

(2013) 12 GUJ CK 0012

Gujarat High Court

Case No: Special Civil Application No. 14657 of 2008

Vasantben Uttamgiri
Goswami and 2 Ors.

APPELLANT

Vs

Jyotiben Harigiri
Goswami and Others

RESPONDENT

Date of Decision: Dec. 19, 2013

Hon'ble Judges: S.R. Brahmbhatt, J

Bench: Single Bench

Advocate: Shirish Joshi for the Petitioners No. 1-3, for the Appellant; C.B. Upadhyaya,
Advocate for the Respondent No. 3, Mr. D.D. Vyas with Mr. Deep D. Vyas, Advocate for the
Respondent No. 1, for the Respondent

Final Decision: Dismissed

Judgement

S.R. Brahmbhatt, J.

The petitioners who happened to be some of the trustees of the trust of Shree Bhimnath Mahadev Temple, and who were opponents in the application being Misc. Application No. 12 of 2008 which came to be decided and disposed of vide order dated 23/9/2008, had approached this Court by way of this petition invoking Article 226 and 227 of the Constitution of India, with following prayers.

(A) to quash and set aside the impugned order at Annexure-N dated 23/9/2008 passed in Misc. Application No. 12/2008,

(B) Pending hearing and final disposal of the petition, stay implementation, execution and operation of the impugned order at Annexure-N and the respondents are restrained from entering the temple premises or from insisting upon their so called right to perform Puja and from preventing the petitioners, family members, servants and agents from managing the affairs of the Bhimnath Mahadev temple and also perform Puja and Seva and collect the offerings and other things in the said temple,

(C) to grant such any other and further reliefs as this Hon"ble Court may deem just and proper,

(D) to provide for the cost of this revision.

Thus what is essentially under challenge is the order dated 23/9/2008 passed by the competent authority in Misc. Application No. 12 of 2008, where under directions were issued for implementing the provisions of the Scheme which were persuaded to be detrimental to the present petitioners and hence they approached this Court by way of present petition.

The facts in brief leading to filing the present petition as gathered from memo of the petition deserve to be set out as under.

The trustees of the said trust are governed by the Scheme which came to be settled way back in year 1985. The trustees named under that Scheme have right to take their turn in performing "Seva-Puja" and receive the offerings, gifts etc. offered to the deity for their sustenance. The private respondents did find it difficult to carry out their obligation and rights under the Scheme which compelled them to approach the concerned Civil Court by way of Special Civil Suit No. 283 of 1997 which came to be instituted on 22/7/1997, inter alia seeking permanent injunction against the defendants wherein some of the trustees were party so as to restrain them from interfering with their acting as Pujari and taking the proceeds of offerings etc. This suit was instituted without any permission of the competent authority u/s 51 of The Bombay Public Trusts Act, 1950 (herein after referred to as the "Trusts Act" for brevity) and the suit was resisted by the present petitioners on the ground of Civil Court having no jurisdiction to entertain the suit and adjudicate the controversy. The Civil Court decided the suit vide judgment & order dated 3/5/2003 inter alia holding that the Scheme where under the right as claimed by the plaintiffs was not acted upon and hence the suit came to be dismissed. The dismissal of the suit did not give rise to any appeal. In other words the parties did not choose to approach higher forum and the judgment of the Civil Court remained as it is. The Scheme provided change of turn in performance of Puja on Akhatrij of every year and one such occasion arose on 7/5/2008 where under when present petitioners-trustees turn was to end and the opponents were to take their turn on 7/5/2008, which the opponent did not get on account of highhanded action which gave them cause of action for moving the competent authority viz. Joint Charity Commissioner by way of application called Misc. Application No. 12 of 2008 u/s 41A. of the Trusts Act wherein a specific direction was sought for implementing the Scheme in its totality which would give the opponents trustees right to carry out Puja and receive the offerings and gifts during that tenure under which they were entitled to perform Puja. The parties were heard and concerned competent authority, viz. Respondent No. 3 herein issued directions dated 23/9/2008. Being aggrieved and dissatisfied there with the present petitioners have approached this Court challenging the same by invoking Article 226 and 227 of the Constitution of India.

