the appellants in the civil suit. The Hon'ble Supreme Court did not interfere with the order passed by the learned Single Judge on the ground that the appellants were just called upon by the trust by issuing notice on the basis of the Chanty Commissioner's order dated 11-6-2008 to vacate and deliver up the possession, and except this, there was no material to show that the trust proposed to forcibly dispossess the appellants. In the said order, statement of learned Advocate for the trust was recorded that the trust has no intention to dispossess the appellants-petitioners, otherwise than in accordance with law and in view of the above statement, the S.L.Ps. were dismissed. Learned Senior Counsel, therefore, submitted that the observations made by the learned Single Judge in the order passed in the Special Civil Application, which had arisen from the order of the Civil Court and observations made by the Charity Commissioner, cannot be taken as final conclusion of the rights of the parties for the purpose of taking possession of the shops from the appellants. They would submit that there is no final decree or order by any competent Court against the appellants directing the appellants to hand over the possession of the shops to the trust, and therefore, the only course open to the trust for taking possession of the shops from the appellants was to file suit seeking recovery of the possession from the appellants but in no circumstances, the remedy of writ under Art. 226 of the Constitution of India was available to the trustees.

7.3. Learned Senior Counsel also submitted that even if there was any decree or order by the competent Court for handing over the possession to the trustees, then also, such order or decree could not be enforced or executed by filing petition under Art. 226 of the Constitution of India. Jurisdiction under Art. 226 of the Constitution of India is not to facilitate or help out the private parties to restore or get back their rights to the properties. When asked to learned Senior Counsel Mr. Thakore that since the property belonged to the trust, whether remedy seeking possession of the trust property from the appellants under Sec. 50 of the Act could be available to the trustees or not, he pointed out that such remedy could as well be available to the trustees, to seek recovery of the possession of the shops.

7.4. Learned Senior Counsel for the appellants have further argued that the appellants have been in possession of their respective shops for more than 30 years and as per the observations of the Charity Commissioner, they were inducted as tenants by earlier trustees, without permission of the Charity Commissioner under Sec. 36 of the Act. Therefore, it is not that the appellants are encroachers on the land of the trust. Therefore, all questions as regards the other rights of the appellants of their long possession on the trust property will be required to be decided by the competent Court. They pointed out that the Collector in the affidavit filed in the proceedings of the Special Civil Application has categorically stated that the construction of the shop was regularised long before and illegal construction, which was beyond the permission, was already regularised and the dispute in respect of the shops is private disputes. Therefore, it is not appropriate for the Collector to assist the trustees to take possession from the appellants and to remove the construction. The Collector has further averred in the reply that on behalf of the trustees, statement before the Hon'ble Supreme Court is made to the effect that the appellants shall not be removed otherwise than in accordance with law. In view of the above stand taken by the Collector, learned Single Judge was not justified in exercising the powers and jurisdiction under Art. 226 of the Constitution of India and issuing direction to the authorities to provide necessary help to the trustees for the purpose of securing the possession of the shops from the appellants. Learned Senior Counsel submitted that the powers under Art. 226 of the Constitution of India are always exercised for protecting the constitutional and statutory rights of a citizen and such powers are not required to be exercised to facilitate the private parties in connection with adjudicating their private disputes. Learned Senior Counsel ultimately submitted that the learned Single Judge has exceeded his jurisdiction vested in him under Art. 226 of the Constitution of India, and therefore, the judgment and order as also the directions issued by the learned Single Judge in the Special Civil Application filed by respondent Nos. 1, 2 and 3 are required to be quashed and set aside.

8. Learned Senior Counsel Mr. Mihir Joshi appearing with Mr. V.M. Pancholi for respondent Nos. 1, 2 and 3 - trustees, on the other hand, submitted that the appellants have been illegally occupying the land of the trust. The Charity Commissioner is as *parens patriae* so far as the trust properties are concerned and when the Charity Commissioner has found that the property of the trust, which is meant for charity purpose only, is being illegally held without permission under Sec. 36 of the Act and used for the purpose other than the purpose for which the trust is created, the Charity Commissioner is authorised to direct for taking necessary action for taking possession of the trust property. Therefore, when the Charity Commissioner has already passed order under Sec. 36 of the Act, refusing the permission from retrospective effect to the appellant, even if the appellants are in long possession of the properties of the trust, the appellants would not be entitled to continue with the possession and the possession can be secured even by filing petition under Art. 226 of the Constitution of India.

