
(1991) 06 MAD CK 0013
In the Madras High Court

R. Shanmugha Sundaram

APPELLANT

Vs

The Commissioner, Hindu Religious and Charitable
Endowments and Others

RESPONDENT

Date of Decision : 20-06-1991

Acts Referred:

Constitution of India, 1950 — Article 25, 27

Citation : (1991) 2 MLJ 582

Hon'ble Judges : Bakthavatsalam, J

Bench : Division Bench

Judgement

Bakthavatsalam, J.—The prayer in the writ petition is as follows:

...to issue a writ of mandamus or any other appropriate writ or order to direct the 1st and 2nd respondents herein, the Commissioner and the

Deputy Commissioner of Hindu Religious and Charitable Endowments Department Madras 34, to entrust to the Mahathejo Mandala Sabha, the

third respondent herein, the performance of all the religious and spiritual rituals of Sri Pamban Kumara Gurudasa Swamigal Samadhi at

Thiruvannamiyur Madras 41 in accordance with the sacred and pious wishes of Sri Pamban Kumaragurudas Swamigal in his last will and testament

dated 17.7.1926....

2. The petitioner is a follower and devotee of Srimath Kumara Gurudasa Swamigal (hereinafter referred to as "Swamigal") and the Swamigal was

an inspired baktha of Lord Muruga and had contributed the celebrated "Shanmugha Kavasam", "Panchamirtha Vannam", ""Kumarasthavam"" and

also had composed more than 6,666 compositions. It seems that Swamigal was a legend, saint and a gnani during his lifetime with a lot of followers

and devotees including the most popular and prominent Tamil scholar like Thiru Vi.Ka. and Dr. Gurusamy Mudaliar and Ors. It seems that before

attaining Jeevan Mukthi, Swamigal left his last will and testament in the year 1926 and codicil in the year 1927 which were probated on the original

side of this Court in O.P. No. 187 of 1933 and under the terms of the said Will, Swamigal had appointed a Sabha called "Mahathejo Mandalam"

with 21 members constituting mostly his disciples, bakthas or worshippers of Lord Subramaaia and they have to perform "Mayura Vahana

Sevanam" festival and other pooja rituals. It seems that mortal remains of the Swamigal were duly preserved in a Samadhi on 20.5.1929 and after

he attained Samadhi, and the land in which Swamigal was enshrined, in an extent of 2 kanis and 4 grounds bearing pymash No. 967 at

Thiruvanmiyur village was purchased in the name of the Secretary, Mahathejo Mandala Sabha on 4.6.1929. Since 1929 onwards, daily poojas,

Mahasivarathri, Kandar Sashti Mayura Vahana Sevanam and all the other religious festivals are performed by the Mahathejo Mandala Sabha in

accordance with the last wishes of Swamigal. It seems that in the year 1951 another Samadhi was raised adjacent to the Samadhi of Swamigal, of

one Chinnasami Jothidar, who was an intimate and important disciple of Swamigal. It is further alleged in the affidavit filed in support of the writ

petition that there is nothing in the said place with the characteristics of a temple such as Gopuram, Mahamantapam, Dwajasthambam,

Arthamantapam, etc., that it is only a sacred place or Samadhi and it is only a private place of worship. It seems that the respondents 1 and 2

herein decided to take over from one T.T. Kuppusami Chettiar who was in charge of the Sabha in 1991. In a writ petition filed by him in W.P.

No. 3501 of 1971 by order dated 4.9.1973, Ramaprasada Rao. J. (as he then was) has allowed the writ petition and issued a writ of prohibition,

holding that the assumption of the jurisdiction by the Hindu Religious and Charitable Endowments department is without authority and without

decision as to whether the institution should come within the four corners of the Hindu Religious and Charitable Endowments Act, 1959. However,

in the year 1984, it seems the said Kuppusami Chettiar who was the then President of the Sabha allowed the department to take over the

management of the Samadhi and its property. It is alleged in the affidavit that the respondents 1 and 2 do not seem to know, realise or enforce the

pious wishes of the Swamigal and in violation of the conditions given by the Swamigal in his will and that it offends Articles 25 to 27 of the

Constitution of India, It is further alleged in the affidavit that as a dedicated and devoted follower of the Swamigal the petitioner has the right to

seek the doctrines and religious practices, which are offered in the Samadhi through the Sabha, the third respondent herein, which knows all the

essentials and the ingredients of the philosophy propagated and followed by the Swamigal all the time. It is further alleged in the affidavit that

though the department has taken over the management of the Samadhi as early as 1984, the followers of the Swamigal tried to move the

Government and the other authorities of the department to do everything possible to implement and enforce the religious practices expressed by

the Swamigal in his last Will and testament. It is further alleged in the affidavit that it is a lawful public duty and obligation of the respondents 1 and

2 herein to entrust to the third respondent herein all the spiritual ritual's for the proper and correct maintenance of the Samadhi. In these

circumstances, the petitioner has come to this Court with the prayer stated supra.

