

(2013) 08 KL CK 0080

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 23927, 24654, 24716, 25866, 26182, 26490, 26834, 26896, 28051, 30706, 31497 of 2009

Payyannur Sree Subrahmanya Swami Kshethroddharana
Samithi and Another

APPELLANT

Vs

Malabar Devaswom Board and Others

RESPONDENT

Date of Decision : 21-08-2013

Acts Referred:

Citation : (2013) 3 KHC 849 : (2013) 4 KLT 94

Hon'ble Judges : Thottathil B. Radhakrishnan, J;P. Bhavadasan, J

Bench : Division Bench

Advocate : N. Nandakumara Menon and K. Rajesh Sukumaran, for the Appellant; K. Mohanakannan, V. Krishna Menon, (Standing Counsel, Malabar Devaswom), Lakshmi Narayan, (Senior Government Pleader), K.T. Lilly, (Government Pleader) and Mahesh V. Ramakrishnan, for the Respondent

Final Decision : Partly Allowed

Judgement

Thottathil B. Radhakrishnan, J.—Section 14 of the Madras Hindu Religious and Charitable Endowments Act, 1951 as substituted by Amending Act 31/2008; Madras Hindu Religious and Charitable Endowments (Amendment) Rules, 2009 inserting "Rules u/s 14(3)"; and, Circular No. HRJ 1 - 5144/2009 dated 03/08/2009 issued by Commissioner of the Malabar Devaswom Board, for short, "Board", are under challenge. Heard learned Senior Advocate and other learned advocates for the petitioners, the learned Government Pleader and the learned Standing Counsel for the Board.

2. Different temples fall within "Malabar area" as defined in Section 9(a) of the Madras Hindu Religious and Charitable Endowments Act, 1951, for short, "Madras Act". Petitioners are either hereditary trustees or trustees of some of those temples.

3. Section 14 is inserted in the Madras Act to provide for Temple Advisory Committees, for short, "TACs". Sub-section 2 of that Section provides that TACs

formed under sub-section 1 of that Section shall be approved by the Board. Sub-section 1 provides that for the purpose of ensuring the adequate participation of Hindu devotees, a committee may be constituted for each temple in the name "(name of the temple) Temple Advisory Committee", not inconsistent with the existing custom and practices. Sub-section 3 of Section 14 provides that the composition of a TAC under sub-section (1) shall be in such manner, as may be prescribed. The impugned amendment to the Madras Hindu Religious and Charitable Endowments Rules, for short, the "Rules", contains eight rules inserted under the heading "Rules u/s 14(3)". Rules 1 and 2 provide that every TAC shall consist of one member from among the trustees of the temple; the chief priest of the temple; one member from Scheduled Caste/Scheduled Tribes Community; one woman member; four other members; and Executive Officer of the temple. Of them, six members, i.e., other than the chief priest, member from among the trustees and the Executive Officer, shall be nominated by the Board from among the locally residing Hindu persons having interest in the affairs of the temple. Rules 3 to 7 provide for the meetings, quorum, frequency of meetings and other related aspects. Rule 8 provides that the TAC shall take special care in maintaining the existing custom and practices of each temple. The impugned circular dated 03/08/2009 issued by the Commissioner enumerates the purpose for the constitution of the TACs and describes the duties and responsibilities of office bearers. Those provisions are spread out in Clauses 1 to 4. Clause 5 deals with the authority of the TACs and also provides the mode of their dissolution and the requirement that the TACs should act in conformity with the directions of the Board. The term of a committee is prescribed as two years.