2. Learned counsel appearing for the petitioners invited this Court's attention to the pleadings and prayers in the suit being Special Civil Suit No. 283 of 1997 as well as the prayers and contentions in the application being Misc. Application No. 12 of 2008 and based there upon contended that the opponent trustees were estopped from approaching the competent authority invoking Section 41A. of the Trusts Act when they failed in their civil suit which judgment contain findings qua lack of right to perform Puja on the part of the opponent trustees. The findings of the Civil Court qua Scheme becoming not operational after it framed would deprive the present opponent trustees from turning around and saying that the findings of the Civil Court would be having no effect as they chose to approach the authority u/s 41A of the Trusts Act.

3. Learned counsel appearing for the petitioners further contended that the findings of the Civil Court were rendered at the instance of opponent/private respondent trustees and having failed in that suit and having chosen not to challenge the same in an appellate proceedings they debarred themselves from taking up any other proceedings for similar relief and prayers. The Civil Court's findings being rendered in the civil proceedings should be treated as barring and estopping the present private respondents from moving any application in the nature of Misc. Application No. 12 of 2008 u/s 41A of the Trusts Act.

4. Learned counsel appearing for the petitioners thereafter contended that the contention raised on behalf of the present petitioners before the concerned Jt. Charity Commissioner, Respondent No. 3 herein above, qua the rights which have been crystallized on account of the findings of the Civil Court cannot be interfered with by the authorities u/s 41A of the Trusts Act have been accepted by the concerned authority but an unfortunate decision is given which has vitiated the entire order and therefore the Court may quash and set aside the same.

5. Learned counsel appearing for the petitioners invited this Court's attention to the decision rendered by the Supreme Court in case of [India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd.](#), and contended that the doctrine of comity or amity as discussed by the Supreme Court would have applicability to the facts & circumstances of the present case. The Supreme Court in paragraph-15 has discussed this aspect and relying there upon a contention is raised that the competent authority being Civil Court who rendered the decision crystallizing the rights or lack of rights and therefore respondent trustees did not have legitimate right to approach the authority having failed at the Civil Court.

6. Learned counsel appearing for the petitioners contended that the prayers made in the civil suit and the prayers made in the application being Misc. Application No. 12 of 2008 would indicate that the Scheme was made in respect of ascertaining and establishing the property rights or civil rights which would be rightly decided by the Civil Court having jurisdiction there over. The right to perform Puja is coupled with right to receive the offerings and gifts and therefore, when a specific plea raised and

negated by the competent Civil Court on the ground of acquiescence and or non-operation of the Scheme then in such a case the respondent trustees could not have moved Section 41A application and the authority therefore ought to have appreciated this fact and rejected the same.

7. Learned counsel appearing for the petitioners thereafter relying upon a decision rendered in case of [N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another](#), and submitted that having invoked and submitted to the jurisdiction of the Civil Court in respect of the civil right to receive gifts & proceeds and offerings and perform Puja, and having failed there under the respondent trustees did not have any right to take up fresh proceedings on a specious plea of Civil Court's lack of jurisdiction. Learned counsel for the petitioners submitted that the ratio laid down in this decision in case of N. Chellappan (supra) would govern the facts of the present case and would support the contention of the petitioners that the private respondents-trustees having submitted to the jurisdiction of the Civil Court and invited order and permitted it to be remained unchallenged, then, they forfeited all their right if any to seek any relief u/s 41A of the Trusts Act.

8. Learned counsel appearing for the private respondents invited this Court's attention to the provision of Section 10 of the Limitation Act and submitted that the submission canvassed on behalf of the petitioners qua acquiescence, laches and delay ascertaining and enforcing the right flowing from the Scheme not to capable of being accepted and the same should be discarded outright.

9. Learned counsel appearing for the private respondents thereafter invited this Court's attention to the cause title of civil suit and the prayers made in the civil suit and contended that the civil suit at the best could be treated as the one seeking remedy or relief against even the non-trustee who was inter-meddling with the affairs of the trust and therefore they were required to be restrained. The Civil Court's lack of jurisdiction is otherwise very much clear and petitioners' objection qua non operation of the suit itself should prevent them from now agitate that the decision rendered in the suit should be binding to all.

10. Learned counsel for the private respondents further submitted that the order made u/s 41 is in respect of implementation of the Scheme and in view of provision of Section 80, 69, 51 and 50 it can well be said that the application being Misc. Application No. 12 of 2008 has rightly not been treated as barred under the law. The concerned competent authority was under an obligation to see to it that the Scheme is given its true meaning and issue appropriate direction for carrying out the purport and purpose of the Scheme to all the concerned. But Scheme of the Trusts Act and the provision of Section 50 & 51 clearly would indicate that the findings of the suit were of no avail to the present petitioners in resisting the application and on that ground even this petition is required to be dismissed.

