

(2010) 12 MAD CK 0075
In the Madras High Court
Case No : W.A. (MD) No. 705 of 2010

The Superintending Archaeologist Archaeological Survey of India APPELLANT

Vs

Kudaivarai Kovil Thirumalpuram, The District Collector, The Tahsildar and The Inspector of Police RESPONDENT

Date of Decision : 13-12-2010

Acts Referred:

Ancient Monuments and Archaeological Sites and Remains Act, 1958 — Section 5(6)
Ancient Monuments and Archaeological Sites and Remains Rules, 1959 — Rule 5, 5(1), 7, 7(2)
Constitution of India, 1950 — Article 226, 227
Customs Act, 1962 — Section 27, 27(3), 27(4)

Citation : (2010) 12 MAD CK 0075

Hon'ble Judges : R. Subbiah, J;R. Banumathi, J

Bench : Division Bench

Advocate : S.M. Deenadayalan, for the Appellant; R. Janakiramulu, Special Government Pleader for Respondents 2 and 4 and S.S. Sundar, Amicus Curie for Respondent R 1, for the Respondent

Final Decision : Allowed

Judgement

R. subbiah, J.—The question that has fallen for consideration in this appeal is whether the restriction imposed by the Archaeological

Department for the celebration of ""Mahasivarathiri"" in Kudaivarai Kovil/Two Rock Cut Temple, Thirumalpuram, to the public from sunrise to

sunset is legally sustainable.

2. This Writ Appeal arises out of the order made in W.P.(MD) No. 1405 of 2009, dated 11.02.2010 whereby the learned single Judge permitted

the petitioner to celebrate ""Mahasivarathiri"" during night hours and directed the Deputy Superintendent of Police, Puliyangudi to provide necessary

police protection for the smooth conduct of the festival.

3. Brief facts which are necessary to decide the issue involved in this appeal are as follows:

a) Though originally regular poojas were being offered by the devotees, it fell into disuse after the Kudaivarai Kovil/Two Rock Cut Temple,

Thirumalpuram was declared to be an ancient monument in the year 1922 under the Ancient Monuments Preservation Act, 1904. At present, the

said temple is under the control of the Archaeological Survey of India and governed by the provisions of the new Act viz., The Ancient Monuments

and Archaeological Sites and Remains Act, 1958 (hereinafter called as "the Act and Rules, 1958) and the Rules of 1959 made there under.

b) From the year 1980 onwards by the residents of that locality and the devotees, Thirukarthigai festival and Sivarathiri festival are being

celebrated in the said temple. In the year 2005, some objection was raised to perform poojas after 6 p.m., on Sivarathiri day by some people

belonging to the nearest locality. Hence, a peace committee meeting was convened in the presence of the Revenue Divisional Officer, Tirunelveli on

23.11.2005. In the said peace committee meeting, a representative from the Archaeological Department was also present. In the said peace

committee meeting, the parties concerned agreed that after getting permission from the Archaeological Department, poojas can be performed after

6 p.m on Sivarathiri Day and was also agreed that on special occasion like Sivarathiri day, poojas can be offered to the deity from 6 p.m to 6 a.m.

on the next day. Pursuant to the permission given on the application submitted by the first respondent, poojas were performed during night hours

on Sivarathiri day during the year 2006-2007, for two days.

c) In the year 2008-2009, the appellant granted permission only for one day stating that poojas and prayer should be completed between sunrise

and sunset. Since the poojas start only at sunset on Sivarathiri day and extends to sunrise, the first respondent expressed their difficulty in

observing Hindu religious practice performing poojas during night hours on sivarathiri day. Even in the year 2009, the appellant by order dated

05.02.2009, granted permission for only one day stating that the poojas should be completed between sunrise and sunset. Hence, the petitioner

has approached this Court by way of filing writ petition in W.P.(MD)No.

