

(2010) 07 MAD CK 0334
In the Madras High Court
Case No : A.S. No. 1020 of 2007

S.K. Velu, K. Palanisamy and T.K. Ramasamy

APPELLANT

Vs

The Commissioner and Others

RESPONDENT

Date of Decision : 23-07-2010

Acts Referred:

Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 — Section 33, 34, 6(11), 6(20), 63(b)

Citation : (2010) 5 CTC 267

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : W.C. Tiruvengadam for W.C. Sridhar, for the Appellant; M.R. Murugesan, Government Advocate (HR and CE) for Respondent Nos. 1 and 2 and D. Shivakumaran, Advocate for Respondent Nos. 3 to 5, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—Heard Mr W.C. Tiruvengadam for Mr. W.C. Sridhar, learned Counsel appearing for Appellants, Mr. M.R. Murugesan, learned Government Advocate (HR & CE) for Respondents 1 and 2 and Mr. D. Shivakumaran, learned Counsel appearing for Respondents 3 to 5. This Appeal is filed u/s 70(2) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (Tamil Nadu Act 22 of 1959) (for short HR & CE Act) against the judgment and decree made in O.S. No. 51 of 1996, dated 21.12.2006 on the file of the learned Subordinate Judge, Namakkal. Pleadings set was printed and circulated. The original records were also summoned and were perused.

2. The three Appellants are the Plaintiffs in the Suit. The Suit was filed to set aside the order of the First Defendant, i.e. The Commissioner of HR & CE Department in C. No. 89224 of 1994 on 09.11.1995 and to set aside the scheme covered by the order passed by the Commissioner and also for further relief of declaration that Defendants 3 to 5 are not hereditary trustees of the suit temple and for grant of consequential permanent injunction restraining them from

preventing the Plaintiffs with their agnates worshipping the Nallayee Amman deity always and participating in the festival as usual celebrated during the month of Panguni of each year and to prevent them from altering the physical features of Gopuram and the building of the temple as well as to set aside the scheme which was framed by the Deputy Commissioner, HR & CE Department, Coimbatore which was inconsistent and repugnant to the Act.

3. Since parties in the Appeal had similar position in the Suit, they are referred to here as Plaintiffs and Defendants. It is the case of the Plaintiffs that in Vallipuram village, there is a temple by name Sri Nallayiamman temple, which is dedicated to Sri Nallayiamman. It is a public temple coming under the provisions of the HR & CE Act. It is a community temple and has been in existence for the sole benefit of the members belonging to "Semponkulam Gounders", who are the direct descendants of Semponkulam of Thottipatti Village. The deity in the question is also the "Kuladeivam" of their community. During the month of "Panguni", on the day of "Uthiram", the Plaintiffs and their agnates go to the temple, take out the "Vel", "Karagam" and "Kavadi" in procession to the "Kovil Veedu" in Thottipatti, which is in their possession. Those materials will be installed to offer poojas and are carried out to the river Cauvery at Manappalli on the following day. The deity will be given bath in the river. Again, they take it in procession to the "Kovil Veedu" for offering further worship. Thereafter, they will perform "Mavilakku" pooja in the temple. According to them, it is a custom and practice prevailing for number of years.

4. It was further alleged that Defendants 3, 4 and 5 (private Respondents herein) had obtained an order under Act II of 1927, i.e. Madras Hindu Religious Endowments Act, 1926 on the ground that the institution was an excepted one. The Board's order was passed on 12.12.1942 in reference No. 3739/1942. According to the Plaintiffs, the order of Endowment's Board did not carry any hereditary right on Respondents 3 to 5 as laid down u/s 6(11) of the present Act 22 of 1959, wherein the term "hereditary trustee" is defined. Not satisfied with the earlier order passed by the department, declaring the temple as an excepted temple, the private Respondents have moved the Deputy Commissioner, HR & CE, Coimbatore and filed an Application u/s 64(1) of the HR & CE Act and got the scheme framed for the institution in question and also got incorporated a permanent provision in the said scheme recognizing that the hereditary trusteeship belonging to the family of Seeranga Gounder, the Fifth Respondent herein. An hereditary trustee was appointed to the temple by the scheme framed in O.A. No. 226 of 1976 without considering the earlier decision obtained by Defendants 3 to 5 under 1927 Act. In order to explain the long delay, it was contended that Plaintiffs were not aware of the earlier decision under 1927 Act and the scheme framed u/s 46(1) of the present Act by an order of the Second Defendant, dated 23.9.1977.

