

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :19.02.2019

CORAM:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Civil Revision Petition No.1123 of 2014
and M.P.No.1 of 2014
and
Crl.O.P.No.8674 of 2014

1.The State of Tamil Nadu
rep.by the Secretary to Government,
Tamil Nadu Development and Religious
Endowment Information Department,
Fort St.George,
Chennai 600 009.

2.The Commissioner,
Hindu Religious and Charitable
Endowment Administration Department,
Nungambakkam,
Chennai 600 034.

3.The Joint Commissioner,
Hindu Religious and Charitable
Endowment Administration Department,
Nungambakkam,
Chennai 600 034.

.. Petitioners in
C.R.P.No.1123 of 2014

K.Shanmughavel Mudaliar .. Petitioner in
Crl.O.P.No.8674 of 2017

/versus/

K.Shanmugavel Mudaliyar .. Respondent in
C.R.P.No.1123 of 2014

1.The Commissioner of Police,
Grater Chennai Police,
Vepery, Chennai 600 007.

2.The Assistant Commissioner of Police,
Pallavaram, Chennai-43.

3.The Inspector of Police,
S-6, Shankar Nagar Police Station,
Pammal, Chennai-75.

.. Respondents in
Crl.O.P.No.8674 of 2017

Prayer in C.R.P.No.1123 of 2014: Civil Revision Petition has been filed under Section 115 of C.P.C., praying to set aside the judgment and decree dated 10.07.2012 made in I.A.No.363 of 2011 in O.S.No.118 of 2009 on the file of Additional District Munsif, Alandur.

Prayer in Crl.O.P.No.8674 of 2017: Criminal Original Petition has been filed under Section 482 of Cr.P.C., praying to pass an order directing the third respondent to provide police protection to the functioning as Managing Hereditary Trustee to the petitioner temples and his life and limb for the enforcement of appropriate civil Court decree made in O.S.No.118 of 2009 District Munsif Court at Alandur in respect of decree and judgment on 05.11.2009 & ***26.6.2014** in Pozhichallur Village, Alandur Taluk, Kancheepuram District, Chennai 600 074 by considering petitioner's complaint dated 05.02.2017.

For Petitioners :Mr.M.Sricharan Rangarajan,
Spl.G.P.(CS)
(CRP No.1123 of 2014)
Mr.T.Sai Krishnan
(Crl.O.P.No.8674 of 2017)

For Respondents :Mr.T.SaiKrishnan for
M/S.Sai Bharath & Ilan
(CRP.No.1123 of 2014)

Ms.P.Kritika Kamal, GA
(Crl.O.P.No.8674 of 2017)

COMMON ORDER

It is a classic case, where pedantic interpretation of law leading to undue delay without decision on merit.

2.K.Shanmugavel Mudaliyar, who was appointed as hereditary trustee by Hindu Religious and Charitable Endowment Department (in short "HR & CE") of Arulmighu Agastheeswarar Temple and its Allied temples, was later found unfit by the HR &

CE Department. So, he was removed from the said post. Aggrieved by the same, he has preferred a statutory appeal before the Joint Commissioner, HR & CE Department. However, he lost his appeal.

3. Meanwhile, he has thought fit that the temple, which was managed and administrated by the petitioner's forefathers, does not come within the purview of HR & CE Act. He has laid a suit in O.S.No.118 of 2009 against HR & CE Department arraying the Secretary to the Government, HR & CE Department as the first defendant, the Commissioner, HR & CE Department as the second defendant and the Joint Commissioner, HR & CE Department as the third defendant. In the said suit, he has prayed for declaration that the plaintiff's temple situated in the residential place Grama Natham S.No.210/2 as private land and not coming under the purview of the HR & CE Act and for permanent injunction restraining the third defendant and their subordinates from conducting any enquiry initiate by the third defendant against the plaintiff, till the character of institution is decided in the suit.

4. The defendants have not filed their written statement within the time prescribed under the statute. Therefore, the trial Court has thought it fit to set them exparte and passed exparte decree as prayed in the suit. Meanwhile, the plaintiff K.Shanmugavel Mudaliyar also been agitating his right before the Joint Commissioner, HR & CE Department challenging his removal from the trusteeship. After the delay of 237 days, the HR & CE Department has woke up from the slumber and taken up an application I.A.No.1069 of 2010 in O.S.No.118 of 2009 to set aside the exparte decree passed on 05.11.2009 along with the application under Section 5 of the Limitation Act to condone the delay of 237 days in filing their application under Order IX, Rule 13 of C.P.C.