1317/2009 seeking direction to grant permission for Sivarathiri day

festival during night hours. This Court by order dated 25.03.2009, disposed of the said writ petition, directing the first respondent to submit an

application to the appellant Archaeological Department for conducting Sivarathiri festival after sunset and before sunrise and directed the appellant

Archaeological Department to consider and dispose of the said application.

d) Similarly, in the year 2010, the permission was refused by the appellant herein for conducting poojas during night hours on Sivarathiri day. The

first respondent thereafter, filed another writ petition in W.P(MD)No. 1405 of 2010 to permit the first respondent to conduct Sivarathiri festival

during night hours on 12.02.2010.

e) The said prayer of the first respondent was resisted by the appellant Department stating that the Kudaivarai Kovil/Two Rock Cut Temple,

Thirumalapuram with inscriptions in Varnachimalai, Tirumalapuram is a Centrally Protected Monument of National Importance vide notification

No. 118, dated 09.06.1922 and preserved and maintained by the Archaeological Survey of India, Thrissur Circle under the provisions of the Act

and Rules, 1958. As per the Rules of Archaeological Survey of India [ASI], there are two types of monuments (a) monuments under worship fully

or partially and (b) monuments which are not under worship. The Rock Cut Cave Temple, Tirumalapuram falls under the category of monuments

under worship partially. As per the Act and Rules, 1958 monuments are kept open from sunrise to sunset.

f) The learned single Judge after considering the submissions of the learned Counsel appearing for the writ petitioner and the learned Counsel for

the appellant, allowed the writ petition on a finding that Section 5(6) of the Act, 1958 and Rules, 1958 enable the continuance of use of the

protected monuments for customary religious observations without any prejudice and the said temple being a religious monument with the regular

worship by public on the basis of customs and usages, permission could be granted to celebrate the festival in the night hours also. Aggrieved over

the same, the present writ appeal is filed by the Archaeological Department.

4. Learned Counsel appearing for the appellant submitted that two rock cut temple is a centrally protected monument of national importance,

which is preserved and maintained by the appellant Department.

5. He further submitted that under Rule 5(1) of the First Schedule contained in Rules, 1959, the protected monuments specified in the First

Schedule shall remain open during night hours specified against them in the schedule. If the specified monuments is not in the First Schedule, those

monuments shall remain open from sunrise to sunset. But the subject temple is not specified in the First Schedule of the Rules. Therefore, as per

Rule 5(1) which shall remain open only from sunrise to sunset. Therefore, permission cannot be granted to conduct sivarathiri against the provisions

of the Act 1958 and Rules of 1959.

6. Learned Counsel appearing for the appellant further submitted that the object of the Act is to preserve national monuments under respective acts

and to ensure that all of them have to be properly maintained. Therefore, there cannot be a permission against the object of the Act.

7. The first Respondent has not entered appearance even though served with notice and the name of the first Respondent was printed in the cause

list. Having regard to the issue involved Mr. S.S. Sundar, learned Counsel was appointed as Amicus Curie. We have heard Mr. S.S. Sundar, the

learned Counsel.

8. Learned Counsel for the first respondent submitted that Rule 5 has to be read conjointly with Rule 7 of the Rules 1959. Rule 7 envisages that

no protected monuments shall be used for the purpose of holding any meeting, reception, party, conference or entertainment except in accordance

with a permission in writing granted by the Central Government"". But Sub Rule 2 to Rule 7 says that nothing in sub-rule ""(1) shall apply to any

meeting, reception, party, conference or entertainment which is held in pursuance of a recognised religious usage or custom. Hence, if any

celebration, pursuant to a religious usage or custom"". Hence, if there is any celebration, pursuant to a religious usage and custom, there cannot be a

bar to conduct the festival during night hours. Moreover, Rule 5 only says that the protected monuments specified in the First Schedule shall remain

open from sunrise to sunset, it does not mean that the festival cannot be performed during night hours.

