

S. Mahalakshmi Vs M. Syamala and others

Court: Madras High Court

Date of Decision: March 19, 1996

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 40 Rule 1, Order 43 Rule 1

Constitution of India, 1950 â€” Article 224, 226, 227

Government of India Act, 1915 â€” Section 107

Government of India Act, 1935 â€” Section 224

High Court Act, 1961 â€” Section 15

Citation: AIR 1997 Mad 34 : (1996) 2 MLJ 5

Hon'ble Judges: Jagadeesan, J

Bench: Single Bench

Advocate: M. Venkatachalapathy, for the Appellant; K.V. Venkatapathy, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. The 12th defendant in O. S. 133 pf 1996 on the file of Sub Court, Trichy has filed this revision challenging the order of the lower Court in I. A.

202/96 whereby an ex parte interim Receiver was appointed.

2. The respondents 1 and 2 have filed the suit for dissolution of the partnership known as "Srinivasa Transport (Firm)", for rendition of accounts by

the third defendant in the said suit, for permanent injunction restraining the defendants 12 and 13 from alienating the buses bearing Registration

Nos. TUC 9991, TDG 555 and TAY 977 and for other consequential reliefs. The plaintiffs have filed the suit contending that the plaintiffs and

defendants 1 to 11 are partners of the partnership firm and the partnership was entered on 1-12-92. as per the terms of the partnership deed, the

third defendant is the Managing Director of the partnership firm. The third defendant in collusion with the first and second defendants, who are his

father and mother, had alienated the permits and the Registration Certificate relating to the aforesaid three business belonging to the partnership

firm in favour of one Sri Srinivasa Transport (Firm) in which defendants 12 and 13 are partners. The 12th defendant is the wife of the third

defendant and 13th defendant is his sister-in-law. The plaintiffs came to know about the illegal transfer on 16-2-96. Since the third defendant had

acted against the interest of the partnership concern, the suit for dissolution has been filed all along with the plaint I. A. 202/96 for appointment of

interim Receiver was also filed.

3. In support of the application for appointment of Receiver, the petitioners have filed the affidavit in which the plaintiffs have stated that the third

defendant had illegally transferred the permits and the plaintiffs came to know about the same only on 16-2-96. It is further stated in the affidavit

that the plaintiffs understood that the third defendant has committed manipulation of accounts and has transferred the liquid assets and other assets

in favour of the said Sri Srinivasa Transport (Firm) and there is gross concealment of income belonging to the partnership firm Srinivasa Transport

(Firm) of which the plaintiffs and defendants 1 to 11 are partners. The plaintiffs apprehend that they will be put to colossal loss, hardship and

irreparable injury. The defendants 12 and 13 are attempting to alienate the aforesaid buses to other parties and if the attempts on their part

materialise, the plaintiffs and other partners will be put to irreparable loss and hardship.

4. On the basis of the averment, the trial Court had appointed separate interim Receiver by order dated 23-2-96, on the date on which the plaint

was presented. The petitioner has filed this revision under Art. 227 of the Constitution of India, challenging the ex parte order of appointing the

interim receiver.

5. The counsel for the petitioner contended that even though an appeal has been provided under O. 43, R. 1, C. P. C. the petitioner has to wait to

prefer the appeal till she gets the certified copy of the fair and decretal order in I. A. 202/96. Without the certified copy of the decree, appeal

cannot be preferred. Before over the certified copy of the fair and decretal order is made available to the petitioner, the order of appointing ex

parte interim Receiver will be given effect to; whereby the petitioner will be deprived of the management of the buses. Once the order is given

effect to, then there is no purpose in filing the appeal, as the same may become infructuous. Hence the revision under Art. 227 of the Constitution

of India has been filed in order to get justice. Further the learned counsel for the petitioner contended that it is not a case where an ex parte interim

receiver is not a case where an ex parte interim receiver is required. The business is a running concern and the buses had been transferred in the

name of 12th and 13th defendants i.e., the petitioner herein and her sister as early as 1994. The plaintiffs have sought for the appointment of

Receiver on the ground that they came to know about the transfer in favour"" of the defendants 12 and 13 only on 16-2-96 and these defendants

are trying to further alienate the property and if the alienation is made, the plaintiffs along with other defendants will be put to loss. The transfer had

been made as early as 1994 and when two years had been elapsed, now the defendants 12 and 13 cannot be deprived of the enjoyment of the

property by ex parte order of appointing interim Receiver.