5. It was alleged that on coming to know of framing of the scheme, the Plaintiffs moved the First Defendant under Sections 69(1) and 69(2) of the HR & CE Act to

set aside the provisions of the scheme framed by the Second Defendant, dated 23.9.1977. They filed a regular Appeal u/s 69(1) with a Petition to condone the delay. They also requested the First Defendant to invoke suo motu power u/s 69(2), for which there is no limitation prescribed. It was contended in the so-called appeal that the recognition of hereditary trustee in the temple cannot be made under the provisions of the scheme. Under the HR & CE Act, the authority will have to determine and decide the hereditary character of religious institution. If there is no provision under the Act, the authority functioning under the Act cannot incorporate the relief by framing the scheme instead of deciding the matter u/s 63(b) of HR & CE Act. It is further submitted that the First Defendant entertained the Application and gave a file number and also issued a notice to Defendants 3 to 5.

6. The Defendants also filed a reply justifying framing of the scheme and the recognition granted to them by virtue of 1927 Act. The First Defendant rejected the Appeal filed under Sections 69(1) and 69(2) of the Act and summarily held that the appeal was not maintainable. Because of the order passed by the First Defendant, the Plaintiffs filed an Appeal before the lower Court u/s 70(1) of the HR & CE Act.

7. The Appeal was registered as O.S. No. 51 of 1996 and notice was ordered to Defendants. On behalf of the Second Defendant, a Written Statement, dated 10.2.2003 was filed. The third Defendant also filed a written statement on 29.10.1996 itself. Before the Trial Court, on behalf of the Appellants, the Third Appellant was examined as P.W.1 and one T.R. Chinnusamy was examined as P.W.2. On the side of the Plaintiffs, eight documents were filed and they were marked as Exs.P.1 to P.8. On the side of the official Defendants 1 and 2, one Thamizarasu was examined as D.W.3. On the side of private Defendants 3 to 5, Defendants 3 and 4 were examined as D.Ws.1 and 2. On the side of private Defendants, one exhibit was filed which was marked as Ex.D.1. The said document was the order passed in O.A. No. 150 of 1942 by the HR & CE Department.

8. The Second Defendant in his written statement contended that the suit temple is a non-listed institution and the scheme was framed u/s 64(1) in O.A. No. 226 of 1976, dated 23.9.1977. The scheme has provision for appointment of trustee from among the family of Seeranga Gounder. After framing of the scheme, trustees were appointed from 1977 for several periods, who were taken charge and were functioning. It was further stated that the suit temple is a public temple as defined u/s 6(20) of the HR & CE Act 22 of 1959. It was claimed that the Petition filed by Plaintiffs were dismissed by the First Defendant on 9.11.1995 as it was filed after 17 years from the date of formation of scheme. The Plaintiffs had suppressed the fact that there is distinction between Section 64(1) and 63(b) of the Act.

As on date, the order of the Second Defendant is in force. It was further stated that the order made under 1927 Act was revised under the present HR & CE Act.

It is further stated that an enquiry u/s 64(1) was conducted. It was not based upon any Board's order listing it as an excepted temple. It was further contended that the word "excepted temple" has to be comprehended elaborately and it included right of community temple and hereditary trusteeship. There are differences between hereditary trustees appointed under Sections 63(b) and 64(1). Here in the present scheme, the term of appointment of trustees is only for three years and it is from the family of Seeranga Gounder. They are not bestowed with right to have hereditary trusteeship. There was no anomaly between the old Act and the new Act and no demolition or repair can be carried out without the permission of the department.