3. Notice of motion has been ordered by me on 19.4.1991.

4. Respondents 1 and 2 have filed a counter-affidavit stating that the writ petition is not maintainable, more so, the request to entrust the

management of the temple and performing the rituals to the Maha Theoja Mandala Sabha (hereinafter referred to as the "Sabha"). It is also

claimed in the counter affidavit that the petitioner has no locus standi, when he is not even a member of the Sabha. According to the counter

affidavit the petitioner is an outsider and he has no locus standi to maintain the writ petition. It is further claimed in the counter affidavit that the

institution having subjected to the jurisdiction of the Hindu Religious and Charitable Endowment Department by the then president one

Kuppuswamy Chetty and two others by letter dated 9.9.1984 to the effect that A/ m. Mayuranthan alias Pamban Kumaragurudasar Thirukoil,

Thiruvanmiyur, Madras-41 is a public religious institution under the administrative control of the Hindu Religious and Charitable Endowments

Department and that the annual assessable income "of the institution for Fasli 1399 is Rs. 1,13,021. It is further claimed in the counter affidavit that

the said Swamigal has attained Mukthi in the year 1929 leaving behind him a Will

17.7.1926 creating the Sabha called Maha Theoja Mandala

Sabha, that one Thiru T.T. Kuppuswamy Chetty became the Secretary and then the President of the then Sabha, referred to by the petitioner

herein, that the precincts were treated as temple of Mayuranathar besides Samadhi and regular poojas were performed by the said Secretary and

Hindu public participated in the daily worship as of right and that when complaints were made from the worshipping public that A/m. Mayuranathar

alias Pamban Kumara Gurudasar Thirukoil was not properly managed, proceedings were initiated for appointment of trustees as contemplated u/s

49 of the Tamil Nadu H.R. & C.E. Act, 19&> and that show cause notice was also issued to the said T.T. Kuppusamy Chetty. It is further

claimed in the counter affidavit that the said Kuppusamy Chetty filed a writ petition in W.P. No. 3501 of 1971 before this Court and by order

dated 4.9.1973 it has been held that the characteristics of the temple had to be decided in a regularly instituted action either at the instance of the

petitioner or by the department as to whether this institution is one which could come within the jurisdiction and supervision of the Tamil Nadu

Hindu Religious and Charitable Endowments Act, 1959. However, it is further claimed in the counter-affidavit that on 9.9.1984 the said T.T.

Kuppusamy Chetty, the President of the Sabha addressed a letter to the Deputy Commissioner, Madras stating that Sri Pamban Kumaragurudasar

Thirukoil and Sri Mayuranathar Devasthanam are religious institutions and also agreed for appointment of a Fit Person pending disposal of a

scheme for better administration of the institution. It is further claimed in the counter affidavit that in view of the said letter, the Assistant

Commissioner, Hindu Religious and Charitable Endowments Department, Madras 600 034 passed an order appointing the Executive Officer of

Byraghi Mutt and Madras as a Fit Person by order, dated 29.8.1984. It is further claimed in the counter affidavit that the Fit Person took charge

of the said temple and that after this an Executive Officer u/s 45(1) of the H.R. & C.E. Act has been appointed by the Commissioner. It is further

claimed in the counter affidavit that a Thiruppani Committee had also been constituted, that the term of the Thiruppani Committee had already been

lapsed, that a fresh committee was constituted in the year 1987, and that the term of the said committee has been lapsed in the year 1989. It is

further claimed in the counter affidavit that the question whether the institution is a Samadhi or a temple has to be tried in some other forum and that

this Court should not entertain the writ petition. The allegation made by the petitioner that the institution is only a samadhi has been denied in the

counter affidavit. It is further claimed that the petitioner has not obtained any declaration regarding the character of the institution, that an

application u/s 63(1) of the Act in O.A. No. 19 of 1989 is pending before the authorities, that the institution in question is one of the Hindu

Religious Institutions governed by the provisions of the Act that the Swamigal by his Will created a religious endowment for the performance of the

festival called "Mayuravahana Savanam" by setting up a corpus of Rs. 1,516-80 and also dedicated it to the public that the said festival and the

guru poojas for the Swamigal and other important Hindu festivals are conducted by the contributions from the public only since there are no

properties belonging to the temple, that the people in large numbers offer worship for the Lord Mayuranathar and Sri Pamban Swamigal as a

matter of right and as such the institution is a temple and not a mere Samadhi. In para 8 of the counter affidavit certain instances were shown where

certain Samadhis are treated as temples in Tamil Nadu. It is further submitted that the department, the first respondent herein, has got every right to

appoint a Fit Person/Executive Officer for a Hindu public religious institution, that in exercise of the said powers an Executive Officer had already

been appointed and he is functioning in the institution. It is further claimed in the counter affidavit that the person in management of the said temple

had himself given a letter dated 9.9.1984 expressing his willingness that the department could take over the institution and as such it is not open to

the petitioner to question the same. It is further claimed in the counter affidavit that the religious practices as wished by the Swamigal in his Will are

effectively done, that regular daily poojas are being done to the Samadhi as to the idols of Sri Mayuranathar and that the place is a "temple"

attracting the provisions of Section 6(2) of the H.R. & C.E. Act and as a "religious institution" coming u/s 6(18) of the H.R. & C.E. Act. It is

further stated in the counter affidavit that when the said T.T. Kuppusamy Chetty who was in charge of the said Sabha has given his consent for the

supervisory control over the administration of the temple, it is not open to the petitioner to say that the department has no power to enter into the

affairs of the temple, when he is not even a member of the said Sabha. It is further claimed in the counter affidavit that there is no such Sabha as

claimed by the petitioner, that the appointment of a Fit. Person or the Executive Officer is for the better management and administration of the

institution, that the suit filed by one S.M. Nathan styling himself as Secretary to the third respondent herein in O.S. No. 11359 of 1988 before the

City Civil Court, Madras praying for a declaration that the Sabha is entitled to manage and administer the affairs of the institution was dismissed on

12.4.1991, that the lower court in the aforesaid suit had given a finding that there is no such Sabha functioning and that the suit filed by the Maha

Theoja Mandala Sabha, the third respondent has been dismissed the petitioner herein cannot invoke the extraordinary jurisdiction of this Court

under Article 226 of the Constitution and as such the writ petition is liable to be dismissed.