8.1. Learned Senior Counsel Mr. Joshi further submitted that the Civil Court while deciding the injunction application filed in the suit by the appellants, as also the learned Single Judge while deciding the petition filed by the appellants against refusal of the injunction by the Civil Court, as also the Charity Commissioner, all have decided the rights of the appellants in respect of the properties in question. Mr. Joshi pointed out that the learned Single Judge has observed that there was already an order of the Collector for demolition of the shops, that the Charity Commissioner has also finally decided the rights of the appellants to hold the trust property and has refused to grant permission under Sec. 36 of the Act to the appellants and thus the rights of the appellants to hold the properties of the trust are finally decided, and therefore, there is no necessity for filing the suit or taking any other legal course for recovery of the possession of the shops from the appellants. If the rights of the appellants are finally decided by the learned Single Judge as also by the Charity Commissioner and when it is found that the appellants are holding the trust property illegally and unauthorisedly, asking the trustees to file suit for recovery of the possession would be permitting the appellants to take undue advantage by which they will be entitled to enjoy illegal possession of the trust properties because filing of the suit in the Civil Court for recovery of the possession will be cumbersome and long drawn litigation and such course cannot be said to be the procedure in accordance with law as recorded in the order passed by the Hon"ble Supreme Court.

8.2. Learned Senior Counsel Mr. Joshi further submitted that the trustees were within their rights to invoke the jurisdiction of the learned Single Judge under Art. 226 of the Constitution of India. He referred the prayers made in the petition and pointed out that the trustees-petitioners have sought direction against the concerned authorities to demolish the illegal construction made on the land bearing Survey No. 491/2 of the trust and direct the respondent authorities to take possession from the appellants. He submitted that it is permissible under law to seek such direction because if the possession of the appellant from very beginning is illegal and unauthorised and if there is no protection granted by the Civil Court or by the learned Single Judge of this Court in the petition which was filed against the order refusing to grant injunction, the trust cannot be asked to institute proceeding again in the Court of law to enforce the rights of the trust against the appellants for taking back the possession from the appellants, which the appellants hold unlawfully. As per his submission, recourse to law or taking of action in accordance with law stood already satisfied when there was a judicial determination by the Civil Court while deciding the injunction application and when the petition was decided by the learned Single Judge of this Court against the order refusing to grant injunction to the appellants and when the Charity Commissioner found that the possession of the appellants of the trust property was illegal and unauthorised, as the same was without prior permission under Sec. 36 of the Act. He, therefore, submitted that in such facts of the case, the learned Single Judge was justified in issuing direction to the authorities to provide help and assistance to the trust and the trustees inclusive of sufficient

police protection, for the purpose of taking back vacant possession of the shops from the appellants. Mr. Joshi has also relied on decision of Delhi High Court in the case of Thomas Cook (India) Limited Vs. Hotel Imperial and Others, . He thus urged that this Court may not interfere with the judgment and order passed by the learned Single Judge while exercising the powers under Clause 15 of the Letters Patent.

9. Before, we deal with the rival contentions advanced on behalf of the appellants as also the respondents, we may refer the following important aspects of the matter:

(1) The order of the Collector is on record. The Collector has not ordered demolition of 15 shops held and occupied by the appellants. What was ordered to be demolished was only illegal construction of small portion on the land admeasuring 352.77 sq. mtrs., which was found to be beyond the permission granted for construction on the basis of the order of the Collector. The said offending construction was removed and panchnama was also drawn which is also placed on record of this case. Thus, the observation made by the learned Single Judge in earlier round of litigation, which had arisen out of the order passed by the Civil Court in the injunction application of the appellants, as also in the present impugned order that the Collector had ordered demolition of the shops by holding the construction of the shops in question as absolutely illegal and unauthorised, appears to be on the basis of the misrepresentation made by the original petitioners.

(2) The Charity Commissioner was concerned with deciding the issue about grant of permission under Sec. 36 of the Act. It is pertinent to note that the Charity Commissioner decided the application in absence of and without hearing the appellants. The Charity Commissioner has not given any direction to the shop holders to hand over the possession to the trustees. The Charity Commissioner has issued only limited direction to the trustees to initiate appropriate legal proceedings within 60 days to get back the possession of the shops and other properties given on rent by the earlier trustees.

(3) In the S.L.Ps. filed by the appellants, Hon"ble Supreme Court passed the following order:

We find no ground to interfere with the impugned order passed by the High Court.