4. The impugned amendments to the Madras Act and Rules, as well as the impugned circular, are challenged as violative of Article 26, apart from Article 14 of the Constitution. The amendment, incorporating Section 14, is impeached as an unauthorised invasion to the insulation available to the trustees to manage the affairs of a religious institution, as secured by Section 8B of the Madras Act which provides for assumption of direct administration only on request and to that extent, infractive of the constitutionally guaranteed fundamental rights in that regard. The power of the Deputy Commissioner u/s 58 of the Madras Act to frame Scheme is pointed out as sufficient authority to ensure that there is no mismanagement of any religious institution, including of a temple, and the provision in the nature of Section 14 that is now brought in is criticised as contrary to the provisions of Section 8B of the Madras Act. The impugned rules are criticised as having been made without authority under the Madras Act and made only to erode the administration of the religious institutions, including temples by those who are enjoined to carry out such administration in terms of the provisions of the Madras Act. The Commissioner's circular is also criticised on the ground that it has been issued in excess of the authority of the Commissioner under the Madras Act and the provisions therein regarding the TACs, particularly those contained in Clause 5 of that circular are criticised as attempts to undo the functioning of different committees which may be assisting the hereditary trustee

or the trustees, as the case may be, for different matters in connection with the temples, festivals etc. It is argued in support of these writ petitions that, apart from the fact that the rules and the circular are against Section 8B, there is no such power in Section 20 of the Madras Act which would enable the Commissioner to issue any such circular. Even if Section 14 and the rules were to stand, there is no provision in that section or the rules authorising the Commissioner to issue any circular in the nature of the impugned one, it is argued. It is pointedly argued that what is not permissible u/s 8B is sought to be indirectly done through the impugned rules and circular; under the cover of the impugned Section 14. The provisions in Clauses (a) to (c) of Article 26 of the Constitution are argued as infringed amounting to an onslaught and negation of the freedom of every religious denomination in terms of that article. It is pointed out that even on their face, the impugned amendment to the Madras Act, the impugned Rules and the impugned Circular, amount to clear encroachment on to the religious matters; which have absolutely no secular content, to enable a statutory body to meddle with the administration of a temple or religious institution. It is lastly argued that having regard to the powers available to the Board, the Commissioner, the Deputy Commissioner and other authorities under the Madras Act; without reference to the impugned statutory provision, rules and the circular; have vast power to take care of situations of any mismanagement or other such situation in relation to any religious institution, including a temple, which may require intervention of a statutory supervisory authority to protect the interest of any religious institution or persons having interest in the affairs of a temple. It is thus argued that the impugned amendments and the impugned circular are calculated onslaughts on the right of a religious denomination, namely, Hindus, and, on temples and establishments already governed by the standing statutory provisions. This is criticised as plainly unconstitutional.

5. The State Government has placed a counter-affidavit supporting the impugned amendments and denouncing the attack that Section 14 of the Madras Act is unconstitutional being violative of Article 26 of the Constitution. The plea of the State is that the temples in relation to which the writ petitions are filed are religious institutions coming under the ambit of the Madras Act and the TACs are required to be constituted for the purpose of ensuring adequate participation of Hindu devotees. It is contended that the main income of the temples are the contributions of the devotees and it is only fair to have a committee of the devotees to advise the trustees, especially in maintaining the existing customs and practices of each temple and for the celebration of the annual festival etc. It is also pointed out that the constitution of TACs is not intended to curb the powers of trustees or like authorities, but is intended only to advise the temple authorities not to compromise the customs and practices of the temple and to take necessary steps in the general interest of the devotees of the temple. There is no question of any interference with the powers, duties, responsibilities and privileges of the hereditary trustee or the trustees, and the formation of the TACs will not offend either Article 25 or Article 26 of the Constitution, it is argued on