5. The third respondent has filed a separate counter affidavit stating that the Maha Thejo Mandala SaWia with 21 members was constituted by Sri

Pamban Kumagurudasa Swamigal, that as per the wishes of the Swamigal the then Secretary of the Maha Thejo Mandalam purchased the land at

Thiruvanmiyur and a Samadhi was constructed in the land and every year "Mayura Vahana Sevanam" and "Guru Pooja" for the Swamigal were

being performed by the Maha Thejo Mandala Committee, by its President T.T. Kuppusamy Chettiar and others and that due to misunderstanding

between the Committee Members T.T. Kuppusamy Chettiar was not able to administer the affairs of the Samadhi, that in the year 1984 he was

compelled, to entrust the management of the Samadhi to the first respondent herein as a result of which the department through its Executive

Officer, the respondents 1 and 2 herein, interfered with the management of the said Samadhi by appointing a Fit Person and Executive Officer. It is

further claimed in the counter affidavit that from 1929 onwards till 1984 the Samadhi Koil with all its religious festivals and secular affairs were

managed by the Sabha, that when the respondents 1 and 2 herein attempted to interfere with the management of the Samadhi koil at

Thiruvanmiyur, the said T.T. Kuppusami Chettiar as President of the Sabha filed a writ petition before this Court and that this Court by order

dated 4.9.1973 in W.P. No. 3501 of 1971 allowed the writ petition folding the assumption of the jurisdiction by the first respondent is without

authority and that it is for the Department to take such steps to establish that the institution is one which ought to come within the purview of the

H.R. & C.E. Act and issued a writ of prohibition. It has been further held that if substantially Hindu public go to the Samadhi for Guru pooja etc.,

then the Samadhi is not a temple as it has neither been consecrated in accordance with Hindu Customs nor are there present essential

characteristics of a temple such as Dwajasthambam, Ardhamandapam, Mahamantapam and Garbagraham. It is further claimed in the counter

affidavit that the first respondent department, after assuming the jurisdiction in the year 1984 entertained the interested persons to reconstruct the

temple, that the structures which were standing over the Samadhi were removed and demolished and Balalayam was performed, that for the past

four years the above-mentioned work has not been continued, that the first respondent has ignored the pious and sacred wishes of Swamigal and

that the first respondent has no manner of right to assume jurisdiction and manage the Samadhi Koil even though it is neither a math nor a religious

institution as defined under Sections 6(13) and 6(18) of the H.R. & C.E. Act. It is further claimed in the counter affidavit that the Committee

known as Maha Thejo Mandalam constituted by the Pamban Swamigal under the Will was given a legal status by forming a society under the

Societies Registration Act with the principal object to propagate the religious faith and to carry out the publication of 6,666 compositions of

Swamigal which inspired the worshippers of Lord Muruga. It is further claimed in the counter affidavit that the Secretary of the Committee

acquired the legal status on 6.12.1987 and functioning till date through its Committee members who are devoted to Swamigal and are very much

interested in propagating the religious teachings of the Swamigal and that the Committee members are competent to manage the Samadhi Koil with

all his religious rights and functions according to the wishes of the Swamigal and that the poojas prescribed for being performed are as follows:

1. Chithrai Full Moon Pooja : The day on which Sri Pamban Swamigal completed his 35 days penance at Pirappan Valasai where he had dharsan

and Ubadesam and blessings of Lord Muruga and on the basis of which the work called ""THAKARALAYA RAHASYA SASHTRAM"" was

written.

2. Guru Pooja for Swamiji in the month of May/June in each year.
3. Arunagirinatbar Vizha-on the Tamil month full moon day of Ani.
4. Skandashasti-Festival-During September/October.
5. ""Mayura Vahana Sevana Vizha in the month of Margali (a day on which Swamiji received the dharsan of peacocks and Lord Muruga while he was in bed No. 11 in General Hospital, Madras)
6. Mahasivarathri day.
7. Full moon festival in the month of Panguni day on which Swamiji had dharsan and ubadesam.

It is further claimed in the counter affidavit that the above-mentioned functions were being carried out by the committee members assisted by

several followers of the Swamigal. It is further claimed in the counter affidavit that one, Chinnaswamy Pillai, a disciple of the Swamigal was looking

after the religious functions and performing the Guru pooja, that he died in the year 1951 and that his mortal remains were also enshrined in the

Samadhi to the rear of Pamban Swamigal Samadhi. It is further claimed in the counter affidavit that the respondents 1 and 2 have assumed the

office of the Samadhi illegally, that the executive Officer has not been following any of the religious practices, that he was interested in letting out the

portions in the front side and increasing the income for the Samadhi Koil causing disturbance to peaceful worship and performance of religious

festival and that he is not interested in maintaining the Samadhi Koil in the manner in which it is required to be done and that he is violating all the

religious tenets and faith of the worshippers. It is further claimed in the counter affidavit that the third respondent herein through its Secretary filed a

suit in O.S. No. 11359 of 1988 before the City Civil Court, Madras, praying for a permanent injunction restraining the respondents from

interfering with the management of Samadhi Koil and that the said suit was ultimately dismissed on technical ground of want of notice u/s 80 of

C.P.C. and that no findings have been rendered with regard to the merits of the case. It is further claimed in the counter affidavit that the

respondents 1 and 2 after having assumed the management wrongfully are interested in converting the Samadhi Koil as a religious institution for the

purpose of perpetuating their control over the Samadhi Koil and that even in the pamphlets printed and circulated by the Executive Officer of the

Department, an appeal has been made to the public that there is a proposal to construct Garpagraham, Ardhamandapam, and Mahamantapam

without any manner of right.