The trust issued a notice calling upon the petitioners to deliver the possession in pursuance to the orders of the Charity Commissioner dated 11-6-2008 directing that the trust should evict the petitioners by initiating legal procedures in accordance with law. As the Court found that except calling upon the petitioners to vacate and deliver up the possession, there was no material to show that the trust proposed to forcibly dispossess them, the application for temporary injunction was dismissed by the trial Court and that was affirmed by the appellate Court and also by the High Court in the Writ Petition.

Mr. R.K. Abhichandani, learned Senior Counsel appearing for the trust submits that the trust has no intention to dispossess the petitioners otherwise than in accordance with law.

In view of the above, these Special Leave Petitions are dismissed.

(4) The stand of the Collector is very clear before the learned Single Judge that there is a private dispute between the parties in respect of the private properties and there is a statement made on behalf of the trustees before the Hon''ble Supreme Court to take recourse to law for taking back the possession from the appellants, and therefore, the trustees cannot be provided any help to secure possession of the trust property.

10. We may also refer some decisions of the Hon''ble Supreme Court on the width and extent of jurisdiction and power of the High Court under Art. 226 of the Constitution of India for private dispute.

10.1. In the case of *Swamy Atmananda Vs. Swami Bodhananda and Others*, , when the High Court had issued writ of mandamus directing the respondents therein to give all assistance to the appellants of that case in taking over the management of the institution specified therein, Hon''ble Supreme Court has held that writ petition is not the appropriate remedy, and therefore, the judgment of the High Court issuing writ of mandamus was set aside and it was left to the respondents to execute the decree of the Civil Court in accordance with law.

10.2. In the case of *Moran M. Baselios Marthoma Mathews II and Others Vs. State of Kerala and Others*, , the Hon''ble Supreme Court has held in Paras 7, 8, 9, 10 and 12 as under:

7. The short question which arises for consideration, in our opinion, is as to whether in a situation of this nature, the High Court should have gone into the rival contentions of the parties. Our answer is "No". There cannot be any doubt whatsoever that prayer for issuance of a writ of mandamus may be granted against the State commanding it to perform its legal duties when it fails and/or neglects to do so. It is, however, another thing that while considering only that aspect of the matter, the Court in the garb of rendering a decision on that limited aspect would go into the disputed question of title and/or interpretation of a judgment of this Court wherefore other remedies are not only available but, as noticed hereinbefore, in fact, more than 200 suits, touching one aspect of the matter or the other, are pending in different Civil Courts.

8. A distinction, in our opinion, must be borne in mind in regard to the exercise of jurisdiction under Art. 226 of the Constitution of India in relation to the matters providing for public law remedy vis-a-vis private law remedy. The High Court while exercising its jurisdiction under Art. 226 of the Constitution, no doubt, exercises a plenary power but then certain limitations in regard thereto are well accepted. Ordinarily, a writ of or in the nature of mandamus would be

issued against a "State" within the meaning of Art. 12 of the Constitution of India or the public authorities discharging public functions or a public utility concern or where the functions of the respondents are referable to a statute, which a fortiori would mean that, save and except, for good reasons Court would not entertain a matter involving private law remedy.

9. The question as regards grant of a relief for providing police protection in a somewhat similar case, came up for consideration before this Court in P.R. Murlidharan and Others Vs. Swami Dharmananda Theertha Padar and Others, wherein one of us was a party. It was held therein:

Furthermore, the jurisdiction of the Civil Court is wide and plenary, In a case of this nature, a writ proceeding cannot be a substitute for a Civil Suit.

10. Balasubramanyan, J., in his concurring opinion observed:

A writ petition under the guise of seeking a writ of mandamus directing the police authorities to give protection to a writ petitioner, cannot be made a forum for adjudicating on civil rights. It is one thing to approach the High Court, for issuance of such a writ on a plea that a particular party has not obeyed a decree or an order of injunction passed in favour of the writ petitioner, was deliberately flouting that decree or order and in spite of the petitioner applying for it, or that the police authorities are not giving him the needed protection in terms of the decree or order passed by a Court with jurisdiction. But, it is quite another thing to seek a writ of mandamus directing protection in respect of property, status or right which remains to be adjudicated upon and when such an adjudication can only be got done in a properly instituted civil suit. It would be an abuse of process for a writ petitioner to approach the High Court under Art. 226 of the Constitution seeking a writ of mandamus directing the police authorities to protect his claimed possession of a property without first establishing his possession in an appropriate Civil Court. The temptation to grant relief in cases of this nature should be resisted by the High Court. The wide jurisdiction under Art. 226 of the Constitution would remain effective and meaningful only when it is exercised prudently and in appropriate situations.