behalf of the State. The TACs are not to control the income of the temples and they would not have control over the day to day activities of the temple. The apprehension of the petitioners that the impugned rules would take away the right of administration from the hereditary trustee or the trustees is countenanced as baseless. The writ petitioners' plea that the impugned rules are beyond the rule making power of the State is refuted and it is argued on behalf of the State that such rule making power can be easily read from sub-section 3 of Section 14, apart from Section 100 which also confers the rule making power. It is argued on behalf of the State that the rules are not ultra vires the Statute and the plea that the Board normally works in accordance with the wish of the political party in power and that the TACs are likely to misuse funds of the temple is unfounded. It is argued that the impugned circular does not militate against any of the powers of the hereditary trustee or the trustees and that the circular is intended to ensure adequate participation of the devotees and for the welfare of the temples. The formation of TACs is intended to ensure adequate participation of devotees in the activities of the temple and not certainly in the administration of the temple, it is argued. It is further pointed out that the laudable object and aim behind the insertion of Section 14 as it stands, and the transparency in the manner in which the TACs are to be constituted in terms of the Rules would demonstrate that the impugned piece of primary legislation and the rules certainly strengthen the welfare of the temples and devotees at large. On the basis of these submissions and arguments, it is urged that the writ petitions are only to be dismissed.

6. The impugned Section 14 of the Madras Act provides for constitution of TACs, not inconsistent with the existing custom and practices. The object sought to be achieved by the constitution of TACs, provided in the opening part of sub-section 1 of Section 14 is that it is for the purpose of ensuring the adequate participation of Hindu devotees. Rule 2 under the impugned Rules provides that the Board may nominate one member from Scheduled Caste/Scheduled Tribes community; one woman member and four other members among the locally residing Hindu persons having interest in the affairs of the temple. Rule 8 provides that TAG shall take special care in maintaining the existing custom and practices of each temple. While Section 14(1) provides for participation of Hindu devotees, Rule 2 provides for nomination from among locally residing Hindu persons having interest in the affairs of the temple. "Person having interest", in the case of temple, is defined in Section 6(11)(b) to mean a person who is entitled to attend at or is in the habit of attending the performance of worship or service in the temple, or who is entitled to partake or is in the habit of partaking in the benefit of the distribution of gifts thereat Sub-section 17 of Section 6 defines "temple" to mean a place by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of or used as of right by the Hindu Community or any section thereof, as a place of public religious worship. The impugned Section 14 and the impugned Rules are so made that they insulate the maintenance of existing customs and practices of each temple. This

is the only manner in which Rule 8 among the impugned Rules can be understood when read along with Section 14(1) of the Madras Act. The constitution of a TAC shall not be inconsistent with the existing customs and practices. This is the dictate of sub-section 1 of Section 14. The provision in Rule 8 that the TAC shall take special care in maintaining the existing custom and practices of each temple does not give the TAC any role of supervising the maintenance of existing customs and practices of each temple. If a TAC is to be provided under Statute law for such purpose, it would essentially impinge on the freedom of free profession, practice and propagation of religion and management of the affairs of such religious institutions which are established and maintained for religious purposes. This is explicit even on examination of some of the relevant provisions of the Madras Act. Section 6(9) defines "hereditary trustee" to mean the trustee of a religious institution, succession to whose office devolves by hereditary right or is regulated by usage or is specifically provided for by the founder, so long as such scheme is in force. Sub-section 19 of Section 6 provides that a trustee means any person or body by whatever designation known, in whom or in which the administration of a religious institution is vested, and includes any person or body who or which is liable as if such person or body were a trustee. Board of Trustees can be constituted by the Commissioner u/s 39 of the Madras Act. Sub-section 1 provides the manner to deal with religious institutions included in the list published u/s 38 of the Madras Act or over which no Area Committee has jurisdiction. For such institutions, the Commissioner can constitute a Board of Trustees, if they have no hereditary trustee. However, the authority of a hereditary trustee or trustees can be interfered with by appointing non-hereditary trustees only when the Commissioner, following due procedure in terms of sub-section 2 of Section 39, considers for reasons to be recorded, that the affairs of the institution are not, and are not likely to be, properly managed by the hereditary trustee or trustees. Section 24 obliges the trustee to administer the affairs of the religious institution and to apply its funds and properties in accordance with the terms of the trust, the usage of the institution and all lawful directions which the competent authority may issue in respect thereof and as carefully as a man of ordinary prudence would deal with such affairs, funds and properties if they were his own. The various provisions relating to maintenance of registers, furnishing of accounts, inspection of property and documents, alienation etc. would show that the hereditary trustee or the trustees, as the case may be, stands/stand regulated by the different provisions in relation to the administration of the temple. Section 58 empowers the Deputy Commissioner to frame scheme when he has reason to believe that in the interests of the proper administration of a religious institution, a scheme should be settled for the institution, or when not less than five persons having interest make an application in writing, stating that in the interests of the proper administration of a religious institution a scheme should be settled for it. These provisions clearly show that the Madras Act and the Rules including the impugned amendments to the Act and Rules are made in such a manner that the administration of the institution by the hereditary trustee or the trustees is never