6. Mr. R.M. Krishnaraju, the learned Counsel appearing for the petitioner contends that the rituals preferred by the Swamigal are not performed in

accordance with the wishes of the Swamigal shown in the will. The learned Counsel further contends that the Samadhi of the Swamigal is not a

temple or a religious institution as defined in the Hindu Religious and Charitable Endowments Act, 1959 and that there are no characteristics of a

"temple" now. The learned Counsel vehemently contends that it is only a Samadhi and a Samadhi cannot be treated as a temple. The learned

Counsel further states that simply because the first respondent department has taken over the institution under a letter from one Kuppusamy

Chetty, when he was looking after the affairs of the Samadhi, the respondent department will not have the jurisdiction to have the control over the

Samadhi treating it as a temple. According to the learned Counsel for the petitioner that even if the said Kuppusamy Chetty has handed over the

management of the institution, the department has to find out as to whether it is a religious institution before exercising its jurisdiction over the

Samadhi. The learned Counsel further points out the order of Ramaprasada Rao, J. (as he then was) in W.P. No. 3501 of 1971 dated 4.9.1973

wherein it has been clearly stated that the Sabha was formed by the Swamigal and that the will and codicil clearly state that how the said Sabha has

to be managed. The learned Counsel further states that though the relief asked for in the writ petition is different, that this Court could take note of

the facts and mould the prayer asked for to suit the occasion and that it is not necessary for this Court to grant the very same relief asked for in a

petition under Article 226 of the Constitution of India. It is further contended that the petitioner herein is an aggrieved person inasmuch as a

worshipper of the Swamigal and that he can maintain the writ petition before this Court.

7. Mr. P.K. Sivasubramaniam, the learned Counsel appearing for the third respondent contends that the said Kuppusamy Chetty died in the year

1984, that the department has wrongly assumed the jurisdiction over the temple. He further contends that the suit filed by the Sabha in O.S. No.

11359 of 1988 on the file of the City Civil Court, Madras was dismissed on 15.2.1989 only on technical ground for want of notice u/s 80, C.P.C.

and that nothing was decided on merits. The learned Counsel further vehemently contends that beside the samadhi of Pamban Swamigal, there is

also another Samadhi of one Chinnasamy Jothidar, who was a disciple of Pamban Swamigal, and as such, by no stretch of imagination the said

Samadhis can be treated as a "temple". He further contends that the department, before assuming the jurisdiction over the Samadhi it ought to have

decided the issue in question whether the institution would come under the provisions of H.R. & C.E. Act. He further contends that the letter of the

said Kuppusamy Chetty will not confer the jurisdiction on the department when factually the department has no jurisdiction over the issue i.e., the

Samadhi in this case.

8. Mr. P.M. Bhaskaran, the learned Government Advocate appearing for the department, vehemently contends that there are cases where

Samadhis are treated as temples and refers to the cases in C. Ratnavelu Mudaliar Vs. Commr. for Hindu Religious and Charitable Endowments,

and Bhaskar Shripal Deobhajta Vs. Shankar Ganesh Modak and Another, , for the said proposition. The learned Government Advocate further

contends that once the said Kuppusamy Chetty, who was the President of the institution at that time, has handed over the management to the

respondent department, it is not open either to the petitioner herein or to the third respondent to turn round and say that the department has no

jurisdiction. The learned Government Advocate further contends that it is a temple and that when it is a temple where the idol of Muruga is installed

and general public are worshipping as of right, certainly the institution will attract the provisions of the H.R. & C.E. Act. He further contends that

from the year 1984, the petitioner herein and the third respondent Sabha kept quiet and now only they started agitating their rights. The learned

Government Advocate points out that a Thiruppani Committee has been constituted and that because of the attitude of the petitioner and the third

respondent herein, the Thiruppani Committee has not moved an inch further and that the term of the members of the said Thiruppani Committee

has also been lapsed. The learned Government Advocate strongly denies the allegations made by the Sabha, the third respondent herein, that the

respondent department is trying to convert the Samadhi into a temple. He further says that there are certain indicia to make the institution as a public temple. The learned Government Advocate further relies upon the judgment in C. Ratnavelu Mudaliar Vs. Commr. for Hindu Religious and Charitable Endowments, , and contends that Apparswami Koil institution has been treated as a "temple" and in the above mentioned case, the Division Bench of this Court has held so.

9. I have given careful consideration to the arguments of Mr. R.M. Krishna Raju, the learned Counsel for the petitioner, Mr. P.M. Bhaskaran, the learned Counsel appearing for the respondents 1 and 2 and Mr. P.K. Sivasubramaniam, the learned Counsel for the third respondent.

10. The first point to be determined in this writ petition is what relief should be granted to the petitioner and for the relief to be granted, it should be considered that whether the petitioner is an "aggrieved person" to invoke the jurisdiction of this Court under Article 226 of the Constitution of

India. First of all, in my view, the writ petition cannot be thrown out on the ground that the petitioner is not an aggrieved person. In recent years,

the scope of the term "aggrieved person" has been widened a lot by this Court as well as by the apex Court of the land. It is settled law that the

persons having right to worship are persons having interest. In fact, that Section 6(15) of the Tamil Nadu Hindu Religious and Charitable

Endowments Act, 1959 defines who is a "person having interest". Considering the abovesaid definition also, it is enough to say that the petitioner

herein, who is a worshipper, has got the right to invoke the writ jurisdiction of this Court under Article 226 of the Constitution of India. In fact, in

an unreported decision of this Court in T.T. Parthasarathy v. Commissioner H.R. & C.E. Madras and Ors. W.P. No. 633 of 1963, dated

9.8.1964, it has been held that a worshipper can file a revision petition before the Commissioner under the H.R. & C.E. Act. When such is the

position, I don't see how the petitioner can be thrown out on the ground that he is not an aggrieved person. So far as he is a worshipper of the

Swamigal, the writ petition cannot be thrown out in limine, questioning the locus standi of the petitioner. Apart from that, the third respondent has

been impleaded as a party whose rights are infringed by the action of the respondents 1 and 2. What all the writ petitioner requires is that the

Sabha, the third respondent herein, should be allowed to follow the pious wishes of the Pamban Swamigal and the respondent department should

not interfere with the management of the Samadhi and should not convert the Samadhi into a temple. In such circumstances, I do not see any

reason in the objection raised by the respondent department that the writ petitioner has no locus standi to file the writ petition.

