IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.02.2019

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THE HONOURABLE Mrs. JUSTICE PUSHPA SATHYANARAYANA

W.P.Nos.15531 and 15532 of 2016
and W.M.P.No.13507 and 13508 of 2016

Vishwa Hindu Vidya Kendra
rep. by its President,
S.Vedantam,
No.43, Ramanujam Street,
T.Nagar, Chennai-600 017. .. Petitioner

Vs.

1. The Commissioner,
Hindu Religious and Charitable Endowment Department,
Nungambakkam,
Chennai-600 034.

2. The Joint Commissioner,
Hindu Religious and Charitable Endowment Department,
Tirunelveli.

3. Incorporated and Unincorporated Devaswoms
now known as Kanyakumari District Temples
Suchindrum rep. by its
Executive Officer/Joint Commissioner
& Takkar, Suchindrum-629 704
Kanyakumari District. .. Respondents

* * *

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari calling for the records relating to the common order dated 28.03.2016 passed in R.P.No.80 and d4 respectively/2016-D2 on the file of the first respondent herein and to quash the same.

* * *

For Petitioner : Mr.S.Subbiah, Senior Counsel
for Mr.P.Raja

For Respondents: Mr.M.Maharaja,
Special Government Pleader
for RR 1 and 2

Mrs.Hema Sampath, Senior Counsel
for Ms.R.Meenal for R3

O R D E R

These writ petitions have been instituted laying challenge to the common order of the first respondent dated 28.03.2016 passed in R.P.No.80/2016-D2.

2. The case of the petitioner is that it owns an extent of 14.5 Ares corresponding 36 cents in Survey No.678/41, Agasteeswaram Taluk, Kanyakumari District, whereas, the third respondent, claiming to be that of its property, approached the second respondent for recovery and possession of the said property, after removing the petitioner from the disputed property. Accordingly, the second respondent had taken up an enquiry under Section 78 of the Hindu Religious and Charitable Endowment Act (in short, HR & CE Act) and issued notice. According to the petitioner, the property originally belonged to the Maharaja of Travancore and it was assigned in favour of one Velayutham Thampi, who had sold it to one S.Venkatachalam Iyer. The petitioner claimed to have purchased the same from Venkatachalam Iyer and continued in its possession from the date of purchase and there is no question of any encroachment to invoke the provision of Section 78 of the HR & CE Act.

3. It is stated that there was an earlier suit filed by the said Venkatachalam Iyer against the third respondent in O.S.No.537 of 2002 on the file of the III Additional District Munsif, Nagercoil, and the same was decreed in favour of the plaintiff. In the said suit, the plaintiff, Venkatachalam Iyer had filed an application in I.A.No.36 of 2009 seeking for an appointment of an Advocate Commissioner to examine the descendant of Maharaja of Travancore by name Mrs.Jayanthi Menon and also one Saroja Thampi, wife of the said Velayutham Thampi, who were residing in Chennai. The said application was allowed and the witness Saroja Thampi was examined in full. Similarly, the petitioner had filed I.A.No.1 of 2015 before the second respondent in the enquiry proceedings contemplated under Section 78 of the HR & CE Act for examining the said Saroja Thampi by appointing an Advocate Commissioner. The said application was dismissed on 14.05.2015 by the second respondent and a review application in R.A.No.1 of 2015 was filed and the same was also dismissed on 17.11.2015. Aggrieved by the above said orders, the petitioner preferred revision

petitions before the first respondent and both the revisions came to be dismissed by a common order dated 28.03.2016. The above writ petitions are filed aggrieved by the same.

4. Learned counsel for the petitioner contended that when the Advocate Commissioner was appointed by allowing I.A.No.36 of 2009 in the suit filed by Venkatachalam Iyer, I.A.No.1 of 2015 filed by the petitioner before the second respondent also ought to have been allowed.

5. However, learned Senior Counsel appearing on behalf of the third respondent resisted the same contending that the proceedings under Section 78 of the HR & CE Act were initiated in the year 2012 and the petitioner had filed the application only in the year 2015 and the same was dismissed on 14.05.2015. The intention of the petitioner being only procrastinating the proceedings, she prayed for dismissal of the writ petitions.