12. Such might have been the contentions of the appellants before the High Court or before us in the Special Leave Petitions, but we have no doubt in our mind that such disputed questions in regard to title of the properties or the right of one group against the other in respect of the management of such a large number of Churches could not have been the subject-matter for determination by a Writ Court under Art. 226 of the Constitution of India in the garb of grant of police protection to one or the other appellants.

10.3. In the case of P.R. Murlidharan and Others Vs. Swami Dharmananda Theertha Padar and Others, , it is held by the Hon'ble Supreme Court that a writ for police protection has only a limited scope, as, when the Court is approached for protection of rights declared by decree or an order passed by a Civil Court. It cannot be extended to cases where rights have not been determined either

finally by the Civil Court or, at least at an interlocutory stage in unambiguous manner, and that too in furtherance of the decree or order. The jurisdiction of the Civil Court is wide and plenary and writ proceeding for private disputes cannot be a substitute for a civil suit.

11. On interpretation of Secs. 36 and 50 of the Act, we may refer some decisions but, before that, we may reproduce Sec. 36 and Sec. 50 of the Act as under:

36. Alienation of immovable property of public trust.-

1(1) Notwithstanding anything contained in the instrument of trust]-

(a) no sale, mortgage, exchange or gift of any immovable property, and

(b) no lease for a period exceeding ten years in the case of agricultural land or for a period exceeding three years in the case of non-agricultural land or a building, belonging to a public trust, shall be valid without the previous sanction of the Charity Commissioner.

(2) The decision of the Charity Commissioner under sub-sec. (1) shall be communicated to the trustees and shall be published in such manner as may be prescribed.

(3) Any person aggrieved by such decision may appeal to the Gujarat Revenue Tribunal within thirty days from the date of its publication.

(4) Such decision shall, subject to the provisions of sub-sec. (3) be final].

50. Suits relating to public trusts:- In any case-

(i) where it is alleged that there is a branch of a public trust,

(ii) [where a direction is required to recover possession of a property belonging to a public trust] (or the proceeds thereof or for an account of such property or proceeds) from any person including a person holding adversely to the public trust, or

(iii) where the direction of the Court is deemed necessary for the administration of any public trust.

the Charity Commissioner (after making such enquiry as he thinks necessary) or two or more persons having an interest in the trust and having obtained the consent in writing of the Charity Commissioner as provided in Sec. 51 may institute a suit whether contentions or not in the Court within the local limits of whose jurisdiction the whole or part of the subject-matter of the trust is situate, to obtain a decree for any of the following relief:

(a) an order for the recovery of the possession of such property [or proceeds thereof],

(b) the removal of any trustee or manager,

- (c) the appointment of a new trustee or manager,
- [(cc) vesting any property in a trustee,]
- (d) a direction for taking accounts and making certain inquiries,
- (e) a declaration as to what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust,
- (f) a direction authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged,
- (g) the settlement of a scheme or variations or alternations in a scheme already settled, or
- (h) granting such further or other relief as the nature of the case may require:

Provided that no suit claiming any of the reliefs specified in this Section shall be instituted in respect of any public trust except in conformity with the provisions thereof:

[Provided further that the Charity Commissioner may instead of instituting a suit, make an application to the Court for a variation or alteration in a scheme already settled.]

12. This Court had an occasion to interpret and explain the scope of Sec. 36 as also Sec. 50 of the Act, in the case of Kamalsha Gulzarsha and Another Vs. Charity Commissioner, Gujarat State, . Paras 7, 8, 9 and 10 are relevant for our purpose, and therefore, they are reproduced hereinbelow:

7. A reading of the provisions contained under Sec. 36 of the Act would go to show that the Charity Commissioner could have approached the Gujarat Revenue Tribunal for cancellation of the sanction already accorded by his office. But, it requires to be pertinently noticed, as has been done by the learned Single Judge, that the other prayers, which are material and substantial, could not have been granted by the Gujarat Revenue Tribunal while exercising its jurisdiction under Sec. 36(3) of the Act.