11. It is not in dispute that the Sabha, the third respondent herein, was managing the affairs of the Samadhi till 1984 according to the pious wishes

of Swamigal and according to his will and Codicil. It is also not in dispute that the Samadhi of the Swamigal was built in the land purchased by the

Sabha, and another Samadhi of one Chinnasamy Jothidar, who was a disciple of Swamigal, is also in existence adjacent to the Samadhi of the

Swamigal. It cannot also be disputed that the respondent department tried to intervene the affairs of the Sabha, that one Kuppuswamy Chettiar,

who handed over the management of the Samadhi to the respondent department raised a dispute before this Court in W.P. No. 3501 of 1971 in

which Ramaprasada Rao, J. (as he then was) by order dated 4.9.1973 issued a writ of Prohibition. The order of the learned Judge in the

abovementioned writ petition reads thus:

...In the counter affidavit, a vague denial is made on the factual position. The respondents feel that it is the Deputy Commissioner or the

Commissioner of the Hindu Religious and Charitable Endowments Board who should ultimately decide whether the institution in question is a

Samadhi or a temple or a religious institution. It is in that sense they characterise the writ petition as premature. The respondents are not in a

position to set out all the materials necessary to sustain their case that the ""institution is one which should be controlled by the State Hindu Religious

and Charitable Endowments Board. In their counter affidavit, they have not dealt with the various factual details given by the petitioner in support

of his case that the institution in question is a Samadhi and, therefore, it is not a temple or religious institution.

A writ of prohibition ordinarily would issue when a statutory authority or a person in authority under law assumes jurisdiction when he has none or

attempts to further his jurisdiction after having assumed it without authority or law. In the instant case, excepting for a bare assertion on the part of

the respondents that the institution in the management of the petitioner is a temple or a religious institution which is bound to follow the prescriptions set out in the Act, there is no material for me to lightly discard the abundant Hypothesis placed by the petitioner to sustain his case that the institution in question is neither a temple nor a religious institution. The facts disclosed, which are not expressly controverted, lead to a reasonable inference that it is a Samadhi. It has been repeatedly held by our Court, that, if substantially the Hindu Public go to a Samadhi for Guru Puja etc., then the same is not a temple, as it has neither been consecrated in accordance with the Hindu customs and notions nor are these present the essential characteristics of a temple such as Dwajasthamabam Arthamantapam, Mahamantapam and Garbhagriham. Merely because some idols have been installed in and around a Samadhi of a sacred person in order to propitiate his soul, that by itself may not convert the situs into a religious institution or a temple. [underlining is mine]. Without adverting to these essential facts, the respondents have assumed jurisdiction under the provisions of the Act and, in particular, have invoked Section 49 of the Act and called for applications for the appointment of non-hereditary trustees to the institution. It has to be decided in a regularly instituted action either at the instance of the petitioner or by the Department suo motu as to whether this institution is one which should come within the rigorous supervision and jurisdiction of the Hindu Religious and Charitable Endowments Board. Without a prior decision on that question, the assumption of jurisdiction is without authority. The petitioner, therefore, is entitled to a writ of prohibition. The rule nisi is made absolute. The Writ petition is allowed. No costs.

In the instant case, it is for the Department, which has set the ball in motion, to take such steps, if they are interested to establish that the institution is one which ought to come within the purview of the provisions of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, and it is not for the petitioner to go to Court and establish to the contrary....

When such is the case, I do not see how the department can assume jurisdiction over the management of the institution on the basis of the letter given by one Kuppusamy Chetty who was the President of the institution at that time of handing over the management of the institution, the

Samadhi in this case. Even if the said Kuppusamy Chetty, who came up before this Court on an earlier occasion by way of a writ petition against

the respondent department in W.P. No. 3501 of 1971, in the year 1984 had accepted to hand-over the management of the institution to the

respondent department, by way of consent letter, in my view, the respondent department cannot exercise its jurisdiction over the management of

the Samadhi, because the Samadhi in question is outside the purview of the Act. In *G. Viswalingam Pillai v. The Secretary Commercial Taxes and*

Religious Endowments, Madras 1977 T.L.N.J. 250, Ramanujam, J. had an occasion to consider the issue whether the consent given by the

Trustee can confer jurisdiction on the Hindu Religious and Charitable Endowments Department. In the above mentioned case, the learned Judge

has held that the consent given by the trustees cannot confer jurisdiction on the government to invoke Section 3 of the Act when that section cannot

have any application to the endowment in question. In my view, the very same principle applies to the point raised by Mr. P.M. Bhaskaran, the

learned Government Advocate that since the very same Kuppusamy Chetty has handed over the institution, the petitioner cannot question the

same. The very same contention put forth by Mr. P.M. Bhaskaran, the learned Government Advocate was raised before Ramanujam, J. in the

above mentioned case and the same had been negatived and as such the contention of the learned Government Advocate before me will not hold

good. The Supreme Court had an occasion to consider the question of estoppel or waiver with regard to fundamental rights in *Olga Tellis and*

Others Vs. Bombay Municipal Corporation and Others, in which the Supreme Court has observed (at p. 192) as follows:

...The Constitution is not only the paramount law of the land, but it is the source and sustenance of all laws. Its provisions are conceived in public

interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts

certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the

former cannot resile from the representation made by him. He must take it good. This principle can have no application to representations made

regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would

not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those

constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of

Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and

enforced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is

not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democratic

Republic.