6. The respondents 1 and 2 who are the plaintiffs have filed caveat and took notice when the revision came up for admission. The counsel for the

respondents 1 and 2 insisted for the disposal of the revision itself on the ground that the bus bearing Registration No. TCU 9991 had been taken

custody by the Receiver on 7-3-96 and so far as the other two buses are concerned, the Receiver is not able to take custody of the same. As the

ex parte interim Receiver had been appointed, some of the respondents in I. A. 202/96 had filed counter and the petitioner herein can also file her

counter in the said I. A. and the lower Court may be directed to dispose of the said I. A. finally on merits by stipulating some time and till then

status quo may be maintained i.e., the custody of the bus bearing Registration No. TCU 9991 to be remained with the Advocate Receiver and the

other two buses are concerned they can be remained with the petitioner. The learned counsel further contended that the revision under Art. 227 of

the Constitution of India is not maintainable, as the CPC provides the appeal. When the alternative remedy of statutory appeal is available, the

constitutional remedy cannot be sought for.

7. I have heard both the counsel. The issues involved in this revision are :--

i) Whether the revision is maintainable?

ii) Whether the order of appointing an ex parte interim Receiver is liable to be set aside?

8. Issue Nos. (i) and (ii) :-- Order 43, Rule 1(s), C.P.C. provides for an appeal against an order under R. 1 or R. 4 of O. 40. The present order of

the lower Court is only under O. 40, R. 1. Whether it is an ex parte interim receiver or interim Receiver after hearing the parties, would fall only

under O. 40, R. 1, C.P.C. Hence the question to be decided is whether because of the alternative remedy, the present revision is not maintainable

under Art. 227 of the Constitution of India.

9. As per Art. 227 of the Constitution of India, the High Court shall have superintendence over all Courts and the power of "superintendence" is

not confined to "administrative superintendence" only, but includes the power of judicial revision also. The High Court is entitled to exercise the

power where the lower Court assumes erroneous jurisdiction or excess of jurisdiction, where the lower Court refuse to exercise its jurisdiction,

where an error apparent on the face of the record as distinct from a mere mistake of law or error of law relating to jurisdiction exists, where the

violation of principles of natural justice involved and where the arbitrary or capricious exercise of authority of discretion. These incidents are not

exhaustive but only certain examples. Equally, to power under Art. 227 of the Constitution of India cannot be exercised in cases to correct

erroneous exercise of jurisdiction or to interfere with the intra vires exercise of discretionary power. Hence to exercise power under Art. 227 of

the Constitution of India, this Court has to find out at the outset whether the exercise of power by the lower Court is intra vires exercise of

discretionary power, since the power given to the lower Court under O. 40, R. 1, C. P. C. is totally a discretionary one.

10. It is well settled that the discretionary power given to the Court has to be exercised in a judicial manner and it cannot be exercised in an

arbitrary manner. To consider whether the power has been exercised in a judicial manner or arbitrary manner, the Court has to necessarily take

into consideration the facts and circumstances under which the Court below exercised its discretionary power. The facts and circumstances are the

only basis to find out the nature of exercise of power by the lower Court and if it is found that the lower Court, under the given facts and

circumstances had exercised its power in an arbitrary manner, then this Court can interfere under Art. 227 of the Constitution of India.

11. With regard to the exercise of power under Art. 227 of the Constitution of India, the Supreme Court had dealt with two cases reported in (1)

Umaji Keshao Meshram and Others Vs. Radhikabai and Another, and (2) Mani Nariman Daruwala alias Bharucha (Deceased) through Lrs. and

Others Vs. Phiroz N. Bhatena and Others, , as follows :

In Umaji Keshao Meshram and Others Vs. Radhikabai and Another, the Supreme Court has observed at page 1317 as follows :

Under Art. 226 the High Court have power to issue directions, orders and writs to any person or authority including any Government. Under Art.