5. The plaintiff K.Shanmughavel Mudaliyar had thought it fit that the averments found in the affidavit accompanying the petition to condone the delay is to be tested by examining the deponent. Therefore, he has filed a counter in the application to condone delay and also an application under Order XIX, Rule 1 of C.P.C., to permit him to cross examine the deponent P.Vasunathan, the then Joint Commissioner, HR & CE Department.

6. The trial Court took up the application filed by K.Shanmugavel Mudaliyar and numbered it as I.A.No.363 of 2011. After hearing the parties, the trial Court has allowed the application on 10.07.2012 and adjourned the case for cross examination of P.Vasunathan, S/o Pinna Thevar, Joint Commissioner, HR & CE Department to 23.07.2012.

7. It appears that HR & CE Department has filed a memo on 27.08.2012 stating that P.Vasunathan, Joint Commissioner has been placed under suspension and so, he cannot mount the witness box and subject himself to be cross examined as Joint Commissioner of HR & CE.. However, there is no material placed before this Court to know the content of the said memo except "B" Diary of the trial Court, wherein there is an indication to infer that on 27.08.2012 "memo filed and pending". The trial Court had time and again adjourned the matter for cross examination of the deponent till 26.06.2014.

8. Meanwhile, the HR & CE Department has preferred the present revision petition before this Court challenging the order passed by the trial Court allowing I.A.No.363 of 2011 to permit the plaintiff to cross examine the deponent/petitioner I.A.No.1069 of 2010. Though the revision petition was presented in the Registry of High Court on 31.01.2013, it was in fact after few returns to cure the defects, numbered by the Registry only in the year 2014 and assigned the number as C.R.P.No.1123 of 2014.

9. The factum of pendency of the Civil Revision Petition before the High Court has been informed to the trial Court. The trial Court has also during the adjudication has mentioned above it and recorded the pendency of Civil Revision Petition, which could be seen from "B" Diary extract. It has granted time to the HR & CE Department for production of order copy of the Civil Revision Petition, which was never produced before the trial Court.

10. In the said background, the trial Court on 26.06.2014 has dismissed the Section 5 application filed by the HR & CE department for default. The trial Court has recorded the reason as below:

"26.06.2014: Cross of petitioner.

The above petition is pending for cross of petitioner since 19.02.2014. Petitioner not present for subjecting to cross examination in spite of sufficient opportunities granted. Petitioner called absent. Petition is dismissed for default."

11. Meanwhile, certain other developments in this case have parallelly taken place. Few to mention is that K.Shanmugavel Mudaliyar has approached the Hon'ble Supreme Court and obtained an order of status quo on 02.06.2009 in S.L.P.No.13861 of 2009 filed by him against the Division Bench

Judgment in W.A.No. 1504 of 2008, dated 12.05.2009. This writ appeal was preferred by K.Shanmugavel Mudaliyar, aggrieved by the appointment of five persons as hereditary trustees of Arulmighu Agastheeswarar Temple and allied temples.

12. The appeal petition before the Commissioner, HR & CE Department preferred by K.Shanmugavel Mudaliyar challenging his removal from trusteeship also came to an end, vide order dated 29.05.2017 upholding his removal from trusteeship by order of the Joint Commissioner, HR & CE Department.

13. When this revision petition is pending, K.Shanmugavel Mudaliyar has approached this Court invoking Section 482 of Code of Criminal Procedure seeking police protection for his functioning as Managing Hereditary Trustee to Arulmighu Agatheeswarar Temple and its Allied Temples and to enforce the exparte decree passed in O.S.No.118 of 2009 by the District Munsif Court, Alandur.

14. As narrated above, the said decree is exparte decree. To set aside the said exparte decree, the defendants have filed an application along with the condonation delay petition. In the condone delay application, the Court ordered examination of witness. Against the order passed by the trial Court granting permission to the plaintiff to cross examine the deponent, the present revision petition filed in the year 2013 got numbered in 2014. Pending Civil Revision Petition, the trial Court has dismissed the Section 5 Limitation Act application but no appeal filed against it.

15. With these complex facts of issue before this Court, few legal points have been agitated by the learned counsels, which are bound to be addressed by this Court. The first and foremost ground challenging in the revision petition raised by the learned counsel appearing for the respondent K.Shanmugavel Mudaliar is the maintainability of the civil revision petition challenging the order passed by the trial Court in his application filed under Order XIX, Rule 2 of C.P.C.