9. On behalf of Defendants 3 to 5, it was contended that Sembonkulam Vellalars of Thottipatti or any other village never had any right or interest in the suit property. Sri Nallayeeamman temple is a temple where ashes of Nallayee Ammal belonging to Seeranga Gounder's family is being worshipped by the descendants of Seeranga Gounder. Even as early as 1942, the HR & CE Department, after due enquiry and as per the provisions of law prevailing, passed an order in O.A. No. 150 of 1942, dated 12.12.1942, declaring that the temple was an excepted temple and that only the descendants of Seeranga Gounder were entitled to manage and administer the temple exclusively. After the advent of 1959 HR & CE Act, the scheme for administration of temple was framed by the Second Defendant in O.A. No. 226 of 1976. The present scheme is only confirmation of earlier right declared in O.A. No. 150 of 1942, which provided for trustees to be appointed only from the descendants of Seeranga Gounder. Likewise, the trustees were appointed in the years 1972 and 1979 from the descendants of Seeranga Gounder before and after framing of scheme. Even when transition rule was framed in 1985, only the third Defendant was appointed as a fit person. The Plaintiffs are fully aware of all the earlier proceedings of the year 1976 confirming the proceedings of 1942.

10. The Trial Court framed the following three issues:

- (a) Whether the relief claimed to set aside the order, dated 9.11.1995 passed by the First Defendant is available to the Plaintiffs?
- (b) Whether the Plaintiffs are entitled for permanent injunction?
- (c) To what other relief, the Plaintiffs are entitled to?

11. In respect of issues Nos. 1 and 2, the Trial Court after discussing the lis between the parties, in paragraph 9 of the judgment held that the First Defendant had refused to invoke his Appellate power and since the delay was more than 17 years, the question of filing of any further Appeal against such an order will not arise. Since the order was not based on exercise of any suo motu power disregarding the limitation u/s 69(1), there is no order which could have been appealed u/s 70(2) of the Act. The order passed by the authority cannot be considered as an order u/s 69(2) and the Court has no power to give any direction to the First Defendant to exercise its suo motu power. Therefore, Ex.P.1

though was passed after hearing both sides, it was rejected on the ground that Revision is not maintainable. Therefore, Plaintiffs' request that there may be direction to conduct suo motu Revision cannot be considered and there is no basis for Plaintiffs to file a Revision. It also held that there was a scheme framed after due notice to parties. Therefore, it is unnecessary to exercise suo motu revisional power.

12. After new Act came into force, no difference has been made between excepted temple and unexpected temple. The Scheme has been framed only to appoint trustees and not the appointment of hereditary trustees. Therefore, the Commissioner's order that temple was belonging to the family of Seeranga Gounder and they alone gave all pooja materials and there was no evidence to show that it was the "Kuladeivam" of Semponkula Gounder cannot be found fault with. It also found that the properties of temple did not belong to Plaintiffs and it has to be kept to the trustees. No evidence was let in that Sri Nallayeeamman temple belonged to Semponkula Gounder and that the deity was the "Kuladeivam" of that community. On the other hand, the fact that the temple was built with the ashes of Nallayee Ammal, who committed "Sati" and prayed by their family was not within the knowledge of Plaintiffs. Even as per Ex.P.1, it was proved that it was the family members of Seeranga Gounder who are managing the temple. In the light of the above, the Court below came to the conclusion that Plaintiffs have no right over the temple and they have no right to question the order passed by the First Defendant.

13. With reference to set aside the scheme, the Trial Court found that Section 64 of 1959 HR & CE Act provides for appointment of trustees. Unless Revision is made u/s 69(1), there is no question of further Appeal u/s 70. Since Plaintiffs were non-suited, for any relief u/s 69(1), the question of filing Appeal u/s 70 will not arise. With these findings, the Court below dismissed the Suit by a judgment and decree, dated 21.12.2006.

