

(2010) 03 KAR CK 0255
In the Karnataka High Court
Case No : Writ Petition No. 17580 of 2006

Sri Samsthana Mahabaleshwar Devaru and Another	APPELLANT
Vs	
State of Karnataka and Another	RESPONDENT

Date of Decision : 08-03-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Karnataka High Court Act, 1961 — Section 4

Citation : (2011) ILR (Kar) 2667 : (2011) 2 KCCR 928

Hon'ble Judges : Subhash B. Adi, J

Bench : Single Bench

Advocate : Subramanya Jois for V.G. Bhat, for the Appellant; B.V. Acharya, for the Respondent

Final Decision : Dismissed

Judgement

Subhash B. Adi, J.—This writ petition is directed against the order dated 17.11.2006.

2. The case of the Petitioners is, that they had made an application before the District Judge, Canara, u/s 47 of the Bombay Public Trust Act on 19.2.1957 to appoint 2nd Petitioner as trustee of the temple in exercise of power u/s 47 of the Bombay Public Trust Act, (hereinafter referred to as "the Trust Act"). The learned District Judge by order dated 30.1.1960 appointed the 2nd Petitioner's father as Trustee of the temple. The father of the 2nd Petitioner died on 3.11.2004. After his demise the 2nd Petitioner has been performing the duties in the place of his father. In the meanwhile, the devotees of the 1st Petitioner along with other trustees, acting under the Trust Act, filed writ petitions in W.P. No. 33012/2003 to 33015/2003 challenging the validity of the Karnataka Hindu Religious Institutions and Charitable Endowments Act, 1997 (hereinafter referred to as the "Endowments Act") and also for a direction to restore the temple in favour of the Petitioners therein. It is stated that the Endowments Act was held constitutional by this Court. However, the 1st Respondent issued a notification appointing the

2" Respondent as the Executive Officer of the 1st Petitioner--temple, as an additional charge. It is this order of the 1st Respondent is called in question.

3. This Court by order dated 12.12.2006 directed the parties to maintain status quo as on that date and the said interim order was continued. However, the State Government filed a Memo on 19.8.2008, producing a Notification dated 16.8.2008 inter alia stating that, by said notification the State Government has withdrawn the impugned notification dated 17.11.2006 with effect from 14.8.2008. This Court accepting the notification, by order dated 19.8.2008 dismissed the writ petition as having become infructuous..

4. Being aggrieved by the order of dismissal of the writ petition, Petitioners herein filed an appeal in W.A.6083/2009. The Division Bench after hearing the parties, allowed the appeal by observing as under:

31. We are of the clear opinion that in the present case that has not happened as the writ petition was got dismissed in a hurried manner by the memo filed by the learned Government Advocate before the Court and in the course of hearing of the case.

32. It is a salient requirement of law that a proper opportunity is always given to the other side before taking any adverse action. We notice that the State Government by its conduct and by filing the memo was getting the writ petition filed by the Petitioners dismissed and that too as having become infructuous. The conduct of the State Government is neither fair nor proper. This is not the conduct and method we expect from the highest governance in the State and the Executive organ of the State.

33. It is not necessary to go into the legality or the merits of the orders though the learned Additional Advocate General has sought to defend the same contending that the action taken and the orders passed by the State Government is fair and proper.

34. We are of the view that the action taken by the State Government, requires proper scrutiny by this Court and it is also desirable that the matter is examined in an adequate manner and to the satisfaction of the Petitioners and also as to whether the writ petition had become infructuous.

And directed the Registry as under:

We direct the Registry to re-list the writ petition before the Single Bench of this Court.

It is in pursuance of this order passed by the Division Bench, the matter has been re-listed before this Court.

5. Sri. Subramanya Jois, learned Senior Counsel appearing for the Petitioners submitted that, when the Counsel for the Petitioner was not present, the respondent-State in great hurry has filed a Memo dated 18.8.2008 and on 19.8.2008 got the writ petition dismissed. By notification dated 17.11.2006, the

Assistant Commissioner was given additional charge of administration of the temple and this Court granted the interim order of status quo. by virtue of the same, Petitioner continued as trustee. The notification dated 16.8.2006 not only is for withdrawing the notification dated 17.6.2006, but it based on the issue of another notification dated 12.8.2006. and by which the Government not only deleted the temple from the list of notified temples, but decided to entrust the temple to Ramachandrapur Mutt. The whole exercise of the government was to defeat the interim order and to defeat the rights of the Petitioner. He submitted that the notification dated 16.8.2006 has an effect of denial of rights accrued to the Petitioner. The State Government in order to over reach the interim order of this Court dated 12.12.2006, had adopted a very ingenious method of issuing notification dated 12.8.2008 to delete the temple from the notified list, and hand over the same to the Ramachandrapura Mutt and thereafter, by issuing the notification dated 16.8.2008 has withdrawn the impugned notification, with an intention of discontinuing the impugned notification, with an intention of discontinuing the Petitioner as a trustee. He further submitted that, in view of the above circumstances this writ petition has not become infructuous.