16. The learned Special Government Pleader (CS) representing the revision petitioners HR & CE Department would submit that the scope of Order XIX, Rule 2 of C.P.C., is very limited and it cannot be extended to interlocutory application. Plethora judgment of this Court has already held that the deponent's filed affidavit in support of Section 5 application cannot be compelled to give testimony and subject himself for cross examination.

17. Order XIX, Rule 1 of Civil Procedure Code reads as follows:

"1. Power to order any point to be proved by affidavit:- Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable.

Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit."

18. As pointed out by the learned counsel appearing for the respondent, the plain reading of the order does not restrict to the suit alone or does not say this provision excluding interlocutory proceedings. In fact, Order XIX, Rule 3 of the Civil Procedure Code would say, when an affidavit is filed in a suit about the content of the affidavit, the deponent has to sworn, it is based on his knowledge about the content of the affidavit, whereas, if the affidavit is filed in the interlocutory application, he can say his pleadings are based on his belief. Except this distinction, an affidavit in any civil proceedings, whether the main suit or interlocutory application cannot be discriminated or classified. Whenever a fact or statement in the affidavit sought to be proved, the deponent has to prove the same in the manner known to law. The best manner is to mount the witness box and speak himself under oath when subjected to cross examined.

19. Per contra, the learned Special Government Pleader (CS) would submit the following judgments and would canvass that an application filed under Section 5 of the Limitation Act should be considered on a different footing. A uniform interpretation of Order XIX Rule 1 of C.P.C., will not be proper. On the factual issue, the learned Special Government Pleader (CS) would submit that the memo filed by HR & CE Department informing the trial Court that the deponent P.Vasunathan, Joint Commissioner was placed under suspension and he has become incompetent to depose about the content of the affidavit, which was sworn based on the record, has not been taken note of by the Court below, thereby grave injustice has been caused to the ideal.

20. Being the Government Institution, the delay in processing the legal matter ought to have been given due consideration by the trial Court. Since the trial Court has failed to appreciate the facts properly, which has led to miscarriage of justice, the revision under Section 115(1) of the Civil Procedure Code has been filed. The petition is well within the scope of the amended provision of Section 115 of C.P.C.

21. Referring to few of the judgments of the Hon'ble Supreme Court, wherein the Hon'ble Supreme Court was of the view that while considering the application under Section 5 of the Limitation Act for condoning the delay, the Government Agency should be given a sympathetic approach taking note of the administration process involved in decision making, the learned Special Government Pleader prays that the delay in filing the petition to condone the delay of 237 days in filing the petition under Order IX, Rule 13 of C.P.C., should be allowed without examining the deponent of the affidavit filed to condone the delay.

22. To counter, the learned Special Government Pleader (CS) for the respondent would submit that though earlier the Hon'ble Apex Court had a view that the Government Institution should be treated on a different footing, later in Post Master General and others v. Living Media India Limited and another reported in (2012) SCC 563, wherein the Hon'ble Supreme Court has categorically held in paragraph No.29 that there cannot be two yardsticks between the private litigation and the Government Agency.

"29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be

swirled for the benefit of a few."

23. The core issue involved in this revision petition is that whether the exparte decree passed by the trial Court can be allowed to sustain due to the lapse of the defendants not filing their written statement in time; for not filing application to set aside the exparte decree in time; not subjecting the deponent for cross examination to prove the content of the affidavit; and not filing any appeal against the dismissal of their Section 5 application passed when the present revision petition was pending.

24. Whether the lapses pointed put together can deprive the idol of Sri Agastheeswarar Temple and its Allied Temples, deny of its right to protect its property on merits and allow the exparte decree passed against it uncontested and loose the valuable property worth several crores of rupees?.

25. This Court though fully convinced with some of the legal submissions made by the learned counsel appearing for the respondent that on every score, the HR & CE Department has failed to protect the interest of the temple, having seized of the matter, this Court cannot turn a nelson eye to the issue before it and allow the administration and the properties of the temple to be taken over by a third party based on the exparte decree. Therefore, prima facie though the revision petition under Section 115 of C.P.C., may not sustain as paren patriae this Court exercising the superintendent power vested under Article 227 of the Constitution of India, it is bound to interfere in this lis.