It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed

by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the

Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding,

whether under a mistake of law or otherwise that he does not possess or will not enforce any particular fundamental right, cannot create an

estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the

argument of estoppel valid, an all powerful State could easily tempt an individual to forgo his precious personal freedoms on promise of transitory,

immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental

right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that

any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and

scope of the right claimed by the petitioners is well founded is another matter. But, the argument has to be examined despite the concession.

The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to-day transactions. In

Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, , a Constitution Bench of this Court considered the

question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das, C.J. and Kapoor, J.) held

that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H. Bhagawati and Subba Rao, JJ.)

held that not only could there be no waiver of the right conferred by Article 14, but there could be no waiver of any Other fundamental right

guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights

enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy...

I am of the view that the principle laid down in the above mentioned judgment applies to the case on hand, even though the question is raised by a

devotee of the Swamigal and not by the said Kuppusamy Chetty, who is no more, on the basis of whose letter the respondent department clutched

at the jurisdiction, over the management of the Samadhi of the Swamigal.

12. There is another way of looking at the matter. Sub-section (18) of Section 6 defines ""religious institution"" which is as follows:

...religious institution"" means a math, temple or specific endowment....

Sub-section (2) of Section 6 defines ""temple"" which is as follows:

...""temple"" means 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...

So, to clutch the jurisdiction of the institution first of all, the respondent department has to satisfactorily establish that the institution has come under

the purview of Sub-sections (16), (18) or (20) of Section 6 of the H.R. & C.E. Act. Factually, it has not been done in this case. In fact,

Ramaprasada Rao, J. (as he then was) in W.P. No. 3501 of 1971 by order dated 4.9.1973 has given a direction to the respondent department to

decide the characteristics of the institution before assuming any jurisdiction. It is not disputed and more so it cannot be disputed, that no action has

been taken to decide the characteristics of the institution by the respondent department. The learned Judge in the above-mentioned case has

specifically stated that it is open to the department suo motu to take action to decide the characteristics of the institution and it is not necessary for

the respondent department to wait for the petitioner in that case for getting declaration. It has not been done in this case. I am not at all satisfied with the argument of the learned Government Advocate that simply because some one, who was in charge of the institution at that time, gave a letter to the respondent department to take over the management of the institution, it will confer the jurisdiction on the department. It is well settled that when the respondent department lacks jurisdiction, no person can confer the jurisdiction by consent. So, on this basis alone, the entire issue has to be decided. I am of the view, that the respondent department ought not to have interfered with the management of the Sabha and more so, ought not to have altered the construction of the Samadhi of the Swamigal, as I could see from the photographs in the file. As I have already pointed out, unless the characteristics of the Institution is decided u/s 63(a) of the H.R. & C.E. Act the respondent department cannot have any jurisdiction. I am told by Mr. P.M. Bhaskaran, the learned Government Advocate that the application filed u/s 63(a) of the H.R. & C.E. Act had been dismissed. But when, I questioned the learned Government Advocate whether it was decided on merits, the learned Government Advocate submitted that it was not decided on merits. So also, the suit said to have been filed by the Sabha the third respondent was dismissed. On a perusal of the judgment in O.S. No. 11359 of 1988, dated 12.4.1991.1 find that the lower court had dismissed the suit only for want of notice u/s 80, C.P.C. and that the matter was not decided on merits. So that point falls to the ground. No decision has been taken yet on merits as to whether the Pamban Swamigal Samadhi and the Samadhi of one Chinna Swamy Jothidar, who was one of his disciples, is a "temple" to attract the provisions of the Hindu Religious and Charitable Endowments Act, 1959 (Act No. 22 of 1959). Unless and until the characteristics of the institution is decided, in my view, the respondents 1 and 2 cannot have any jurisdiction over the institution. Sub-section (3) of Section 1 of the H.R. & C.E. Act clearly states that the Act applies to all Hindu Religious and Charitable institutions. The characteristics of the institution have to be decided under the provisions of the H.R. & C.E. Act. This fact has been considered by Ramaprasada Rao, J. (as he then was) in W.P. No. 3501 of 1971 by order dated 4.9.1973 and inspite of the order of issuing a writ of prohibition against the department, the first respondent herein, the department thought it