He strongly relied on the observations made by the Division Bench of this Court in W.A. No. 6083/2009 and submitted that, the Division Bench categorically at para-34 of its order has observed, that the matter requires proper scrutiny and has expressed that it is desirable that the matter is examined in an adequate manner and to the satisfaction of the Petitioners, to consider as to whether the writ petition has become infructuous or not. He submitted, that in view of the observations made by the Division Bench, the matter required to be considered on the question as to whether it has become infructuous and also as to the effect of the withdrawal of notification dated 16.8.2006.

He further relied on two judgments of the Apex Court reported in Paramjeet Singh Vs. State of U.P. and Others, and in Ashgar Khan Vs. Union of India (UOI) and Others, and submitted that, even if the question involved in the dispute has become academic, writ petition will not become infructuous and the Apex Court. In the judgment referred to above has observed that the dismissal of writ petition as having become infructuous on the ground that the issue has become academic was held as not justified. He submitted that, the order of withdrawal of Impugned notification should ensure status quo ante, that is the position as on the date of granting of interim order by this Court, and mere withdrawal of notification will not render the writ petition infructuous.

6. On the other hand, Sri. B.V. Acharya learned Senior Counsel representing the State, submitted that, the Petitioners have only questioned the validity of the notification dated 17.6.2006 and no other relief. He submitted, that the interim order dated 12.12.2006 only directs the parties to maintain status quo as on the said date and the notification impugned in the writ petition is dated 17.11.06. Further, by notification dated 16.8.2008, the State Government has withdrawn the impugned notification. In view of the withdrawal of impugned notification,

nothing survives for consideration. He further submitted that the writ petition does not survive without there being any cause of action.

In so far as the merits of the case is concerned, he submitted that detailed objection statement has been filed denying the claim of the Petitioners. Further, the learned Senior Counsel also submitted that there is no need to go into any other aspect of the matter, because the writ petition itself has become infructuous. He submitted even in case of suit, if the plaint does not show any cause of action, the plaint is liable to be rejected under Order 7, Rule 11(d) of Code of Civil Procedure. The Division Bench has asked the Court to again find out as to whether the writ petition has become infructuous or not, and that is how this matter is considered once again in detail.

7. To understand the rival contentions on the issue, as to whether the writ petition has become infructuous or it still survives for consideration, I may required to notice the following:

The prayer in the writ petition reads as under:

- i. Issue a writ of certiorari or any other writ or order quashing the impugned notification dated 17.11.2006 issued by the first Respondent in No. Kam.E. 103 Mu. Savi.2006, vide Annexure-A.
- ii. grant such other and further relief"s as this Hon"ble Court deems fit in the facts and circumstances of the case, including an order as to costs.

Reading of the prayer makes it clear, that the Petitioners are aggrieved by the impugned notification dated 17.11.2006 wherein the Government had directed the Assistant Commissioner of Kumta Sub-Division, to take additional charge of the temple. This Court on 12.12.2006 has passed the following order which reads as under:

The learned AGA seeks further time to seek instructions. Post this matter on 18.12.2006. In the meanwhile, parties are directed to maintain status quo as on today.

This interim order was continued further.

Thereafter, the Government filed a Memo dated 18.8.2008 on 19.8.2008 before the Court. The memo reads as under:

In the above writ petition, the Petitioner has challenged the Notification No. Kam. E. 103 Mu Se Vi 2006 dated 17.11.2006. The said Notification has been withdrawn by the Notification dated 16.8.2008. Consequently, the above writ petition has been infructuous.

Therefore, it is prayed that this Hon"ble Court he pleased to dismiss the above writ petition as having become infructuous, in the interest of justice and equity.

Along with the above memo, the notification dated 16.8.2008 was produced, which is Kannada which reads as under:

By reading of the Memo dated 18.8.2008 as tiled by the Government, In categorical terms it is stated that the notification dated 17.11.2006 has been withdrawn. Assuming for a moment, that the State has filed the Memo without even producing the notification dated 16.8.2008 and stated that the notification has been withdrawn, the question arises as to whether, even after the statement made by the State Government withdrawing the notification, still the Court could go into the question of validity of the impugned notification. The only prayer in the writ petition is for quashing the impugned notification and statement of Government is that it is withdrawn. If there is no impugned notification, the writ petition will remain without any cause, and no writ could be issued, much less, the writ of certiorari, as there is nothing to be quashed.

8. No doubt the Government has withdrawn the notification impugned in the writ petition with effect from 14.8.2008. However, no cause survived, particularly for quashing. Writ of Certiorari cannot be issued against non-existing order or notification. If there are any other notifications issued and if they affect the rights of the Petitioner, Petitioner has right to question them, but no writ of certiorari could be issued against the non est order. Now, it is brought to my notice that vide notification dated 12.8.2008 the Petitioner- temple which was notified in the list of notified temples under the Endowments Act has been deleted and it is also stated that the administration of the temple has come under the Ramachandrapura Mutt and the said notification is challenged by the Petitioners in W.P. No. 30609/ 2008 and two other writ petitions, viz. W.P.31026/2008 & W.P.60092/2010. From this it is clear that Petitioner has already taken steps to challenge the said notification.

