

A.Dhanasekaran and anr. Vs. the Commissioner and ors.

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Court : Chennai

Decided On : Mar-21-2011

Judge : K.Chandru, J.

Acts : Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 - Section 69(1), 70; Code of Civil Procedure (CPC) - Order 39 Rule 2A; [Foreign Exchange Management Act, 1999](#); [Constitution of India](#) - Article 226

Appeal No. : W.P.NOs.1579 and 2083 of 2011 and M.P.Nos.1 to 3 and 1 of 2011

Appellant : A.Dhanasekaran and anr.

Respondent : The Commissioner and ors.

Advocate for Def. : Mr.T.Chandrasekaran; Mr.R.Subramanian, Advs.

Advocate for Pet/Ap. : Mr.K.M.Vijayan; Mr.S.N.Ravichandran, Advs.

Judgement :

COMMON ORDER

1. The first writ petition is filed by one A.Dhanasekaran, S/o R.Athiappan, challenging an order of the second respondent Joint Commissioner of Hindu Religious and Charitable Endowments, Salem vide order dated 2.8.2010 and seeks to set aside the same.

2.By the aforesaid order, the Joint Commissioner had formed a 15 member Thiruppani Committee and also made the third respondent Executive Officer of Arulmigu Athanooramman Temple as its Secretary and Treasurer with conditions. The term of the office of Thiruppani Committee was fixed as one year from the date of the order. When that writ petition came up on 24.01.2011, Mr.T.Chandrasekaran, learned Special Government Pleader took notice on behalf of respondents 1 to 3. Notice was directed to be served to Thiruppani Committee, i.e., the fourth respondent privately. On notice, Mr.R.Subramanian, learned counsel appeared for fourth respondent. Further, counter affidavits, dated 13.2.2011 were filed by the third respondent in the first writ petition and also by the fourth respondent in W.P.No.2083 of 2011. The petitioner in the second writ petition had also filed a rejoinder, dated 23.2.2011.

3.In the meanwhile, one A.S.Shanmugam, S/o.Siddeswaran, filed a writ petition in W.P.No.2083 of 2011 for the issuance of the writ of prohibition against the Principal District Court, Namakkal from proceeding to try the suit in O.S.No.170 of 2010. The said District Court has been made as fifth respondent. In other respects, respondents 1 to 4 in both writ petitions are same parties.

4.Heard the arguments of Mr.K.M.vijayan, learned Senior Counsel leading Mr.S.N.Ravichandran, counsel appearing for the petitioner in both writ petitions, Mr.T.Chandrasekaran, learned Special Government Pleader for HR&CE; for respondents 1 to 3 and Mr.R.Subramanian, learned counsel for fourth respondent.

5.The facts leading to filing of both writ petitions are as follows:

It is claimed that one A.Subbaraya Gounder and four others including the father of the petitioner in W.P.No.1579 of 2011 had filed a suit in O.A.No.51 of 1988 to the second respondent Joint Commissioner for framing a scheme for appointment of hereditary trustees to administer the Arulmigu Athanooramman and Bathrakaliamman Temples. It was claimed that these temples were situated in Athanoor Village at Rasipuram Taluk. The temples were founded and managed exclusively by Vizhiyan Kulam Nattu Gounder community residing at Atanur and the other surrounding villages. On 14.4.1991, the second respondent had confirmed the draft scheme for these temples. During may, 1991, a Gazette

notification was issued.

6.It was claimed that an appeal was filed against the framing of scheme by a third party. On appeal, the earlier order was set aside and the matters were remanded vide order dated 5.5.1992. During the year 1992, an attempt was made to form a Thiruppani Committee for carrying out Thiruppani work of the temple. The same was challenged in W.P.No.11027 of 1992. Thereafter, the second respondent on 06.12.1993 had appointed a Thiruppani Committee. This was once again challenged in W.P.No.1839 of 1994 by the said Subbaraya Gounder. In the meanwhile, the application in O.A.No.51 of 1988 for framing the scheme was dismissed on its remand. As against the same, original five petitioners as well as the petitioner in W.P.No.1579 of 2011 filed an appeal in A.P.No.36 of 2001 under Section 69(1) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 before the first respondent, the Commissioner, HR&CE.; The said appeal was dismissed by an order, dated 17.12.2004.