fit to interfere with the management of the institution only on the basis of a letter written by the said Kuppusamy Chetty who was the managing Trustee in the year 1984. It is not the case of the respondent department that they have given any notice to the public before they have taken over the management of the institution or that any action has been taken legally in the manner known to law to bring the institution under the jurisdiction of the department. At this stage, I would like to point out that unless all the trustees are made as parties to the proceedings or consent, no action could be taken see (1975) 1 M.L.J. 151 . As such, the said action of Kuppuswami Chetty, cannot bind other Trustees or the institution itself. It has been held so by a Division Bench of the Court in Chennammal Vs. The Commissioner, for Hindu Religious and Charitable Endowments, , following the earlier decisions of this Court. It is case, the learned Government Advocate tries to justify the jurisdiction of the respondent department depending solely on the letter written by the said Kuppusamy Chetty in the year 1984. In my view, such a letter will not bind the members of the Sabha, the third respondent herein, and as such the institution itself. An argument was put forth by the learned Government Advocate that the Sabha was not in existence from the year 1984 and as such this Court should take note of the fact and decide that the taking over of the management by the department is not vitiated. I am not able to agree with the said argument, because even assuming for a minute that there was no Sabha in existence, the respondent department cannot simply enter into the Samadhi and assume jurisdiction according to its whims and fancies throwing all norms of law to wind. There are many provisions under the C.P.C. and the Trusts Act for initiating proceedings in such contingencies. Admittedly, it has not been followed here. Since the issue whether the Samadhi is a temple or not has not been decided u/s 63(a) of the H.R. & C.E. Act on merits and also in the suit filed by the third respondent herein, I am not inclined to accept the action of the respondent department of taking over the management of the institution. In my view, the very same position as the department was there in the year 1973 exists even now except the letter which created all the troubles to the Sabha and the followers of the Pamban Swamigal.

13. The learned Government Advocate has pointed out an order of Srinivasan, J. in The Executive Officer, Arulmighu Pamban Kumara

Gurudassan Mandam, Thiruvanmiyur v. Maha Thejo Mandala Sabha represented by its Secretary S.M. Nathan and Ors. C.R.P. Nos. 2878 and

2879 of 1990, dated 14.11.1990, in which the learned Judge has given certain findings. I think that since those findings were given against an

interlocutory petition pending a suit, in my view, it cannot be taken as a final decision on this issue, and it is not binding on this Court.

14. I think it is worthwhile to refer to a passage from ""The Hindu Law of Religious and Charitable Trusts-by B.K. Mukherjea-IV Edition at page

77"" which runs as follows:

Building of Samadhis : It has been held and I think quite rightly by the Madras High Court that the building of a Samadhi or tomb over the mortal

remains of a saintly person is not a charitable purpose according to Hindu Law. While, therefore, a founder directed a temple to be erected only as

an...adjunct to a tomb or Samadhi of a holy person and provided for the performance of Guru Puja at the Samadhi, it was held that it did not

constitute a valid charitable gift.

...

...

where the primary institution is a tomb, the mere presence of some idols around the samadhi and the observance of festivities with reference to

them were held not to impress it with the character of a public temple so as to give jurisdiction to the Board under the Madras Hindu Religious

Endowment Act, 1927...

I think it is also necessary to refer to the order of S. Natarajan, J. (as he then was) in Soundharathammal Vs. The Tiruchirapalli Mavattam

Mahasuruli Alaya Bakthargal Madya Sangam, , in which the learned Judge has held as follows : [at p.129]

Before a temple or a shrine or other holy place can be accepted and recognised as a place of public religious worship there must be evidence of

dedication of the same for the benefit of the Hindu Community or a section thereof. The guidelines are that it should be a place of public worship,

there should be acceptable proof of dedication for the benefit of the Hindu Community or a section thereof and/or the worshippers have been using

as of right the religious institution as a place of public religious worship. The building of a Vinayakar Temple on one side of the samadhi and the

consecration of a Vel on the other side in the instant case can only be considered adjuncts to the Samadhi and not factors which have the effect of elevating the samadhi to the category of a temple.

...

Merely because the members of the Public are allowed to attend religious festivals and ceremonies, it cannot be straightway said that such user was due to an inherent or acquired right of the public to visit the shrine and offer worship. The mere fact that Hindu worshippers have been freely admitted to the temple does not prove the temple to be a public institution, because the consonance of Hindu sentiment and practice is not to turn away worshippers even in private temples.

The judgment of the Division Bench of this Court in *C. Ratnavelu Mudaliar Vs. Commr. for Hindu Religious and Charitable Endowments*, , which

is relied on by the learned Government Advocate, is distinguishable on facts. In that case, the institution referred to therein got the normal features

of a temple, that it has got prakaram, dwajastambam, bali peetam...and Nandikeswara, and there are Shrines for Bhairavar, Kasi Visalakshi,

Chandikeswarar, and other deities. There was a 16 pillared mantapam and there were gopurams all over the shrine therein. It also appeared from

the evidence therein that festivals were being performed regularly, the deity was taken in procession and archanas were performed by the

worshippers. But, that is not the case here. But this is a case which comes within the principles laid down by a single Judge of this Court in

Committee of Management of Institution known as Bodendraswami Mutt Vs. President of Board of Commrs. for Hindu Religious endowments, .

In that case, the learned Judge has distinguished the judgment in *C. Ratnavelu Mudaliar Vs. Commr. for Hindu Religious and Charitable*

Endowments, , referred to by the learned Government Advocate. In *Malayammal and Ors. v. A. Malayalam Pilial and Ors.* (1991) 1 L.W. 89, the

Supreme Court has held as follows:[at page 92]

...In Hindu system there is no line of demarcation between religion and charity. On the other hand, Charity is regarded as a part of religion. But

what are purely religious purposes and what religious purposes will be charitable must be entirely decided according to Hindu Law and Hindu

notions.

15. Following the ratio laid to down in the above mentioned decisions and on the facts and circumstances of the case on hand, I do not see any

reason at all calling for interference of the respondents 1 and 2 with the affairs of the samadhi of the Swamigal which is said to be managed by the

Sabha, the third respondent herein. In my view, the contention of the learned Counsel for the petitioner that the respondents 1 and 2 are trying to

convert the Samadhi as a public place of worship is right. I do not think that there is any necessity for converting the institution into a public temple.

I am surprised to note from the photographs that a portion of the said Samadhi of the Swamigal has been even demolished or altered.