14. In the present Appeal, once again similar contentions were raised. It was contended that under 1927 Act, more particularly Section 9(1) of the said Act related to declare the temple as excepted or non excepted temple. Once the temple was excepted temple as held in the case of Nallayeeamman, the said fact was not considered. There is no limitation for exercise of power u/s 69(2). Since notice was given on the Revision filed both under Sections 69(1) and 69(2) and parties were allowed to file counter, pleadings and arguments were heard, it should be taken only as exercise of power u/s 69(2) since findings on merits was also given. Since earlier classification was made u/s 9(1) of 1927 Act, the present controversy can be decided only by taking recourse u/s 63(b), but a wrong relief was given which was sought to be revised and the authorities cannot deny granting them relief.

15. Mr. W.C. Thiruvengadam, learned Counsel appearing for Appellants referred to the definition of "Excepted Temple" found u/s 9(5) of Act 2 of 1927, which reads as follows:

9. In this Act, unless there is anything repugnant in the subject or context--

(1) to (4) omitted

(5) "Excepted temple" means--

(a) a temple which before 1801 was, and since 1863 has continued to be, under the sole management of a trustee whose nomination did not vest in, nor was exercised by, the Government nor was subject to the confirmation of the Government or of any public officer, or

(b) a temple founded since 1842, the right of succession to the office of trustee whereof is hereditary or specially provided for by the founder.

Therefore, he contended that no right flowed either under 1927 Act or under 1959 Act. If at all, a person must have been an hereditary trustee in terms of Section 9(6) of 1927 Act, which reads as follows:

(6) "Hereditary trustee" means the trustee of a religious endowment, succession to whose office devolves by hereditary right or by nomination by the trustee for the time being, or is otherwise regulated by usage or is specially provided for by the founder, so long as such scheme of succession is in force.

16. He further contended that the Plaintiffs did not get any right by the order passed in the year 1942 marked as Ex.D.1. On the other hand, by framing of scheme u/s 64(1), they cannot incorporate a clause of trusteeship and if at all, private Defendants ought to have moved u/s 63(b). Hence, the order passed in O.A. No. 150 of 1942 or the subsequent order passed in the year 1977 has no legal value. When such blatant violation had taken place, the authority should have exercised suo motu power to revise the order which is palpably illegal and without jurisdiction.

17. Alternatively the learned Counsel for the Appellant contended that if the authority dismissed his Revision by refusing to exercise his suo motu power, then he ought not to have reached the conclusion on merits that too with the defective Revision Application. He ought not to have numbered the Revision Application and passed orders on merits. Since the order has been passed on merits, it is referable u/s 69(2) of HR & CE Act. If a person is allowed to file a Revision u/s 69, then he is automatically entitled to file an Appeal u/s 70. u/s 69, the locus standi of a person to file a Revision is very wide because the said Section begins with a term any person aggrieved by any order. Though u/s 70, the term used is any party aggrieved by the order passed by the Commissioner, the Plaintiffs having filed a Petition u/s 69(2) and failed to satisfy the First Defendant, their Appeal is maintainable. The Trial Court committed the same error as that of the First Defendant. Therefore, the present Appeal should be allowed and prayed for not only the Trial Court but even the orders of first and Second Defendants as well as the earlier order passed in Ex.D.1 should be set aside.

18. In support of his contentions, the learned Counsel placed reliance upon the judgment of this Court in *Kumara Alagu Samayya Naicker Vs. Madras Hindu Religious Endowments Board and Others*, . In that judgment, this Court after referring to Section 9(5) of the Act 2/1927 held in page 321 as follows:

It is obvious from this definition that there can be two grounds upon which a temple may be found to be an excepted temple. The first category is temples in which the right of succession to the office of trustee is hereditary. The second category consists of temples the succession to the trusteeship whereof has been specially provided for by the founder. The learned District Judge in his order has considered only the first category and not the second. He has found on the admission of the Appellant himself that succession to the office of trustee in the temple has not been in practice hereditary for at least 70 years. The learned District Judge has held that, therefore, the temple cannot be considered to be an excepted temple. The learned Counsel for the Petitioner contends that on the evidence produced before the learned District Judge, he would be able to show that the succession to the trusteeship of the temple was specially provided for by the founder....