9. In the notification dated 16.8.2008 there is a reference to the notification dated 12.8.2008. Admittedly, the Petitioner has already filed separate writ petition and the said writ petition is pending. Assuming that the issue of notification dated 16.8.2008 is a resultant of notification dated 12.8.2008 and has affected the interests of the Petitioner, however the Petitioner admittedly has filed a separate writ petition. In view of the same, even the said aspect also does not arise for consideration in this Writ Petition.

10. The Government not only in the memo but also in the notification has categorically stated that the impugned notification dated 17.11.2006 has been withdrawn. The only consequence of the said notification is that, there is no impugned order and there is nothing to determine.

11. Two decisions cited by the learned Senior Counsel for the Petitioner, one relates to the date of birth. In the said decision the Appellant had attained the age of retirement on the basis of the date of birth recorded in his service record and if the date of birth claimed by the Petitioner was upheld, dismissal of the writ petition as having become infructuous would affect the rights of the said Petitioner, as such, it is held as not become infructuous. Hence, the said decision is of no help to the Petitioner.

12. As far as the opinion expressed by the Division Bench in its judgment at paras 32 to 34 supra, wherein it has been observed that, the dismissal of the writ petition having become infructuous was passed, when the Petitioner's Counsel was not present and the Division Bench felt that there was no great hurry to dispose of the writ petition. In this context, observations are made that, a proper scrutiny is desirable to examine the matter in an adequate manner to the satisfaction of the Petitioners and also to know whether the writ petition has become infructuous.

It is in the light of the above observation, it may be mentioned that, on the writ side this Court function under Articles 226 and 227 of the Constitution of India, whether it is Single Judge or the Division Bench. By virtue of Section 4 of the Karnataka High Court Act, a provision is made for intraCourt appeal from order of Single Judge to the Division Bench. This cannot be treated as an inter-Court appeal. The orders passed whether by the Single Judge or the Division Bench they are all called as an order passed by the High Court. Learned Single Judge does not function as subordinate Court to the Division Bench.

Appellate Court has power to remand the matter to the Court which has passed the decree in appeal. Appellate Court under the provisions of the CPC is a superior Court, and has a power to remand. Order 41 Rule 28 and 23A of CPC provide for remand. But such remand is to the subordinate Court.

Since all Judges of the High Court carry the same status and position, Division Bench of the High Court does not treat the Single Judge of the High Court against whose order the appeal is filed as subordinate Court to remand the matter or to issue direction to the Single Judge. However, u/s 4 of the Karnataka High Court Act, the Division Bench can set aside the order of learned Single Judge if it finds that the order is not sustainable in law or confirm the order if it does not warrant for interference. Beyond this, remanding the matter to the learned Single Judge will have an effect of treating the single Judge as Court subordinate to Division Bench.

In this case, the entire matter was before the Division Bench and it was open to the Division Bench either to confirm or reverse the order and hear the matter on merit. But observation indicates that the Division Bench has felt that the decision making process of the learned Single Judge is incorrect. The Division Bench could have considered the entire matter, however, the Division Bench has asked the Registry to relist the matter to consider, as to, whether writ petition has become infructuous or not, and for the said purpose, the Registry is directed to re-list the matter before the Single Judge.

This Court took up the matter without going into the propriety of relisting the matter before the Single Judge, only on the ground that in the process the cause should not suffer. Hence, this writ petition is fully heard on the question, as to whether writ petition has become infructuous or not.

13. In this case, since the impugned notification has been withdrawn, vis-a-vis, a

grievance of the Petitioners did survive against the impugned notification. If that is so, nothing remains to be considered, as such, only opinion that can be expressed is that, the writ petition has become infructuous. Accordingly, the writ petition is dismissed as having become infructuous.

14. During the course of hearing of the writ petition, an application Misc W.60478/2010 for amendment is filed. It is necessary to mention that the amendment sought for pertains to the notification dated 12.8.2008. Assuming that the amendment application requires to be liberally considered, however, consideration of amendment application also does not arise, as the said notification is already challenged by the Petitioner by filing separate writ petition. When another writ is pending against the said notification, there is no need to consider the said application. Even other prayer sought for is a consequential relief, in view of the same, the application for amendment is dismissed as the same does not survive for consideration. It is also clear that in view of the withdrawal of impugned notification, the appointment of administrator under the said notification also comes to an end automatically. For the above reasons, the writ petition does not survive for consideration. All other contentions relating to the notification dated 12.8.2008 could be raised in the pending writ petitions.

15. In the circumstances, keeping open all other contentions, this writ petition is dismissed as having become infructuous. Consequently, the amendment application Misc. W.60478/2010 also stands dismissed.