16. It is also necessary to state that the respondents 1 and 2 cannot get over the writ of prohibition issued by Ramaprasada Rao, J. (as he then

was) in W.P. No. 3501 of 1971, dated 4.9.1973 on the basis of a letter written by one of the Trustees in the year 1984. I am of the view that the

judgment of the learned judge, referred to above, had become final as the writ petition has been filed by the President and as such the respondents

1 and 2 should not interfere with the management of the third respondent, over the institution i.e., samadhi in this case. In my view the question as

to whether the institution is one which ought to come under the provisions of H.R. & C.E. Act and also the assumption of jurisdiction are without

authority. The law laid down by the learned Judge in the above mentioned case will not change this because the person who invoked the writ

jurisdiction of, this Court is to succumb to certain pressure.

17. It is true that this Court is aware of the position as expressed by the Supreme Court in Nagu v. Banu AIR 1978 S.C. 1178, in which it has

been held as follows:[at page 1179]

The rule that a provision for the purpose of Puja over the tomb of the remains of a person is invalid is subject to certain exceptions. As pointed out

by this Court in Saraswathi Ammal and Another Vs. Rajagopal Ammal, , there have been instances of Hindu saints having been deified and

worshipped but very few if at all have been entombed. Such cases stand on a deferent footing from the case of an ordinary private individual who

is entombed and worshipped thereat. After referring to the decision in Saraswathi Ammal and Another Vs. Rajagopal Ammal, , a Bench of the

Madras High Court in Ramanasramam by its secretary G. Sambasiva Rao and

Others Vs. The Commissioner for Hindu Religious and Charitable

Endowments, Madras, , observed that as samadhi over one who comes to be regarded as of the Illuminate or even the tombs of heroes may

evolve in course of time as a shrine of Hindu Public religious worship, as was held in the The Board of Commissioner for the Hindu Religious

Endowments Vs. Pidugu Narasimham and Others, , C. Ratnavelu Mudaliar Vs. Commr. for Hindu Religious and Charitable Endowments, , and

T.R.K. Ramaswami Servai and Another Vs. The Board of Commissioners of the Hindu Religious Endowments, . This Court referring to the

decision of The Board of Commissioner for the Hindu Religious Endowments Vs. Pidugu Narasimham and Others, , observed that the Judges of

the High Court were inclined to hold that the worship was religious. But this was a case of a grant from a sovereign authority and was not an

endowment for worship of a tomb. In C. Ratnavelu Mudaliar Vs. Commr. for Hindu Religious and Charitable Endowments, , a Bench of the

Madras High Court held that the samadhi or tomb of one Apparswami is a place of religious worship taking into account that the institution was for

over a century regarded as a place of religious worship. Viswanatha Sastri, J. in T.R.K. Ramaswami Servai and Another Vs. The Board of

Commissioners of the Hindu Religious Endowments, , expressed his view that it was sufficient if the worshippers considered themselves likely to be

the recipients of the bounty or blessing of a Divine presence, which they believed to exist at the place, Samadhis of saints are recognised as

religious institutions in the South. It is well known that the Samadhi of saint ""Pattinathar"" is considered as a place of worship in Tiruvottiyur near

Madras. According to tradition great saints have attained Yoga Samadhi in the well-known pilgrim centres, Saint Tirumoolar attained Samadhi in

Chidambaram, Saint Konganavar at Tirupati, Saint Valmiki at Srirangam and Bhogamuni at Palani...

Recently in Meera Nireshwalla Mrs. v. The State of Tamil Nadu 1990 W.L.R. 313., Mishra. J. has considered the power of this Court to issue a

writ of mandamus to possession. In the above mentioned case, the learned Judge has held at page 321 as follows:

...A writ court's jurisdiction in these matters is more ex debito justitiae than as a rule of law as Courts as sentinels of the people's rights, cannot

close their eyes to matters which strictly do not fall within the realm of law, or in cases where law is thrown to winds and those who are expected

to obey, observe and follow law, decided to violate it. Even without recourse to the provisions like Article 226 of the Constitution of India, courts

in India never allowed a straight case where it was found that somebody was dispossessed of a property illegally without following the prescribed

procedure of law and ordered for restoration of possession....

Following the principles enunciated in the above mentioned cases, I am of the view that the respondents 1 and 2 will be directed to hand over the

administration of the institution to the third respondent herein.

18. Having said so, it is necessary for me to observe that this is a typical case where the department has assumed jurisdiction and spoiled the

quietness of the place in which the Samadhi is installed. In my view, this is a case where the department has not applied its mind at all before taking

any action on the basis of a letter of the Trustee. In my view, the department cannot at all be a sentinel where it has not got any jurisdiction. It

cannot take over a Samadhi-not one but two-and try to build up a temple in that place. What all has been done for the past six years by the

department is in my view, is a highhanded action. The respondent department ought to have left the place to the worshippers and the followers to

worship the Samadhi of Pamban Swamigal peacefully.

19. In such circumstances, though the prayer asked for is entirely different, it is well settled that this Court can mould the prayer to suit the occasion

and as such a writ of mandamus will issue to the respondents 1 and 2 to hand over the management of the affairs of the Samadhi etc., to the

Sabha, the third respondent herein, within a month from to-day, as it was done before the respondent department took over the same. As such, I

am granting the relief to the Sabha, the third respondent herein, to take over the management of the affairs of the Samadhi of Pamban Swamigal.

The writ petition is allowed. However, there will be no order as to costs. I do hope that the Sabha will understand the situation and act according

to the pious wishes of the Swamigal as laid down in his will and codicil, without giving any room to anybody to contend that the Sabha is not in

existence.