11. Learned counsel appearing for the private respondents thereafter contended that the Civil Court in the trust matter arising under the Trusts Act has a very limited jurisdiction as specified under the Act itself. The question of establishment of right flowing from the Scheme cannot be given colour of property or civil right so as to confer the Civil Court the jurisdiction which it did not have, and the judgment rendered there under therefore cannot be said to be binding so as to preclude the respondent from interfering their right or obligation of the other side invoking Section 41A of the Trusts Act. and it is said that the judgment was rendered without jurisdiction and therefore it was nullified and such nullity cannot have effect upon jurisdiction which is statutory in nature to issue instruction conferred upon the competent authority, whose order is challenged in this petition.

12. The Court has heard learned counsels for the parties and perused the documents. The relevant provisions of the Trusts Act need to be set out herein below for its ready reference which would govern the discussion hereafter, as under.

[41A. (1) Subject to the provisions of this Act, the Charity Commissioner may, from time to time, issue directions to any trustee of a public trust or any person connected therewith to ensure that such trust is properly administered and the income thereof is properly accounted for or duly appropriated and applied to the objects and for the purposes of the trust.

(2) It shall be the duty of every such trustee and person to comply with a direction issued to him under sub-section (1)]

50. In any case-

(i) where it is alleged that there is a breach of a public trust,

(ii) [where a direction is required to recover possession of a property belonging to a public trust] [or the proceeds thereof or for an account of such property or proceeds] from any person including a person holding adversely to the public trust, or

(iii) where the direction of the court is deemed necessary for the administration of any public trust,

the Charity Commissioner [after making such enquiry as he thinks necessary] or two or more persons having an interest in the trust and having obtained the consent in writing of the Charity Commissioner as provided in section 51 may institute a suit whether contentions or not in the Court within the local limits of whose jurisdiction the whole or part of the subject-matter of the trust is situate, to obtain a decree for any of the following reliefs:--

(a) an order for the recovery of the possession of such property [or proceeds thereof],

- (b) the removal of any trustee or manager,
- (c) the appointment of a new trustee or manager, [(cc) vesting any property in a trustee,]
- (d) a direction for taking accounts and making certain inquiries,
- (e) a declaration as to what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust,
- (f) a direction authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged,
- (g) the settlement of a scheme or variations or alterations in a scheme already settled, or
- (h) granting such further or other relief as the nature of the case may require:

Provided that no suit claiming any of the reliefs specified in this section shall be instituted in respect of any public trust except in conformity with the provisions thereof:

[Provided further that the Charity Commissioner may, instead of instituting a suit, make an application to the Court for a variation or alteration in the scheme already settled.]

[50A. (1) Notwithstanding anything contained in section 50, where the Charity Commissioner has reason to believe that, in the interest of the proper management or administration of a public trust, a scheme should be settled for it, or where two or more persons having interest in a public trust make an application to him in writing in the prescribed manner that, in the interest of the proper management or administration of a public trust, a scheme should be settled for it, the Charity Commissioner may if after giving the trustees of such trust due opportunity to be heard, he is satisfied that it is necessary or expedient so to do, frame a scheme for the management of administration of such public trust.

(2) Where the Charity Commissioner is of opinion that in the interest of the proper management or administration, two or more public trusts may be amalgamated by framing a common scheme for the same, he may, after-

- (a) publishing a notice in the Official Gazette and also in at least two newspapers (one in English, and the other in the language of the region) with a wide circulation in the region in which the trust is registered, and
- (b) giving the trustees of such trusts and all other interested persons due opportunity to be heard,

frame a common scheme for the same.

[(2A) A scheme under this section may provide for the number of trustees, the mode of appointment of trustees including the appointment of the first trustees, vesting of the trust property in the trustees so appointed, mode of filling any vacancy of a trustee the remuneration of a trustee or manager of the public trust and where necessary, a clarification of the objects of the public trust.]

(3) The Charity Commissioner may, at any time, after hearing the trustees, modify the scheme framed by him under sub-section (1) or sub-section (2).

(4) The scheme framed under sub-section (1) or sub-section (2) or modified under sub-section (3) shall, subject to the decision of the competent court u/s 72, have effect as a scheme settled or altered, as the case may be, under a decree of a Court u/s 50.]