227 every High Court has the power of superintendence over all courts and Tribunals throughout the territory in relation to which it exercises

jurisdiction. The power to issue writs is not the same as the power of superintendence. By no stretch of imagination can a writ in the nature of

habeas corpus or mandamus or quo warranto or prohibition or certiorari be equated with the power of superintendence. These are writs which are

directed against persons, authorities and the State. The power of superintendence conferred upon every High Court by Art. 227 is a supervisory

jurisdiction intended to ensure that subordinate Courts and Tribunals Act within the limits of their authority and according to law. The orders;

directions and writs under Art. 226 are not intended for this purpose and the power of superintendence conferred upon the High Courts by Art.

227 is in addition to that conferred upon the High Courts by Art. 226. Though at the first flush it may seem that a writ or certiorari or a writ of

prohibition partakes of the nature of superintendence inasmuch as at times the end result is the same, the nature of the power to issue these writs is

different from the supervisory or superintending power under Art. 227. The powers conferred by Arts. 226 and 227 are separate and distinct and

operate in different fields. The fact that the same result can at times be achieved by two different processes does not mean that these two

processes are the same.

In the very same judgment, the scope of the power of this Court under Art. 227 of the Constitution has been succinctly put at page 1318 as

follows :

It is equally well settled in law that a proceeding under Art. 227 is not an original proceeding. In this connection, we need refer to only two

decisions of this Court. In Ahmedabad Mfg. and Calico Ptg. Co. Ltd. Vs. Ram Tahel Ramnand and Others, this Court said:

Article 227 of the Constitution no doubt does not confer on the High Court power similar to that of an ordinary court of appeal. The material part

of this Article substantially reproduces the provisions of Section 107 of the Government of India Act, 1915, except that the power of

superintendence has been extended by this Article to Tribunals as well. Section 107 according to preponderance of judicial opinion clothed the

High Courts with a power of judicial superintendence apart from and independently of the provisions of the other laws conferring on them

revisional jurisdiction. The power under Art. 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose

of keeping the Subordinate Courts and Tribunals within the bounds of their authority and, not for correcting mere errors, see Waryam Singh and

Another Vs. Amarnath and Another, . Under Art. 226 of the Constitution it may in this connection be pointed out that High Court does not hear an

appeal or a revision, that court is moved to interfere after bringing before itself, the record of a case decided by or pending before a court, a

Tribunal or an authority, within its jurisdiction," The origin and nature of the power of superintendence conferred upon the High Courts by Art. 227

was thus stated by this Court in Waryam Singh and Another Vs. Amarnath and Another, .

It reads as follows:

The material part of Art. 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915, except that the power

of superintendence has been extended by the Article also to tribunals. The only question raised is as to the Article. Reference is made to clause (2)

of the Article in support of the contention that this article only confers on the High Court administrative superintendence over the Subordinate Courts

and Tribunals. We are unable to accept this contention because Cl. (2) is expressed to be without prejudice to the generality of the provisions in

Cl. (1).

Further, the preponderance of judicial opinion in India was that S. 107 which was similar in terms of Section 15 of the High Courts Act, 1961, gave

a power of judicial Superintendence to the High Court apart from and independence of the provisions of other laws conferring revisional

jurisdiction on the High Court. In this connection it has to be remembered that Section 107 of the Government of India Act, 1915, was

reproduced in the Government of India Act, 1935, as Section 224 of the 1935 Act, however, introduced sub-section (2) which was

new, providing that nothing in the section should be construed as giving the High Court any jurisdiction to question any judgment of any inferior.

Court which was not otherwise subject to appeal or revision. The idea presumably was to nullify the effect of the decisions of the different High

Court referred to above. Section 224 of the 1935 Act has been omitted from Art. 227. This significant omission has been regarded by all High

Courts in India before whom this question has arisen as having restored to the High Court the power of judicial superintendence it had under Sec-

tion 15 of the High Courts Act 1961, and Section 107 of the Government of India Act, 1915.....

Recently, the Supreme Court in *Mani Nariman Daruwala alias Bharucha (Deceased) through Lrs. and Others Vs. Phiroz N. Bhatena and Others*,

consider the scope of Art. 227 of the Constitution of India observed as follows (at p. 143) (of SCC) : (at p 1499, Para 16 of AIR):--

In the exercise of jurisdiction under Art. 227 of the High Court can set aside or ignore the findings of fact of an inferior Court or tribunal if there

was no evidence justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the court or tribunal has

come to, or in other words it is a finding which was perverse in law. Except to the limited extent indicated above the High Court has no jurisdiction

to interfere with the findings of fact.