26. Hence, the order passed by the trial Court on ***26.06.2014** dismissing the ***I.A.No.1069** of 2010 in O.S.No.118 of 2009 is set aside. It is needless to examine the deponent, after lapse of so many years to testify the contents of the affidavit, which has stated the cause for 237 days delay in filing the application under Order IX, Rule 13 of C.P.C.

27. This Court is conscious of the fact that the HR & CE Department has not pursued the matter properly and they have not even chosen to file appeal against the dismissal of their Section 5 application, which was passed subsequent to the filing of the revision petition. However, as pointed out earlier, to meet the ends of justice, the inherent power of the Civil Court vested under Section 151 of C.P.C., and the superintendent power of the High Court vested under Section 227 of the Constitution of India is invoked in this case. The human agencies, who are supposed to protect the interest of the temple, have failed to do so. In such circumstances, as paren patriae Court has to protect its interest. Accordingly, this Civil Revision Petition

is disposed of with the following directions:

(i) The order passed by the trial Court on ***26.06.2014** dismissing the ***I.A.No.1069** of 2010 in O.S.No.118 of 2009 is set aside.

(ii) The delay in filing the application to set aside the exparte decree is condoned.

(iii) The exparte decree passed by the trial Court on 05.11.2009 is hereby set aside.

28. It is submitted by the learned Special Government Pleader(CS) that along with the application to condone the delay in filing the application to set aside the exparte decree, the defendants have already filed their written statement. The trial Court shall consider the pleadings of the rival parties and frame the issues within a period of seven days from the date of receipt of a copy of this order and conduct the trial as expeditiously as possible. The suit has to be disposed of on merits preferably within a period of six months. Consequently, connected Miscellaneous Petition is also closed.

Crl.O.P.No.8674 of 2014

29. The respondent K.Shamugavel Mudaliyar has taken out the petition Crl.O.P.No.8674 of 2017 seeking police protection alleging that there is a probability of law and order problem, due to interference of the rival claimants and others. The Government Advocate appearing for the State would submit that the apprehension of the petitioner is not based on any material facts. As of now, there is no threat to peace or law and order. If there is any request from the petitioner/K.Shanmugavel Mudaliyar is made and if it is well found, necessary protection will be given by the police.

30. Recording the above, the Criminal Original Petition is disposed of.

Sd/-

Assistant Registrar(CS IV)

Dated:19/03/2019

*Corrected as per the order dated 30/4/2019 in CRP 1123/14 & CMP 4895/18 and Crl.O.P.No.8674 of 2017
Sd/-

Assistant Registrar(CS IV)
Dated:21/05/2019

//True Copy//

Sub Assistant Registrar

ari
To

1.The Commissioner of Police,
Grater Chennai Police, Vepery,
Chennai 600 007.

2.The Assistant Commissioner of Police,
Pallavaram, Chennai-43.

3.The Inspector of Police, S-6,
Shankar Nagar Police Station,
Pammal, Chennai-75.

4. The Additional District Munsif,
Alandur.

5.The Public Prosecutor,
High Court, Madras.

6.The Secretary to Government,
Government of Tamilnadu,
Tamil Nadu Development and Religious
Endowment Information Department,
Fort St.George,
Chennai 600 009.

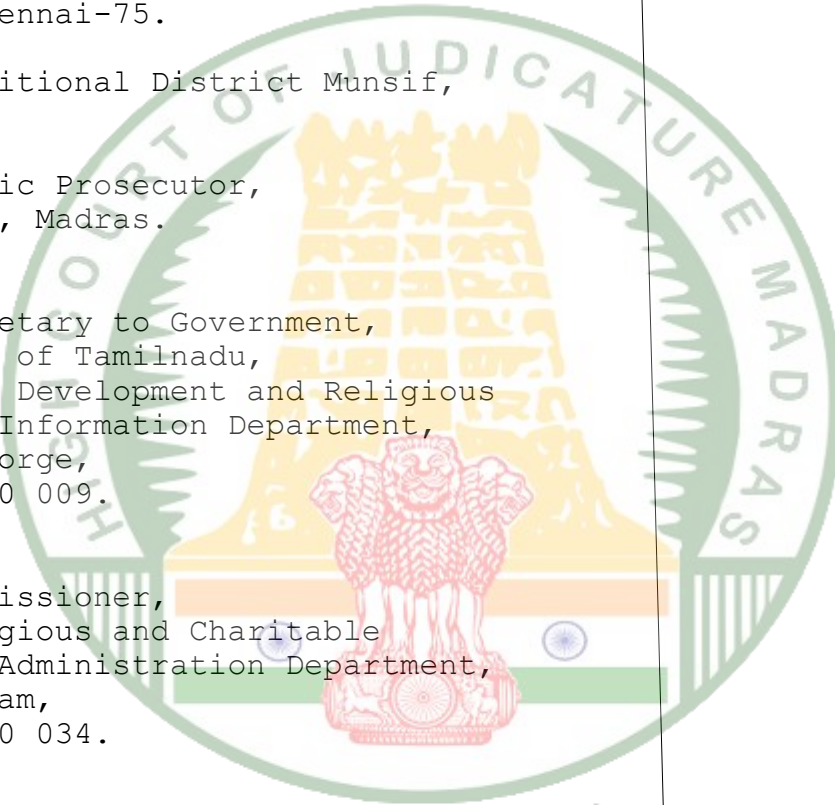
7.The Commissioner,
Hindu Religious and Charitable
Endowment Administration Department,
Nungambakkam,
Chennai 600 034.