8. Mr. Merchant urges that the property in dispute, after the sale to the original defendant No. 2 has ceased to be the trust property, and therefore, the provisions contained under Sec. 50 of the Act are not attracted, and that therefore, the suit would not be maintainable under the abovesaid provisions of the Act. A reference to the provisions contained under Sec. 50 of the Act and especially sub-clause (i) makes it clear that such a suit would be competent and maintainable, where it is alleged that there is a breach of a public trust. It is not in dispute that the property belonged to a public trust, which was duly registered under the Act, and that, later on, the previous sanction was also obtained. Merely because acting upon such a previous consent, the sale deed has been executed, it cannot be successfully urged that the property in question loses the original character of being a trust property. The property, which was,

undoubtedly, a trust property, can be traced wherever it is, after following the necessary procedure, as laid down by law. The Charity Commissioner, in fact wanted to trace the trust property, which, according to him, has passed over to defendant No. 2 illegally. It, therefore, cannot be successfully urged that, in such a case, the provisions contained under Sec. 50 of the Act have no application.

9. We are of the opinion that the acceptance of the contention being raised by the learned Counsel, at our hands, would render the salutary provisions contained under Sec. 50 of the Act rather nugatory, making in its turn, impossible for the Charity Commissioner to trace the trust property after its passage to the third parties, on the basis of a transaction, which is not supported by a valid and legal previous sanction and appears to be in violation of the terms and conditions annexed to the orders according previous sanction. We find ourselves unable to agree with such a construction sought to be placed upon Sec. 50 of the Act.

10. Therefore, looking to the provisions contained under Sec. 36 and Sec. 50 of the Trust Act, we feel that the learned Single Judge was perfectly justified in coming to the conclusion that the Charity Commissioner wanted to put forth a case of a breach of public trust within the purview of Sec. 50(1) of the Act and that, therefore, we do not see any reason to interfere with the orders pronounced by the learned Single Judge. Finding no warrant for interference, we feel that the present appeal requires to be dismissed. We do so. We make no order as to costs.

13. In the case of Virupakshayya Shandarayya Vs. Neelakanta Shivacharya Pattadadevaru, , the Hon''ble Supreme Court has considered and discussed Sec. 50 read with Sec. 51 of the Act and has held that the suit for recovery of the trust property can be filed against a person who is holding the possession of the trust property adversely to the public trust as also suit can be filed for recovery of the possession from any person. Meaning thereby, it would also include a person who may not claim adversely to the public trust.

13.1. The Hon''ble Supreme Court in the case of Shree Gollaleshwar Dev and Others Vs. Gangawwa Kom Shantayya Math and Others, , has held as under:

13. It is clear from these provisions that Sec. 50 of the Act created and regulated a right to institute suit by the Charity Commissioner or by two or more persons interested in the trusts in the form of supplementary statutory provisions without defeasance of the right of the manager or a trustee or a shebait of an idol to bring a suit in the name of idol to recover the property of the trust in the usual way. There is, therefore, no reason why the two or three person interested in the trust should be deprived of the right to bring a suit as contemplated by Sec. 50(ii) (a) of the Act. Although, sub-sec. (1) of Sec. 52 makes Secs. 92 and 93 of the Code inapplicable to public trust registered under the Act, it has made provision by Sec. 50 for institution of such suits by the Charity Commissioner or by two or more persons interested in the trust and having obtained the consent in writing

of the Charity Commissioner under Sec. 51 of the Act.

14. We are unable to subscribe to the view expressed by the High Court. Although, the Full Bench rightly adverted to sub-sec. (13) or Sec. 52 of the Act which excludes the applicability of Secs. 92 and 93 of the Code to the public trusts governed by the Act, it is not right in its conclusion that a suit instituted by the idol represented by two or more trustees, with the written consent of the Charity Commissioner as provided in Sec. 51 of the Act, was not within the purview of Sec. 50(ii)(a) of the Act, and therefore, could not be brought in the Court of the District Judge. Although, Sec. 50 of the Act is structured upon the pattern of Sec. 92 of the Code, the Full Bench failed to appreciate that there is no provision in Sec. 92 of the Code analogous to clause (ii) or relief (a) of Sec. 50 of the Act. It will be seen from Sec. 50 that the Section authorises the institution of a suit by the Charity Commissioner or two or more persons interested in the trust only in the District Court having jurisdiction to try it. The scope of Sec. 50 of the Act is wider than that of Sec. 92 of the Code. It applies to a case so long as the relief claimed falls within the scope of the Section. One of the reliefs that can be claimed in a suit brought under Sec. 50 of the Act is that covered by relief (a) set out in clause (ii) viz. for a declaration that a certain property belongs to a public trust and for possession thereof from a person holding it adversely to the trust viz., a suit brought by the Charity Commissioner or two or more persons interested in the trust with his consent in writing as provided in Sec. 51 of the Act.