.... The provision for the succession to the trusteeship of an institution like this which is made by the founder of it is something which is done once for all at or about the time of the foundation. It would be a misuse of language to say that these words in sub-section (5) imply that the provision made by the founder must continue to be in force at the time of the petition u/s 84....

Therefore, he contended that since private Defendants did not derive any right over Act 2/1927, merely relying upon definition u/s 9(1) did not give them any right.

19. The learned Counsel thereafter on the refusal of exercising suo motu power, placed reliance upon a Division Bench judgment of this Court in *S.A. Ponnuswami Vs. The Deputy Commissioner, H.R. and C.E. (Admn.) Department and Others*, Reliance was placed upon the following passage found in paragraph 5 and after referring to Section 69(2), the Division Bench held as follows:

5.....It does not prescribe any period of limitation. The statute has purposely not prescribed the period of limitation in order to ensure that if the original Authority commits any mistake in the matter of passing an order which touches the public interest, because the Temples under the Act are open to the general public as such the public are entitled to visit, such mistake can be corrected by the Revisional Authority, i.e., the Commissioner. No doubt, the statute does not prescribe any time limit for exercising suo motu power, but nevertheless, the Commissioner is expected to exercise the suo motu power within a reasonable time. The question as to in a given case whether Revisional jurisdiction has to be exercised suo motu within a reasonable time, would depend upon the facts and circumstances of each case. In fact, the very decision relied on by the learned Counsel for the Appellant in *S.B. Gurbaksh Singh Vs. Union of India (UOI)* and

Others, states thus:

What is a reasonable time, however, will depend upon the facts of each case.

Hence, the learned Counsel contended that by either course of action, Plaintiffs are entitled to succeed in this Appeal.

20. Per contra, Mr. D. Sivakumaran, learned Counsel appearing for Defendants 3 to 5 referred to Ex.D.1 in O.A. No. 150 of 1942, wherein the origin of the temple is set out, to hold that Nallayee Ammal after the death of her husband, ascended the funeral pyre and performed "Sati". Worship and poojas are done for her sacred ashes. Therefore, it was treated as an excepted temple under Act 2/1927. It was also recorded in that order which is as follows:

The Petitioners have filed before the Board a genealogical tree. The documents filed before the Board show that the management had been in the family of the Petitioners hereditarily. If the temple had been a non-excepted temple, the Temple Committee which had been functioning in the district would have appointed some trustees for it. There is nothing on record to show that the Committee had at any time appointed any trustees for this temple. The temple should therefore be and is hereby declared to be an excepted temple.

Even in the order passed by the Second Defendant in O.A. No. 226 of 1976, a draft scheme was accepted where the descendants of Seeranga Gounder family of Vallipuram village were eligible to be appointed as trustees as per the provisions of the HR & CE Act. This order passed in O.A. No. 226 of 1976, dated 23.9.1977 clearly comes within Section 64(1). Merely because earlier proceedings under Act 2 of 1927 made it as an excepted temple, the Defendants will have to go before the authority once again with a scheme suit u/s 63(b). In any event, either in the order of the year 1942 Act or in the order of the year 1977, no right was accrued to the Plaintiffs and they had not set the law in motion.

21. He also referred to several decisions of the Supreme Court to contend that even if there is any suo motu Revisional power, the said power need not be invoked at the instance of persons who approached the Court belatedly. He relied upon a decision of the Supreme Court *Shri Arun B. Khanjire Vs. The Ichalkaranji Urban Co-op. Bank Ltd. and Others*, . In that case, the Supreme Court considered relevant provisions of the Maharashtra Cooperative Societies Act, 1960. In that case, though a defective Appeal was filed, but during the course of proceedings, it was argued that it can be treated as suo motu proceedings. But, it was found that such argument was made only to avoid precondition of 50% of deposit to maintain an Appeal. Therefore, that attempt was found fault with by the Court.