Considering the above decisions, with regard to the scope of power of this Court under Art. 227 of the Constitution of India, to interfere with any

orders of the subordinate Courts, it is to find out whether the lower Court had exceeded its bounds and if necessary to keep it within the bounds of

their authority, this court has to interfere with the order of the lower Court.

12. The lower Court has passed an ex parte order of appointing an interim receiver on the basis of the arguments of the counsel for the petitioner.

There is absolutely no application of mind on the part of the lower Court. The lower Court has extracted the averments made in the affidavit and

stated as follows:--

(Vernacular matter is omitted)

For appointment of a Receiver, even after hearing both the parties, this Court has held in T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and

Others, that the following five requirements have to be fulfilled.

1. The appointment of a receiver pending a suit is a matter resting in the discretion of the Court.

2. The Court should appoint a receiver except upon proof by the plaintiff that prima facie he has a very excellent chance of succeeding in the suit.

3. Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss

demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important

consideration.

4. An order appointing a receiver will not be made where it has the effect of depriving a defendant of a "de facto" possession since that might

cause irreparable wrong. It would be different where the property is shown to be "in medio", that is to say, in the enjoyment of no one. And

5. The Court, on the application made for the appointment of a receiver, looks to the conduct of the party who makes the application and will

usually refuse to interfere unless his conduct has been free from blame.

The basic principle for appointment of the Receiver in order to dispossess a person who is in possession and enjoyment of their property, have

been clearly laid down in the above judgment.

13. In yet another judgment reported in Subbalakshmi Ammal and Others Vs. Rajalakshmi Ammal and Others, this Court has reiterated that these

five principles have to be complied with and also referred to the decision in Dozier v. Logan 101 Ga 173 (229) rendered by Atkinson, J., wherein

it is observed as follows:--

The appointment of receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights and is allowable

only in extreme cases and in circumstances where the interest of the creditors is exposed to manifest peril.

In the present case, there is no material to hold that the interest of the respondents herein is exposed to any such manifest peril so as to appoint a

Receiver.

14. This Court has held in case reported in Chinnanarayanan v. Sree Shyam Sayee Corporation 1991 TLN J 203 considering the question of

appointment of Receiver for a running concern, as follows:--

But in so far as the application for the appointment of a Receiver is concerned, admittedly, the theatre complex is a running concern deriving daily

collections and it is in the actual management and administration of the respondents herein and that there was no imminent danger to the building of

the theatre complex or the land in question either by way of imminent waste or danger by the respondents herein who are admittedly, is possession

of the same. Accordingly, it is a running business concern. It is true that the allegation of the plaintiff was that except one or two part payments,

nothing has been paid on behalf of them and that they have suspended the payment of the loan amounts due to the plaintiff and that was the reason

why the plaintiff has filed the suit for the necessary relief. Further, it was true that the title deeds of the theatre complex were deposited with the

plaintiff by way of equitable mortgage and that on that score also, heavy amount is due according to the plaintiff. It was alleged by the plaintiff that

there are several creditors who are contemplating to take legal actions against the respondents herein for the recovery of the loan amounts. He has

not enumerated the details of the creditor, though some names were given in the additional affidavit filed by him, but significantly, it has to be seen

that except the plaintiff, no one has come forward with the suit for recovery of any amounts from the respondents so far. The relief asked for in this

application is not one under the Indian Partnership Act or Insolvency Act though the Applicant/plaintiff has referred the insolvency proceedings

against the respondents. In this context, I am of the firm view that even if the amount claimed in the suit is due by the respondents herein, it is open

for him to take the appropriate steps against the property in question, viz., the theatre complex as provided under the CPC for the immediate relief.

The other significant aspect of this case is that the applicant/plaintiff has got all the title deeds of the properties in question in his custody over an

equitable mortgage created by the respondents herein. Therefore, I am able to see that except except expressing his mere apprehension of that the

collections are being wasted in the theatre complex by the respondents, no other averments or materials are placed by the plaintiff in support of his

petition or his plaint. The basis norms as enunciated by the case laws herein before referred to, have not been followed and that those aspects are

totally lacking in this case.....