15. The fallacy underlying in the reasoning of the Full Bench lies in the wrongful assumption that Sec. 50 of the Act is in pari materia with Sec. 92 of the Code. It is upon that erroneous hypothesis that it observes that the suit contemplated by Sec. 50 of the Act is one of a representative character. It overlooks the scope and effect of Sec. 50 of the Act which contemplates not only suits of a representative character but also suits by two or more trustees for preservation of the property of the trust. The reasoning of the Full Bench that if the suit is filed by the idol to enforce its private rights, the provisions of Sec. 92 of the Code are not attracted and a fortiori the same principles equally govern suits under Sec. 50 of the Act, is not worthy of acceptance. The Full Bench was also wrong in relying upon the decision of this Court in Bishwanath's case which turned on the construction of Sec. 92 of the Code. In that case, it was held that the bar of Sec. 92 did not apply to a suit by an idol or by its trustees for a declaration that the suit properties belonged to the trust and for possession of the same from persons holding the properties adversely to the trust inasmuch as such a suit is not a suit of a representative character instituted in the interests of the public, but is really a suit for the vindication of the individual or personal rights or the deity or the trustees. The decision in Bishwanath's case, is therefore, clearly distinguishable and the principles laid down as to the applicability of Sec. 92 of the Code to such suits are not attracted.

16. There is no warrant for the restrictive construction placed by the Full Bench

on the expression "person having interest" in a trust occurring in Sec. 2(30) and Sec. 50 of the Act. The definition of the expression "person having interest" in Sec. 2(10) being an inclusive one, there is lawful justification to exclude the suit brought by two or more trustees in the name of the trust, to recover possession of its property against a person holding it adversely to the trust from the purview of Sec. 50(ii) of the Act.

14. In light of above, when the Charity Commissioner passed order directing the trustees to initiate necessary legal procedure for recovery of the possession of the shops from the appellants and when in the order passed by the Hon'ble Supreme Court in S.L.Ps. filed by the appellants, it is recorded that the trust has no intention to dispossess the petitioners (appellants) otherwise than in accordance with law, whether recourse to the remedy of filing writ petition under Art. 226 of the Constitution of India can be said to be appropriate remedy in the facts of the case.

14.1. When we noticed that learned Senior Counsel Mr. Mihir Joshi had put forth his vehemence on the observations made by the Charity Commissioner as also by the learned Single Judge in their orders, we repeatedly asked Mr. Joshi as to whether invoking the jurisdiction of this Court under Art. 226 of the Constitution of India for getting the possession of the private properties from the appellants, who have been in possession of the shops for more than 30 years, can be said to be a correct procedure followed in law as observed by the Charity Commissioner as also by the Hon'ble Supreme Court. Mr. Joshi tried to justify filing of the petition under Art. 226 of the Constitution of India by the trustees for recovery of the possession of the trust property, by stating that since the rights of the parties have already been decided by the Charity Commissioner as also by the Civil Court at the interim injunction stage, no other rights were required to be adjudicated, and therefore, the trustees had rightly invoked the jurisdiction of this Court under Art. 226 of the Constitution of India.

14.2. We, therefore, deem it proper to refer the following relevant facts emerging from the record of the case:

(1) Before the Charity Commissioner, two persons, who posed themselves to be the office-bearers of the trust, had filed application seeking permission under Sec. 36 of the Act from the retrospective effect in respect of the occupation of the trust property by the appellants as tenants of the shops. The application was opposed by the other trustees stating that the persons who had filed application had no authority and also stating that there was no permission taken before making construction of the shops on the trust property and use of the trust property for commercial purpose was contrary to the purpose of the trust. The appellants were not made parties and in fact, they have stated in their reply before the learned Single Judge that no notice was issued to them. In their absence, the Charity Commissioner has observed that lease-deed was made with the appellants in the year 1983, and therefore, it is not established that the persons claimed to be the tenants are tenants from 1960 to 1972. The Charity

Commissioner has observed that if prior permission was taken before giving the shops on rent, the properties could have fetched more income by way of rent and the purposes of the trust could be achieved in a better way. Ultimately, on this basis, the Charity Commissioner reached to the conclusion that the possession of the trust properties, i.e. shops, is required to be recovered by following the necessary legal procedure and for that purpose, order is required to be passed in the interest of the trust, and ultimately, the trustees were directed to take necessary legal proceedings within 60 days for the purpose of recovery of the possession of the trust properties.