7.It was claimed that thereafter, the aggrieved persons including the petitioner herein filed a statutory appeal in O.S.No.189 of 2005 under Section 70 of the HR&CE; Act before the Sub Court, Namakkal. The said suit was transferred to the Sub Court, Rasipuram and renumbered as O.S.No.139 of 2008. It is the case of the petitioner that during the pendency of the appeal, there was an attempt to form a Thiruppani Committee. The fourth respondent society was formed with effect from 23.12.2009. It was registered under the Tamil Nadu Societies Registration Act. A Bank account was also opened in the name of the said Thiruppani Committee. After formation of the same, apprehending that the said committee will be appointed as Thiruppani Committee, a writ petition was filed being W.P.No.671 of 2010 seeking to forbear the respondents from appointing the said Thiruppani Committee. However, the said writ petition was withdrawn with liberty to move the court below.

8.Thereafter, the petitioners had preferred I.A.No.148 of 2010 in O.S.No.139 of 2008 seeking for an interim injunction restraining the respondents from interfering with the petitioners' possession and management of the suit temple either by appointing of Thiruppani Committee or trustees to the suit temple. The Executive

Officer has filed a counter statement dated 13.7.2010. In the meanwhile, the second respondent had passed an order dated 2.8.2010 appointing 15 members as members of Thiruppani Committee which became the subject matter of W.P.No.1579 of 2011. Though the Thiruppani Committee was constituted with individual names of 15 members, the petitioner had not chosen to implead any one of them in the writ petition, but only made the fourth respondent society as party to the writ petition. It also transpires that the Sub Court had granted an interim injunction pending the suit on 28.09.2010 nearly after a period of 50 days after the impugned order.

9.In the meanwhile, the fourth respondent society had filed a suit before the Principal District Court, Namakkal in O.S.No.170 of 2010 seeking for bare injunction restraining the defendants and their man from interfering with the work of the Committee either from discharging their duty or from collecting funds from the public. An interim application for an interim injunction was also filed pending suit, wherein the petitioner in W.P.No.1579 of 2011 was cited as 5th respondent and the petitioner in W.P.No.2083 of 2011 was cited as 7th respondent. Initially, on 10.11.2010, an exparte injunction was granted. Thereafter, a vacate injunction application in I.A.No.462 of 2010 was filed by the respondents including the two petitioners. The Principal District Court had dismissed the vacate injunction application and confirmed the order of injunction on 16.11.2010 in I.A.No.450 of 2010. Aggrieved by the order passed by the Principal District Court, the petitioners moved this Court in C.M.A.Nos.3600 and 3601 of 2010. This Court by a common order, dated 23.12.2010 had dismissed the appeals filed by the petitioners along with others and confirmed the order of injunction passed by the Principal District Court. This Court had specifically found that there is no illegality in the order passed by the District Court in granting injunction. It was also found that the order dated 2.8.2010 was not the subject matter of challenge in any of the proceedings. After the dismissal of these two appeals filed against the interim order passed by the District court, the petitioner A.S.Shanmugam preferred the second writ petition seeking for a writ of prohibition as noted already.

10.In the second writ petition, the petitioner also cited the District Court as the fifth respondent. It must be noted that as against the order passed by this Court in two

C.M.As., the petitioners have not chosen to go before the Supreme Court. On the contrary, they have filed writ in the nature of prohibition restraining the fifth respondent from trying the suit in O.S.No.170 of 2010. By their own conduct, the petitioners have given finality to the order passed by this court in two C.M.As., thereby the fourth respondent Committee cannot be enjoined from doing Thiruppani work and collecting funds. Perhaps, it is only after the order passed by this court and since the order dated 2.8.2010 appointing the Thiruppani committee was not under challenge, the first writ petition itself came to be filed.

11.The main grievance as projected by Mr.K.M.Vijayan, learned Senior Counsel appearing for the petitioners was that when statutory appeal under Section 70 of the HR&CE; Act is pending before the competent court, it is not open to Thiruppani committee to move some other court with a suit, since against an order of a Civil Court, only an appeal lies to this court under Section 70(2) of the Act. As against the order of injunction obtained by the petitioner, no one had preferred any appeal under Section 70(2) of the Tamil Nadu Hindu Religious and Charitable Endowments Act. Further, any matter to be decided under the Act, Section 108 bars filing of suits except in conformity with the provisions of the Act. Therefore, the fifth respondent Principal District Court in entertaining the suit at the behest of the fourth respondent and granting injunction is contrary to the order passed by the Sub Court, Rasipuram in I.A.No.148 of 2010 in O.S.No.139 of 2008 and is clearly impermissible. Therefore, the writ of prohibition will lie.