9. We heard the learned Counsel appearing for the respective parties and perused the materials available on record.

10. Kudaivarai Kovil/Two Rock Cut Temple, Thirumalapuram with inscriptions in

Varnachimalai, Tirumalapuram is a Centrally Protected

Monument of National Importance vide notification No. 118 dated 09.06.1922 preserved and maintained by the Archaeological Survey of India,

Thrissur Circle under the provisions of the Act of 1958 and Rules 1959. As per the Rules of Archaeological Survey of India [ASI], there are two

types of monuments (a) monuments under worship fully or partially and (b) monuments which are not under worship. The Rock Cut Cave Temple,

Tirumalapuram falls under the category of monuments under worship partially. As per Rule 5 of the Act and Rules, 1958, the monuments specified

in the First Schedule of that Act shall remain open and close during the hours specified against them in the said schedule. But so far as the Rock

Cut Cave Temple is concerned, it is not specified in the First Schedule. As per Rule 5(1) of 1959, the temple shall remain open only from sunrise

to sunset. Therefore, now it is the submission of Archaeological Department that if the devotees are permitted to perform poojas on Sivarathiri

festival during night hours, it is against the object of the Act and Rules. Therefore, the permission cannot be granted.

11. But according to the learned Counsel for the first respondent, Rule 5 has to be read conjointly along with Rule 7, Rule 7 permits celebration of

recognised religious usage or custom in protected monuments. Under such circumstances, the word "shall" found in Rule 5 would mean it remain

open from sunrise and sunset cannot be a bar to permit the devotees to celebrate the festival during night hours. In this context, Rules 5 and 7 are

extracted hereunder:

5. Monuments when kept open:

(1) The protected monuments specified in the First Schedule shall remain open during the hours specified against them in that Schedule; protected

monuments which are not so specified and to which neither rule 3 nor rule 4 applies shall remain open from sunrise to sunset. Provided that an

archaeological officer may, by notice to be exhibited in a conspicuous part of the monument, direct that a protected monument or part thereof

shall be closed temporarily for such periods as may be specified in the notice.

(2) Nothing in this rule or in rule 6 shall apply to an archaeological officer, his agents, subordinates and workman or to any other Government

servant on duty at a protected monuments....

7. Holding of meetings etc. in monuments: (1) No protected monuments shall be used for the purpose of holding any meeting, reception, party, conference or entertainment except under and in accordance with a permission in writing granted by the Central Government.

(2) Nothing in sub-rule (1) shall apply to any meeting, reception, party, conference or entertainment which is held in pursuance of a recognised religious usage or custom.

12. Learned Counsel for the first respondent further submitted that the expression ""shall remain open from sunrise to sunset"" found in Rule 5 has to be read conjointly with Rule 7, it shall give the meaning, the expression "shall" found in Rule 5 cannot be a bar for celebrating a religious usage or

custom in a protected monument even during night hours. On the other hand, the learned Counsel appearing for the appellant submitted that the

word "shall" used in Rule 5 is mandatory in nature and therefore, the permission cannot be granted against the statute. We are of the considered

opinion that Rule has to be interpreted only at the back ground of the object of the Act and the object of the Act is only to maintain all the national

monuments properly. When a strict duty is imposed on the appellant/ Archaeological Department, the interpretation made by the learned Counsel

for the first respondent is accepted, it would be against the object of the Act.

13. In this regard, useful reference can be placed to the judgment of the Supreme Court in *Rajeev Mankotia Vs. Secretary to the President of*

India and others, . In paragraph 21, the Supreme Court has held as follows:

21. It is needless to mention that as soon as the Indian Institute of Advance Studies vacates the building and hands it over to the Archaeological

Department, the Government should provide the necessary budget for effecting repairs and restoring to the building its natural beauty and grandeur.