15. If the above well laid principles are taken into consideration, I am sure that the ex parte order of appointing an interim receiver has been

passed by the trial Court, totally contrary to the said principles. The averment of the respondents is that the defendants 12 and 13 are likely to

transfer the buses and the third defendant had already transferred the buses in favour of the defendants 12 and 13.

16. The application for appointment of Receiver has been made two years after the transfer in favour of respondents 12 and 13, Hence if the lower

Court felt that there is imminent danger of transfer of the buses by the defendants 12 and 13, the lower Court could have granted interim injunction

as prayed for, in paragraph 6 of the plaint restraining defendants 12 and 13 from alienating the buses, instead of appointing an ex parte interim

Receiver, since it is always open to the lower Court to grant lesser relief, when larger relief is asked for.

17. The lower Court has not given any reason as to how the plaintiffs will be aggrieved within the short spell of time during which the respondents

might have been served with the notice. The Court has to give its reasons for appointment of an ex parte interim receiver that the relief is so

imminent without which the rights of the plaintiffs are at peril. In the absence of any such reason, I am of the opinion that the lower Court had

exceeded its bounds in passing an ex parte order of appointing the receiver.

18. The learned counsel for the respondents, referred to a judgment reported in Mohd. Yunus Vs. Mohd. Mustaqim and Others, and contended

that when the alternative remedy is available, this Court cannot exercise its jurisdiction under Article 227 of the Constitution of India, as the power

of this Court is not to correct an error apparent on the face of the record, much less an error of law and in exercising supervisory power under

Article 227 of the Constitution of India, the High Court does not act as an appellate Court or Tribunal. It will not review or reweigh the evidence

upon which determination of the inferior Court or Tribunal purports to be based or to correct the errors of law in the decision. The above said

judgment has no application so far as the facts of the present case is concerned. The order of the lower Court is not based on any evidence and

hence the question of reviewing or reweighing the same may not arise. Only on the basis of the averments made in the affidavit, the lower Court

had passed the order of appointing the interim receiver. Hence it is open to this Court under Article 227 of the Constitution of India to consider

whether the Court has acted within its bounds in ordering the appointment of ex parte interim receiver i.e., whether the lower Court acted in its mind

the well laid principles enunciated by the apex Court and this Court as to the circumstances under which the ex parte interim receiver can be

appointed. There is nothing error apparent on the face of the record or the error of law arises but only the exercise of the jurisdiction of the Court

under the given circumstances is involved.

19. So far as the alternative remedy is concerned, it is true that Order 43, Rule 1 provides an appeal against the order passed by the lower Court.

Under Order 40, Rule 1 it has to be seen whether that alternative remedy is an efficacious, one available to the parties forthwith i.e., immediately

after passing of the ex parte order of appointing the Receiver. In the case on hand, the petitioners have to wait to prefer an appeal till the certified

copy of the fair and decretal order are made remedy. It will take considerable time. In the normal course, the order of the appointment of ex parts

interim receiver will be given effect to. As stated already, the receiver had taken possession of one bus. If the order of appointment of ex parte

interim receiver is given effect to, then there is no purpose in filing the appeal, since pending the appeal, the petitioner may not be entitled to an

order of stay, as the order of the trial Court had already given effect to. The petitioner has to wait till the appeal is disposed of, rnce injustice has

been done to a party, to rectify the same, he can approach this Court in order to seek immediate relief.

20. In the absence of any material to show that the application for appointment of receiver cannot withstand the delay of hardly a week or 10 days,

during which period the respondents could have been served with notice and the application can be disposed of after hearing them, in my opinion,

the lower Court had exceeded in its jurisdiction in appointing the ex parte interim receiver.

21. For the reasons stated above, the civil revision petition is allowed. The order of the lower Court in I.A. 202/96 dated 23-2-1996 appointing

an ex parte interim receiver is set aside.

22. Now that some of the respondents had filed counter, the petitioner is also directed to file counter in I.A. 202/96 within two weeks from today

and the Lower Court can dispose of the application, after hearing, all the parties concerned. I make it clear that the lower Court, while disposing of

the I.A. 202/96, need not carried away with the observations which I made earlier with regard to the appointment of receiver.

23. Petition allowed.