(2) Against refusal of the injunction by the Civil Court, the appellants preferred Special Civil Applications before this Court and while rejecting the Special Civil Applications, the learned Single Judge inter alia made following observations, "it is also required to be noted that as stated above, there is already an order passed by Collector, Sabarkantha to demolish the shops in question by holding that the construction of the shops in question is absolutely illegal and unauthorised and the said order of the Collector has also become final. Therefore, even the construction of the shops in question occupied by the respective petitioners (appellants herein) is held to be illegal and unauthorised". We have already reproduced extract of the affidavit-in-reply filed by the Collector before the learned Single Judge in the Special Civil Application, from which the present Letters Patent Appeal has arisen and we have also gone through the orders passed by the Collector. We find that there is no order of demolition of the shops occupied by the appellants. There was order only for removing illegal construction which was made beyond the permission granted. This fact is also found confirmed from the affidavit of the Collector before the learned Single Judge. The above observation of the learned Single Judge was part of Para 19 of the earlier order, which came to be reproduced by the learned Single Judge in the present impugned order. We find that on the above aspect of the matter, there was misrepresentation of the facts about passing of the order by the Collector for demolition of all shops held by the appellants, before learned Single Judge and on such misrepresentation, the learned Single Judge made the above observation.

15. From what we have considered above, we find that the rights of the parties, especially the rights of the appellants have not been finally decided. The Charity Commissioner, who decided the issue of permission under Sec. 36 of the Act, made observations against the appellants and issued directions to the trustees for recovery of the possession by taking recourse to law in absence of the appellants and without hearing the appellants. Therefore, so far as the appellants are concerned, it cannot be said that the rights of the appellants were decided by the Charity Commissioner finally. At this stage, it is required to be noted that even the Charity Commissioner in his order has stated that if prior permission was taken under Sec. 36 of the Act, perhaps the trust would have earned more rent for its properties. This would go to suggest that if the appellants were heard by the Charity Commissioner while deciding the case under Sec. 36 of the Act, the Charity Commissioner would have permitted the appellants to continue to

hold shops as tenants at the higher rent for the best interest of the trust. It also appears from the above observation of the Charity Commissioner that interest of the trust would have been better served by taking more amount of rent from the appellants rather than to vacate the shops because the trust has been from very beginning facing monetary crisis.

16. In a similar way, the order of the learned Single Judge and the observations made in the order by the learned Single Judge, both cannot be said to be finally deciding the rights of the appellants. Earlier petition filed before the learned Single Judge was against the refusal of injunction by the Civil Court. The learned Single Judge was, therefore, concerned with deciding the issue of injunction. The decision of the learned Single Judge at the interim injunction stage cannot be in the facts of the case said to be a decision finally deciding the rights of the parties for following reasons:

- (a) It was at interim injunction stage;
- (b) It was based on the order of the Charity Commissioner who decided the case under Sec. 36 of the Act without hearing and in absence of the appellants;
- (c) It was also based on misrepresentation of the facts in respect of the order of the Collector as regards demolition of shops of the appellants; and
- (d) Decision of learned Single Judge did not hold good in view of the order passed by Hon''ble Supreme Court in S.L.Ps. filed by the appellants. The parties were bound by the order of Hon''ble Supreme Court.

16.1. The above aspects have led us to form an opinion that the rights of the appellants cannot be said to have been finally decided by the order of the Civil Court and learned Single Judge or by the order of the Charity Commissioner.

17. Undisputably, there is no final order or decree from any competent Court directing the appellants to hand over the possession of the property to the trust. Therefore, in our view, no assistance of the Collector or police protection could have been sought by the trustees for taking possession of the trust property from the appellants by resorting to the remedy of writ. In fact, even if there was any final order or decree directing the appellants to hand over the trust properties, we have our own doubt whether such final order or decree could be enforced or executed by invoking the powers under Art. 226 of the Constitution of India. In the given facts of the case, where there is final order and decree, such remedy may be available but not in all cases, remedy like Executing Court is available. Thus, it always depends upon the facts of each case, provided there is final decree or order for delivery of the possession of the property.

17.1. In the case of *Swamy Atmananda Vs. Swami Bodhananda and Others*, , the Hon''ble Supreme Court has held that writ of mandamus directing the State authorities to give assistance in taking over the management of the Institution is not the appropriate remedy. In the case of *Moran M. Baselios Marthoma Mathews II and Others Vs. State of Kerala and Others*, the Hon''ble Supreme Court has

held that the writ Court would not go into the disputed question of facts when the Civil Suits were pending. It is further observed therein that distinction must be borne in mind in regard to the exercise of jurisdiction under Art. 226 of the Constitution of India in relation to the matters providing for public law remedy and private law remedy.