intended to be impaired, except in cases where it becomes necessary to remove the hereditary trustee or the trustees or appoint non-hereditary trustees or to frame a scheme for the purpose of the temple in question. As noted by the Hon"ble Supreme Court of India in *M.P. Gopalakrishnan Nair and Another Vs. State of Kerala and Others*, the management of the temple is primarily a secular act and although State cannot interfere with the freedom of a person to profess, practise and propagate his religion, the secular matters connected therewith can be the subject-matter of control by the State. In so far as involvement in a TAC under the impugned Rules and Section 14 of the Madras Act is concerned, as already noted, one has to be not merely a Hindu but a Hindu person having interest in the affairs of the temple, thereby meaning that such person should be one who would fall within the definition of the term "person having interest" in Section 6(11)(b). This means that only a person, who is entitled to attend at or is in the habit of attending the performance of worship or service in the temple, or who is entitled to partake or is in the habit of partaking in the benefit of the distribution of gifts thereat, can be included as a member of a TAC. The scheme of the Madras Act and the Rules framed thereunder not only insulates the authority of the hereditary trustee or the trustees to preserve and have matters of religion in a temple in terms of such customs, practices and usages, it gives no room for any authority to interfere with that. The statutory prescription to visit and remove or modify the office of a trustee is itself circumscribed to the effect that such exercise could be only to ensure the management in terms of the customs and practices. It is not to obviate, or to be in derogation thereof. Such being the statutory situs and setting of the impugned Section 14 of the Madras Act and the impugned Rules, we do not find any ground to uphold that those provisions are unconstitutional. Equally, on the face of sub-section 3 of Section 14 and the general rule making power as contained in Section 100 of the Madras Act, the challenge to the impugned Rules that it is in excess of the rule making power under the Madras Act is only to be repelled. We do so.

7. As rightly pointed out by the learned counsel for the petitioners, unlike the Travancore-Cochin Hindu Religious Institutions Act, 1950, and the manner of management of the different temples falling under the Travancore Devaswom Board and the Cochin Devaswom Board; insofar as the Madras Act is concerned, many of the temples are autonomous bodies administered in terms of the schemes framed either by the Deputy Commissioner, or earlier by the District Court and the control of the Malabar Devaswom Board over such institutions in terms of the provisions of the Madras Act is only supervisory. Even in relation to temples where scheme is not framed but the establishment continues to be under the control of a hereditary trustee or trustees, the legal status of that institution does not become anything different. With this in view, the impugned circular needs to be examined, having particular regard to the plea that the terms of the circular are in excess of the authority and sweep of Section 14 and the impugned Rules and it has been issued beyond the authority of the Commissioner.

8. Here, immediate advertence can be made to Section 8B of the Madras Act which empowers the Board to assume the direct management of any religious institution provided the trustees request the Board to take over its management unconditionally. Except in cases where the direct administration is so assumed, the statutory authority under the Madras Act would remain regulatory and supervisory to the entire extent as provided by the different provisions of that Act.