12.It must be noted that as long as the order passed by this court in two C.M.As dated 23.12.2010 is not under challenge before any court in the manner known to law, the petitioners cannot presume that the order emanating from the Principal District Court, Naakkal as well as the appellate order is either void order or that the Court cannot be permitted to proceed with the trial of the suit. On the other hand, a writ in the nature of prohibition itself is clearly not maintainable against the Civil Court. In the present case, the petitioners can always raise the issue of maintainability of the suit before the Principal District Court and request the court to try it as a preliminary issue. Further the Civil Court can also decide the jurisdictional issue including lack of jurisdiction on its part.

13. In this context, it is necessary to refer to a judgment of the Supreme Court in *Isha Beevi v. Tax Recovery Officer* reported in (1976) 1 SCC 70. The following passage found in paragraph 5 may be usefully extracted below:

"5..... The existence of an alternative remedy is not generally a bar to the issuance of such a writ or order. But, in order to substantiate a right to obtain a writ of prohibition from a High Court or from this Court, an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or authority complained against. It is not enough if a wrong section or provision of law is cited in a notice or order if the power to proceed is actually there under another provision." 14. Subsequently, the very same question of issuance of writ in the nature of prohibition against a Civil Court order's came up for consideration by the Supreme Court in *Thirumala Tirupati Devasthanams v. Thallappaka Ananthacharyulu* reported in (2003) 8 SCC 134. The Supreme Court in the following passages found in paragraphs 14 and 16 had observed as follows:

"14. On the basis of the authorities it is clear that the Supreme Court and the High Courts have power to issue writs, including a writ of prohibition. A writ of prohibition is normally issued only when the inferior court or tribunal (a) proceeds to act without or in excess of jurisdiction, (b) proceeds to act in violation of the rules of natural justice, (c) proceeds to act under law which is itself ultra vires or unconstitutional, or (d) proceeds to act in contravention of fundamental rights. The principles, which govern the exercise of such power, must be strictly observed. A writ of prohibition must be issued only in rarest of rare cases. Judicial discipline of the highest order has to be exercised whilst issuing such writs. It must be remembered that the writ jurisdiction is original jurisdiction distinct from appellate jurisdiction. An appeal cannot be allowed to be disguised in the form of a writ. In other words, this power cannot be allowed to be used as a cloak of an appeal in disguise. Lax use of such a power would impair the dignity and integrity of the subordinate court and could also lead to chaotic consequences. It would undermine the confidence of the subordinate court. It was not even argued that there was total lack of jurisdiction in the civil court. It could not be denied that the civil court, before which the suit was pending, had powers to decide on the maintainability of the suit and to decide on questions of its jurisdiction. The civil

court had jurisdiction to decide whether the suit was barred by Section 14 of the said Act or on the principles of res judicata/estoppel. Thus unless there was some very cogent or strong reason the High Court should not have prevented the court of competent jurisdiction from deciding these questions. In other words, the High Court should not usurp the jurisdiction of the civil court to decide these questions. In the impugned judgment no reason, much less a cogent or strong reason, has been given as to why the civil court could not be allowed to decide these questions. The impugned judgment does not state that the civil court had either proceeded to act without or in excess of jurisdiction or that it had acted in violation of the rules of natural justice or that it had proceeded to act under law which was ultra vires or unconstitutional or proceeded to act in contravention of the fundamental rights. The impugned judgment does not indicate as to why the High Court did not consider it expedient to allow the civil court to decide on questions of maintainability of the suit or its own jurisdiction. The impugned judgment does not indicate why the civil court be not allowed to decide whether the suit was barred by virtue of Section 14 of the said Act or on the principles of res judicata/estoppel. To be remembered that no fundamental right is being violated when a court of competent jurisdiction is deciding, rightly or wrongly, matters before it.