22. But with regard to exercise of suo motu Revisional powers, the Supreme Court had several occasions to interpret such clauses found in various enactments. The Supreme Court in *Moradabad Development Authority Vs.*

Saurabh Jain and Others, in dealing with the power of the State Government to suo motu Revision, in paragraph 19 held as follows:

19. As a bare reading of the provision shows that it relates to suo motu action on the part of the State Government. In that sense, a person aggrieved who had a remedy of Appeal u/s 33 has no statutory right to move in revision. However, for the exercise of Revisional power by the State Government it is open to the State Government to examine a Petition and on the basis of material indicated therein to decide whether any action in terms of Section 34 is called for. If the State Government decides to act on the basis of Petition filed by any person, it has to examine as to why the person has not availed the remedy of filing an appeal. It is also necessary to examine whether after a long lapse of time any action is warranted. In this exercise, filing of Petition within a reasonable time is inbuilt. What would be reasonable time would depend upon the facts of each case and no straitjacket formula can be adopted or applied.

(Emphasis added)

23. Likewise, the Supreme Court in its decision in Dadan Ram and Others Vs. State of Bihar and Others, while considering the power of the Government to suo motu revise any order of lower authority as incorporated u/s 45-B of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, struck a note of caution in exercise of such power. In paragraph 16 and 21, the Supreme Court observed as follows:

16.....Though the amended provision contains very wide and extraordinary power, admittedly no guidelines have been provided as to when such power is to be exercised. In fact, no period of limitation has been fixed, the result whereof may be that a proceeding which had been initiated under the provisions of the Act and has been concluded by final orders passed by the Original, Appellate and the Revisional Authority can be reopened after lapse of several years. The amended provision also makes it clear that while exercising powers under the said provision, no one can act as an Appellate or Revisional Court. It is an extraordinary power which can be invoked only if earlier order is found to have been passed not in accordance with the Act.

21. Section 45-B empowers the State Government to reopen the case which had already been disposed of by the Collector under the Act. After reopening the case, the State Government is to dispose of the matter afresh in accordance with law. It is, therefore, clear that before passing any order in a concluded issue, the authority is expected to satisfy the minimum requirement of Principles of Natural Justice by issuance of notice and hearing. Further, the said power to reopen has to be exercised sparingly and for adequate reasons and the proceeding concluded earlier cannot be reopened merely for verification whether the orders were correctly passed. The order of reopening should be passed after hearing the parties concerned and where an order of reopening the case had been passed without hearing the party against whom it was passed, the order suffers with

legal infirmity and is liable to be quashed. The reason behind issuing a show-cause notice is precisely very clear in view of the fact that a proceeding once concluded after a regular hearing should not be ordered to be reopened suo motu by the authorities concerned in a capricious manner and reasonableness requires that parties to be affected by the same should be heard. (Emphasis added)

24. Therefore, in the present case, the First Defendant was right in granting notice to parties and after finding that there was no infirmity in the orders passed in the years 1942 and 1977, he correctly refused to exercise his suo motu Revisional power. This was to be done after recording that the earlier orders are valid and therefore, such suo motu power cannot be exercised. Therefore, arguments raised by the Counsel for Appellants have to fail regarding giving of notice and determining the issue by the First Defendant.

25. Even for refusing to exercise a Revisional power, the authority can validly record such findings. The finding given in the judgment under Appeal holding that the First Defendant had correctly refused to exercise his power u/s 69(2) is correct and also, in view of the fact that no Revisional power was exercised by the authority u/s 69, no Appeal will lie u/s 70(1) of the HR & CE Act is also valid. If it is held that there was no order u/s 69(2) and consequently there is no Appeal u/s 70(1), a further Appeal to this Court u/s 70(2) is also not maintainable. Apart from that for the allegation that the Plaintiffs were aware of earlier proceedings being in close connection with the Defendants all these years, they had also not given any valid explanation for an inordinate delay in filing the so-called Revision u/s 69(1) of the HR & CE Act. Any attempt to seek for a direction to First Defendant to consider the Revision on merits will only result in not only abuse of power, but also gross misjustice to private Defendants. In the light of the above, the judgment and decree passed by the Court below in O.S. No. 51 of 1996 dated 21.12.2006 is confirmed. Accordingly, the Appeal Suit will stand dismissed with costs.