It is also necessary that its proper maintenance and preservation is undertaken as an on-going process to protect the historical heritage and needed

repairs are effected from time to time. We avail this opportunity to direct the Government of India to maintain all national monuments under the

respective Acts referred to above and to ensure that all of them are properly maintained so that the cultural and historical heritage of India and the

beauty and grandeur of the monuments, sculptures secured through breathless and passionate labour workmanship, craftsmanship and the skills of

the Indian architects, artists and masons is continued to be preserved. They are pride of Indians and places of public visit. The tourist visitors

should be properly regulated. Collections of funds by way of admission/entrance fee should be conscientiously accounted for and utilised for their

upkeep and maintenance under respect regulations/rules. Adequate annual budgetary provisions should be provided. In this behalf, it may not be

out of place to mention that if one goes to Williamsburg in United States of America, the first settlement of the Britishers therein is preserved as a

tourist resort and though it is one in the row, its originality is maintained and busying business activity goes on in and around the area attracting daily

hundreds of tourists from all over the world. Similar places of interest, though of recent origin, need to be preserved and maintained as

manifestation of our cultural heritage or historical evidence. Similar efforts should also be made by the Government of India, in particular the

Tourism Department, to attract foreign tourist and to give them good account of our past and glory of the people of India as message to other

countries and territories. Equally all the State Governments would do well vis a vis monuments of State importance, though given power under

Entry 12, List II of the Seventh Schedule to the Constitution. From this perspective, the petitioner has served a great cause of national importance

and we place on record his effort to have the Viceregal Lodge preserved and maintained; but for his painstaking efforts, it would have been

desecrated into a Five Star Hotel and in no time"" We, the people of India"" would have lost our ancient historical heritage

14. Therefore, in our considered opinion when an Act imposed a strict compliance on the appellant Department to protect the national monuments,

the Court cannot grant a direction to the statutory authorities to act contrary to law. In this context, useful reference can be made to the judgment

of the Supreme Court in Union of India and Another Vs. Kirloskar Pneumatic Company Limited, wherein it has been held as follows:

What is relevant herein is sub-section (4) of unamended Section 27 and sub-section(3) of amended Section 27 of the Customs Act, 1962.

According to these sub-sections, a claim for refund or an order of refund can be made only in accordance with the provisions of Section 27 which

inter alia includes the period of limitation mentioned therein. Even assuming that Section 27 did not apply either o a suit filed by the importer or to a

writ petition filed by him and that in such cases the period of limitation would be three years, it is not permissible for the High Court, even while acting u/s 226 of the Constitution, to direct the authorities under the Act to act contrary to the aforesaid statutory provision. The power conferred by Articles 226/227 is designed to effectuate the law, to enforce the rule of law and to ensure that the several authorities and organs of the State act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law. In particular, the Customs authorities, who are the creatures of the Customs Act, cannot be directed to ignore or act contrary to Section 27, whether before or after the amendment. May be the High Court or a civil court is not bound by the said provisions but the authorities under the Act are. Nor can there be any question of the High Court clothing the authorities with its power under Article 226 or the power of a civil court. No such delegation or conferment can ever be conceived. Hence, High Court's direction that the authorities should not reject the refund application on the ground of being time-barred, is not sustainable in law.

15. In *Sree Arumugam Teacher Training College being Managed by Arumuga Mudaliar Sornam Educational Trust, National College of Education and Dhivya College of Education Vs. Thiruvalluvar University*, , this Court in paragraph 18 of the order held as follows:

18. A writ of mandamus cannot be issued to a statutory authority to commit a wrong in violation of the statutes. In a catena of judgments, the Supreme Court has held that no writ can be issued to the authorities either to disobey the law or to violate the law.

16. Therefore, we are of the considered opinion that Rule 5(1) clearly gives unambiguous meaning that the monuments which are not specified in First Schedule shall remain open only from sunrise to sunset. If any direction is issued to the statutory authorities to permit the devotees to celebrate the festival during night hours, which will go against the statutory rules. Therefore, such a direction cannot be granted. In our view, the judgment of the learned single Judge is liable to be set aside and accordingly, the same is set aside. Consequently, the writ appeal stands allowed.

No costs.