17.2. In the case of P.R. Murlidharan and Others Vs. Swami Dharmananda Theertha Padar and Others, , the Hon''ble Supreme Court has held that a writ petition under the guise of seeking writ of mandamus directing the police authorities to give protection to the writ petitioner cannot be made a forum for adjudicating the Civil rights. In the said decision, the Hon''ble Supreme Court has observed that it is one thing to approach the High Court for issuance of writ on a plea that a particular party has not obeyed a decree or an order passed in favour of the writ petitioner and in spite of the petitioner applying for it, or that the police authorities are not giving him the needed protection in terms of the decree or order. But, it is quite another thing to seek a writ of mandamus directing protection in respect of the property, status or right which remains to be adjudicated upon and when such an adjudication can only be got done in a properly instituted Civil Suit. It is further observed that it would be an abuse of process for a writ petitioner to approach the High Court under Art. 226 of the Constitution of India seeking a writ of mandamus directing the police authorities to protect his claimed possession of a property without first establishing his possession in an appropriate Civil Court. The temptation to grant relief in cases of this nature should be resisted by the High Court. The wide jurisdiction under Art. 226 of the Constitution would remain effective and meaningful only when it is exercised prudently and in appropriate situations.

18. We have repeated the above observations taking from the quoted portion of the decisions of the Hon''ble Supreme Court to emphasis that remedy of writ in the facts of the present case was misconceived and not called for, and it was clear abuse of the process of the writ Court.

19. We are of the opinion that Sec. 50 of the Act clearly provides for remedy for recovery of the possession of the trust property. We have referred the decision of this Court as also of the Hon''ble Supreme Court on interpretation of Sec. 50 of the Act. This Court as also the Hon''ble Supreme Court have clearly held that statutory remedy under Sec. 50 of the Act is available to Charity Commissioner as also to the trustees for recovery of the possession of the trust property by filing suit before the competent Civil Court. Bypassing such statutory remedy or bypassing ordinary remedy of filing a Civil Suit for recovery of the possession of the property in question, was not at all permissible in the facts of the case even if there was already a decision of the Charity Commissioner under Sec. 36 of the Act and there was an order of the learned Single Judge while deciding the issue of injunction.

19.1. We are further of the opinion that the order of the Hon''ble Supreme Court for taking of action in accordance with law cannot be construed so as to permit

the trustees to invoke the extraordinary jurisdiction under Art. 226 of the Constitution of India. The observations of the Hon"ble Supreme Court in the said order were required to be read and observed in their true meaning and spirit. The statement of the learned Senior Counsel for the trustees recorded and the observations of the Hon"ble Supreme Court in the said order would, in our view, not permit remedy of writ jurisdiction but it would mean recourse of filing a suit before the competent Court for recovery of the possession of the property of the trust from the appellants.

20. The decision relied by learned Senior Counsel Mr. Joshi would not be of any help to the trustees because the facts of that case and the facts of the present case are totally different. In this case, we have found that the Charity Commissioner had decided the case in absence of the appellants. The learned Single Judge has also made observations on misrepresentation of the facts. We have also found that there are no final decisions regards the right of the appellants in the present case. Therefore, the decision relied by learned Senior Counsel Mr. Joshi would not be applicable to the facts of the case.

20.1. As regards moulding of a relief as suggested by learned Senior Advocate Mr. Joshi, we may observe that if the petition itself is not maintainable under Art. 226 of the Constitution of India for the relief prayed in the petition in the facts of the case and if the facts of the case did not call for exercise of the powers under Art. 226 of the Constitution of India, there is no question of moulding the relief. In our view, remedy of writ was not the remedy at all available to the trustees. Therefore, there is no question of moulding the relief as suggested by learned Senior Counsel Mr. Joshi.

21. We are thus of the confirmed view that filing of the petition under Art. 226 of the Constitution of India by the trustees was not the remedy available to the trustees for recovery of the possession of the trust properties from the appellants and consequently, in the facts of the case, the learned Single Judge was not justified in exercising the powers under Art. 226 of the Constitution of India directing the State authorities to provide assistance to respondent Nos. 1, 2 and 3 trustees to recover the possession of the trust property and for demolition of the shops held by the appellants. In view of the above, the appeal is required to be allowed and is hereby allowed. The judgment and order passed by the learned Single Judge dated 15-2-2010 passed in Special Civil Application No. 13838 of 2009 is quashed and set aside. No order as to costs.