6. Heard both sides.

7. The contention of the learned counsel for the petitioner is that the witnesses sought to be examined belonging to the Royal family and their personal appearance before the Court has to be exempted, besides, the witnesses being old and sought for examining the witness through appointing an Advocate Commissioner. Admittedly, the proceedings are under Section 78 of the HR & CE Act and the proceedings initiated in the year 2012. Section 78 of the HR & CE Act is pressed into service when the conclusion is arrived at that there is an encroachment on the land belonging to the religious institution. Admittedly, in the case on hand, the petitioner is not in possession, though claiming to be the owner.

8. Section 78(4) of the HR & CE Act contemplates an enquiry, after considering the objections, if any, of the encroacher received pursuant to the notice referred to sub-section (2) and after conducting such enquiry as may be prescribed. The procedure contemplated under Section 78(4) of the Act is a specific procedure, though not summary in nature. As stated in the impugned order, the enquiry under Section 78 has to be conducted as far as practicable like a suit. Admittedly, in this case, the show cause notice was issued calling upon the petitioner to explain why it should not be evicted from the property. The petitioner also had given its explanation and objection, pursuant to which, the enquiry had commenced. Section 78(4) indicates the procedure that may be prescribed in conducting such enquiry.

9. At this juncture, it is relevant to note that a Division Bench of this Court in K.V.Lakshmi Ammal V. The Joint Commissioner, HR and CE Department, 2010 (1) CWC 490, had an occasion to consider this aspect, and observed that Sub-section 4 of Section 78 would indicate that the Act gives three statutory mandate on the competent authority, which are, (i) the authority should conduct such an enquiry ; (ii) the authority should be satisfied that there was an encroachment in the property ; and (iii) the authority should pass a subjective order recording the reason for removal of the encroachment. The procedure contemplated under Section 78(4) of the said Act is more or less a full-fledged enquiry, as the one available in a Civil Court. The provisions of the Code of Civil Procedure and the Civil Rules of Practice shall apply, as far as practicable, with respect to the appearance of the Pleader and filing of affidavits, production of documents, examination of witnesses, taking of oral evidence etc. to the said proceedings. The power vests with the authority to decide the same.

10. No doubt, it is clear that in the enquiry, as contemplated under Section 78(4) of the HR & CE Act, the authority should give necessary opportunity to the petitioner concerned including that of cross-examination of witnesses. It is for the petitioner to satisfy the authorities that they could not seek the examination of the witnesses earlier and sought for examination of witnesses Saroja Thampi and Jeyanthi Menon by appointing an Advocate Commissioner. Though it is stated that the said two witnesses belonged to the Royal family, there is no material produced to show that they are descendants of Travancore Maharaja and that they are exempted from personal appearance before the Court.

11. Incidentally, the evidence of one of the witnesses Saroja Thampi, who was examined under the erstwhile owner Venkatachalam Iyer, is also on record. Unless it is pointed out that the said witnesses are descendants of the Royal family and that they have the privilege of avoiding attending the Courts, they cannot be examined by appointing an Advocate Commissioner. Since examination of witnesses in the Court is the rule and examination on commission is the exception under special circumstances, the Court must satisfy itself about the genuineness of the claims of exceptions. The power to grant a commission is discretionary and the same should be exercised judicially and should be on sound principles. Merely because the witness is said to belong to the Royal family, examination

through commission cannot be allowed. If the petitioner chooses to examine them, it is upto him to seek such examination. However, the Joint Commissioner as well as the Commissioner have concurrently felt that examination of the said witness by a Commission is not necessary and rightly rejected the applications.

12. The proceedings have commenced in the year 2012. The procedure contemplated under the HR & CE Act is not a summary proceedings, but it has to be conducted as far as practicable like a suit. Hence, the petitioner cannot be allowed to procrastinate the proceedings on this ground.

13. For the foregoing reasons, this Court is the view that there is no merit in these writ petitions and accordingly, these writ petitions are dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS iv)

//True Copy//

Sub Assistant Registrar

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To

1. The Commissioner,
Hindu Religious and Charitable
Endowment Department,
Nungambakkam,
Chennai-600 034.

2. The Joint Commissioner,
Hindu Religious and Charitable
Endowment Department,
Tirunelveli.

+2ccs to Mr.Elizabeth Rani , Advocate SR.No. 18312
+1 CC TO GOVERNMENT PLEADER SR.NO. 18985
+1cc to Ms.R.Meenal. , Advocate SR.No. 17408

W.P.No.15531 & 15532 of 2016

A.SK(27/03/2019)