9. Reverting to the impugned circular, it can be seen that the provisions thereof, if operated, would be a parallel administrative mechanism whereby the matters relating to different aspects of the temple, including festivals etc. would essentially be under the control of such TACs. Recalling sub-section 1 of Section 14, it is clear that the Statute never contemplated any such authority with the TACs. The provision was only intended to ensure adequate participation of Hindu devotees, not inconsistent with the existing customs and practices. The purpose of the participation of Hindu devotees as envisioned in subsection 1 of Section 14 cannot be to create a managerial institution or a committee which will meddle with the affairs relating to the administration of the temple or any matter related thereto. Matters relating to customs, usages and practices include matters relating to festivals and organising different functions in connection with the rituals of the temple. Those are not matters which can be meddled by the TACs. The administration of the temple is clearly with the hereditary trustee or the trustees, as the case may be, except in cases of institutions which fall u/s 8B and of course those temples in relation to which the non-hereditary trustees or fit persons have been appointed. Under such circumstances, the justifiable situation is the one obtained from the time of institution of these writ petitions, that is to say, the TACs constituted pursuant to the impugned circular were restrained from interfering with the administration of the respective temples. Such situation cannot but continue. But, one would then wonder as to what is the role of the TACs beyond their mere existence as such, because going by sub-section 1 of Section 14 read with Rule 2 of the impugned Rules, they would merely be a committee of persons having interest in the affairs of a temple, to ensure the adequate participation of Hindu devotees. Nothing beyond. Now, the question is whether the powers of the Commissioner to issue circulars include the power to issue any circular of the nature of the one impugned. The circular does not quote any statutory authority. It merely refers to decision No. 3 taken by the Board on 09/07/2009. Section 14 of the Madras Act provides for TACs and enjoins that the composition of a TAC shall be in such manner as may be prescribed. The impugned Rules prescribe for nominations by Board. Such nominations are for members at Clauses (c) to (e) of Rule 1 of the impugned Rules. While the power to prescribe composition of a TAC is left by the Madras Act to be in terms of what may be prescribed, that Statute does not provide subordinate legislative power or regulatory executive authority to enumerate the powers, duties and functions of TACs. The nature of duties and responsibilities fixed on the Chairman, Secretary and Treasurer under the impugned Circular essentially give them the

authority to take donations from the public, issue receipts, maintain bank accounts and get involved in different other aspects which are predominantly matters relating to management of any establishment, whether it is religious or not. No such authority is seen available to a TAC in terms of Section 14 of the Madras Act or the impugned Rules. The insulation of the temple, its customs, usages, the office of hereditary trustee or the trustees from interference by the TACs is one of the grounds on which the validity of Section 14 and the impugned Rules have been upheld herein above. The provisions in the impugned Circular essentially run to the contrary; including by enabling TACs to make recommendations to the temple authorities in matters relating to temple festivals, renovations, naveekaranakalasam and other special chatangukal (ritualistic functions) which have to be held from time to time. It is in this context that the learned Senior Counsel for the petitioners has, in our view, quite rightly, argued that what has been done by the impugned Circular is essentially to take away what stands protected in terms of the different statutory provisions as regards the office of the hereditary trustee or the trustees and their eligibility to regulate the customs, usages and practices and rituals in the temples. He is, therefore, justified in saying that the impugned Circular invades the right of the hereditary trustee or the trustees to manage and administer a temple unless found in statutory proceedings to be liable to be removed from such office. The manner in which nominations are to be made to the TACs in terms-of the impugned circular also tends to indicate that the criticism levelled by the petitioners, that the attempt is to infuse persons of the political choice of those in power, comments acceptance. The impugned circular goes beyond the limits of the provisions of Section 14 and the impugned Rules, as noted above. Under such circumstances, the impugned Circular is ultra vires the Madras Act and the impugned Rules. The same is, therefore, arbitrary and liable to be declared as void and inoperative. We do so.

In the result, these writ petitions are partly allowed, quashing Circular No. HRJ 1 - 5144/2009 dated 03/08/2009 issued by the Commissioner of the Board. No costs.