51.(1) If the persons having an interest in any public trust intend to file a suit of the nature specified in section 50, they shall apply to the Charity Commissioner in writing for his consent. The Charity Commissioner, after hearing the parties and after making such inquiry as he thinks fit, may within a period of six months from the date on which the application is made, grant or refuse his consent to the institution of such suit. The order of the Charity Commissioner refusing his consent shall be in writing and shall state the reasons for the refusal.

(2) If the Charity Commissioner refuses his consent to the institution of the suit under sub-section (1) the persons applying for such consent may file an appeal to the Bombay Revenue Tribunal constituted under the Bombay Revenue Tribunal Act, 1939, in the manner provided by this Act.

(3) In every suit filed by persons having interest in any trust u/s 50, the Charity Commissioner shall be a necessary party.

(4) Subject to the decision of the Bombay Revenue Tribunal in appeal u/s 71, the decision of the Charity Commissioner under sub-section (1) shall be final and conclusive.

13. The submission made on behalf of the petitioners that the private respondent trustees when they approached the Civil Court were indicating the jurisdiction of the Civil Court for interfering from their right or property right though appeared to be attractive, but on a close scrutiny of the aforesaid provisions would persuade this Court to hold that the said submission is not tenable in eye of law especially when the given facts of the case clearly indicate that the right and obligations were flowing from the Scheme and therefore it is incumbent upon the party to first seek permission of the Charity Commissioner for invoking jurisdiction of the Civil Court so far as the dispute enlisted in Section 50 is concerned. One may be at the first blush carry an impression that right to receive offerings or gifts during Puja tenure may be touching upon the property rights clothing the Civil Court with jurisdiction, but had that right been in existence of the Scheme, then, the scenario would have been

different. But in the instant case the rights and obligations which are sought to be enforced are essentially flowing from the Scheme which had been settled way back in the year 1985.

14. The Court is also of the view that the contention of the petitioners qua the private respondents-trustees not performing Puja and not receiving offerings for years together and after having failed in the Civil Suit in the year 2003 could not approach the Jt. Charity Commissioner in year 2008 would be not tenable in eye of law as the Court even if assumes that the contention on fact that the private respondent trustees did not usurp their right after the Scheme was settled or framed, but in that itself would not debar them from seeking appropriate direction in case the Scheme is in inaction or non-action on their part till they filed suit or inaction after 2003 when they failed in the suit could be treated as at the most sufferings on their part which may not be treated as creating any vested right in the petitioners so as to defeat the purport and purpose of the Scheme which even the petitioners have not challenged so far. In other words the petitioners have also not contended that the interpretation of the relief clause of the Scheme namely Clause Nos. 5 & 8 would not confer any right of Puja in turn as contended by private respondents trustees before the competent authority.

15. The decisions cited at the Bar in my view would have no applicability to the facts & circumstances of the present case in as much as the decision in case of "India Household and Healthcare Ltd." (supra) is in respect of comity and amity. There cannot be any quarreling on that but the principle of comity & amity cannot be stretched so as to cover the decision of the Court which rendered without jurisdiction and which was admittedly contrary to the provisions of the Trusts Act, which is the only Act which comes into play and the jurisdiction of Civil Court is plausible only in accordance with Section 51 of the Trusts Act's permission.

16. The another decision in case of "N. Chellapan" (supra) is in respect of submitting parties to the jurisdiction and umpiring under Arbitration Act. Same is also, in my view, will have no applicability of the present case in as much as the basic facts as indicated in the judgment would indicate that there was no question of patent lack of jurisdiction as it is apparent in the present case, as there was no proceedings u/s 51 and straightway the rights flowing from the Scheme were sought to be established. The failure of the respondents trustees in that suit in my view cannot be said to be a bar against them from seeking remedy u/s 41A. of the Trusts Act.

17. For the aforesaid reasons, this Court is of the considered view that the petition being bereft of merits deserves dismissal and is accordingly dismissed. Rule discharged. However there shall be no order as to costs. Learned counsel for the petitioners at this stage prays that the interim relief which has been continuously operating may be extended for some more time so as to enable the petitioners to approach appellate forum. Learned counsel for private respondents strongly opposed to the same. However, this Court is of the view that as the interim relief is

in operation since 23/3/2009, extension thereof for few more days would not harm any one and therefore, it is hereby ordered that the interim relief which is in operation till date may continue to operate till 10/1/2014.