8.The Joint Commissioner,
Hindu Religious and Charitable
Endowment Administration Department,
Nungambakkam,
Chennai 600 034.

9.The Section Officer,
Criminal Section, High Court,
Chennai-104.

To be substituted for
the order already

despatched
on 15/4/2019 in CRP
1123/14 & CrI OP No.
8674 of 2014



WEB COPY

10.The Section Officer,
VR Section, High Court, Madras. (2 Copies)

+1cc to Mr.Sai Bharath & Ilan Advocate Sr.15189

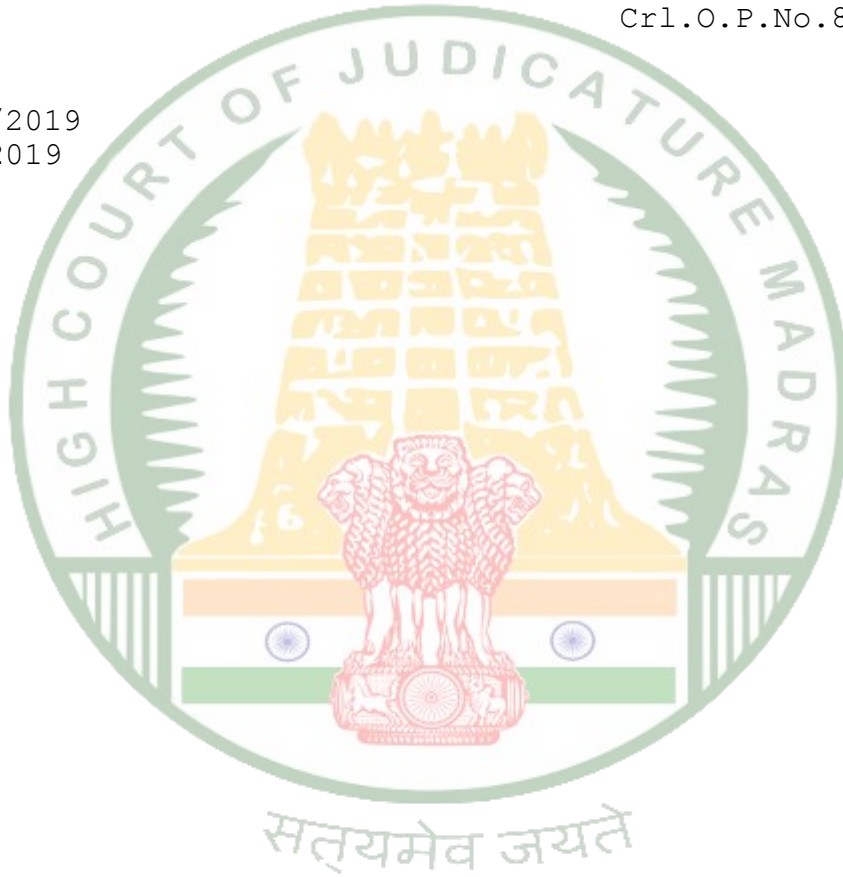
+5ccs to Mr.T.S.Vijaya Raghavan, Advocate Sr.42807

+1cc to the Government Pleader Sr.43039

+1cc to Mr.Sai Bharath & Ilan Advocate Sr.15188(09/04/2019)

C.R.P.No.1123 of 2014
and
CrI.O.P.No.8674 of 2014

rsv[co]
srg 21/03/2019
srg 21/5/2019



WEB COPY