16. We have considered the rival submissions. It is not possible to accept Mr Mishra's submission that this Court should quash the interim orders. Those orders are not before this Court and this Court cannot blindly quash the orders passed by courts of competent jurisdiction without even looking into the orders. Even presuming, without so holding, that the suit is not maintainable by virtue of Section 14 of the said Act or on the principles of res judicata/estoppel in our view the High Court should have permitted the civil court, which was competent to decide these questions to do so. At the most the High Court could have directed the civil court to decide these issues as preliminary issues. In our view the correct course is to set aside the impugned judgment and direct the civil court to decide the question of maintainability of the suit in view of Section 14 of the said Act and/or its jurisdiction to entertain the suit as also the question whether the suit is barred by the principle of res judicata as preliminary issues. We see no substance in the apprehension that in deciding the preliminary issues the civil court will not keep in mind judgments of this Court (set out hereinabove) pertaining to maintainability of

the suit once patta is granted under the said Act. Undoubtedly, the civil court would see whether in effect the suit is for purposes of setting aside or modifying the decisions taken in the earlier round of litigation." (Emphasis added)

15. Since the petitioner as against the interim order had exhausted the appeal remedy before this court and when the suit is still pending for trial, this court is not inclined to entertain the writ petition. Hence W.P.No.2083 of 2011 is liable to be dismissed.

16. Insofar as W.P.No.1579 of 2011 is concerned, the only contention of the petitioner was that the petitioners have obtained an injunction in I.A.No.148 of 2010 in O.S.No.139 of 2008. But that injunction was only obtained on 28.09.2010, i.e., long after the Thiruppani Committee was formed by the impugned order, dated 2.8.2010. Subsequently, the District Court in the suit filed by the fourth respondent in I.A.No.450 of 2010 in O.S.No.170 of 2010 had granted an interim injunction in favour of Thiruppani Committee members. The petitioner has also not made Thiruppani Committee members as parties to the writ petition. If the petitioner contended that the Act provides for remedy and the respondents should exhaust that remedy, the same logic will also apply to the petitioner. The order, dated 2.8.2010 has been prima facie approved by this court in C.M.A.Nos.3600 and 3601 of 2010, vide order dated 23.12.2010 and the Thiruppani work is also in progress. Further, in the absence of Thiruppani Committee members being made as parties, the petitioner is not entitled for an hearing in the writ petition. The petitioner also has a right of appeal to the first respondent Commissioner, HR&CE; against the order passed by the second respondent. If any order is issued at this juncture will completely bring contradictory result which will put the official respondents in a quandry.

17. The petitioners who initially moved this Court to forbear the respondents from appointing any Thiruppani Committee and later withdrew that writ petition with option to move the Civil Court. Even an I.A was filed after taking cue from the order passed by this Court in the CMAs. Having moved the Civil Court, they cannot once again file a writ petition against the order dated 2.8.2010. If the official respondents have violated the order of the Sub Court, Rasipuram, they could have

filed an application under Order 39 Rule 2A of the CPC to punish the respondents for committing contempt. In that case, that court could have gone into the issue as to whether there was any willful disobedience of its order. Having chosen to move the Civil Court, the petitioner cannot come to this court and file a writ petition only to execute the interim order made by the Civil Court. On this ground also, W.P.No.1579 of 2011 is not maintainable.

18. Therefore, in the interest of temple and in the interest of balance of convenience, this court is not inclined to upset the order dated 2.8.2010. Further, the petitioner has also remedy by way of appeal to the Joint Commissioner, HR&CE.; When the Act provides remedy by way of appeal, the petitioner must exhaust that remedy and cannot file the writ petition.

19. In this context, it is necessary to refer to a judgment of the Supreme Court in *United Bank of India v. Satyawati Tondon* reported in (2010) 8 SCC 110. The following passages found in paragraphs 53 and 55 may be usefully reproduced below:

"53. In *Raj Kumar Shivhare v. Directorate of Enforcement*¹⁸ the Court was dealing with the issue whether the alternative statutory remedy available under the [Foreign Exchange Management Act, 1999](#) can be bypassed and jurisdiction under Article 226 of the Constitution could be invoked. After examining the scheme of the Act, the Court observed: (SCC p.781, paras 31-32)

31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the appellants counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not

provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.....

55.It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

20.This Court is not willing to give any finding on the contentious issues raised regarding whether the temple is a denominational temple having the protection under Article 26 of the Constitution or that the temple is a community temple and the department cannot thrust any outsider. These are all subject matters to be tried in the suit pending before the Sub Court. In the light of the same, W.P.No.1579 of 2011 must fail and is liable to be dismissed.

21.Accordingly, both writ petitions will stand dismissed. However, there will be no order as to costs. Consequently, connected miscellaneous petitions stand closed.

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