

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.02.2020

DELIVERED ON : 28.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P.No.18229 of 2013

1.N.V.Sambandam
2.N.P.Vinayakasundaram
3. T.M.Babu @ Ramanjuam ... Petitioners
vs.

1. The Executive Officer,
Arulmighu Vedagiriswarar Temple,
Thirukazhukundram,
Kanchipuram District.

2. Joint Commissioner,
H.R. & C.E. Department,
Vellore - 9.Respondents

Prayer: Writ petition filed under Article 226 of the
Constitution of India for writ of certiorari to call for the
records in respect of the order
No.Se.Mu.Nada.Na.Ka.7606/2010/E1, dated 19.04.2013 issued by the
2nd respondent, quash the same.

For Petitioners : Mr.V.Kuberan
for M/s.Rank Associates.

For Respondents : Mr.A.K.Sriram
for M/s.A.S.Kailasam & Associates
for R1

ORDER

The points for consideration in this writ petition are as follows:

- (a) whether a perpetual lease can be granted by a temple;
- (b) whether the eviction proceeding initiated under Section 78 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 is barred by the law of limitation;
- (c) whether the petitioners can be treated as encroachers of temple land;
- (d) Whether from the facts and circumstances of the instant case, a writ petition is maintainable without exhausting the alternate statutory appellate remedy available under the Tamil Nadu Hindu Religious and Charitable Endowments Act.

2. Aggrieved by the eviction order dated 19.04.2013 passed by the second respondent under Section 78 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, this writ petition has been filed.

3. It is the case of the petitioners that under a Permanent Counter Part Agreement dated 09.12.1904 with the first respondent temple, the petitioners were put in possession of the temple property as perpetual lessees. According to them, without any basis, under the impugned order, the second respondent has passed the eviction order on the ground that the lease under the Permanent Counter Part Agreement dated 09.12.1904 is only valid for 99 years and on account of its expiry, the petitioners will have to redeliver possession to the first respondent temple. It is also the case of the petitioners that the claim of the second respondent is barred by law of limitation as prior to the amendment of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 2003, Limitation Act was applicable and therefore, the power exercised by the second respondent under Section 78 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 in the year 2013 is barred by the law of limitation.

4. It is the case of the petitioners that even though there is a statutory appellate remedy available under the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, as against the impugned order, there is no bar for the petitioners to file this writ petition, since without authority under law, the impugned eviction order has been passed by the second respondent.

5. However it is the case of the respondents that there cannot be a perpetual lease of temple property that too without legal necessity. It is also their case that contradictory stands have been taken by the petitioners. It is their case that before the Civil Court in O.S.No. 500 of 1946 the stand of the petitioners was that they are claiming adverse possession on account of their long and undisputed possession. According to them, before this Court, the petitioners have taken a contradictory stand that they are perpetual lessees and cannot be evicted under Section 78 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. It is also their case that the impugned eviction order has been passed by the second respondent with authority under law as the petitioners are deemed encroachers subsequent to the expiry of the lease. It is also the their case that the only remedy available to the petitioners is to file the statutory appeal under the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, if aggrieved by the impugned order.

6. The learned counsel for the petitioners drew the attention of the Court to the permanent Counter Part Agreement dated 09.12.1904 and submitted that as per the said agreement, the predecessors in interest of the petitioners are perpetual Lessees under the first respondent Temple. He also drew the attention of this Court to a judgment and decree dated 28.09.1954 passed in O.S. No.500 of 1946, wherein, the predecessors in interest, who were the plaintiffs in the said suit were recognised as Lessees, as there is a finding given by the said court that the rent was not paid monthly or yearly, but it was paid in one lumpsum of Rs.400/- in the year 1910, as per as Ex.A-10 receipt issued by the then Trustees of the first respondent Temple. According to him, a finding has also been given that the said lumpsum amount of Rs.400/- was used as a corpus and the interest accrued therefrom was treated as rent for the property. According to him, when the lease is a perpetual lease, no proceeding can be initiated by the first respondent under Section 78 of Hindu Religious and Charitable Endowments Act(hereinafter referred to as HR & CE Act) as the petitioners are not encroachers, but are perpetual Lessees.

7. The learned counsel for the petitioners also drew the attention of this Court to a judgment of the Hon'ble Supreme Court in the case of State of U.P. And others versus Lalji Tandon (Dead) reported in 2004 (1) CTC 359 and submitted that perpetual lease has been recognised by the Hon'ble Supreme Court as per the aforesaid decision. According to him, the Permanent

Counter Part Agreement dated 09.12.1904, if read as a whole will conclusively prove that the lease is a perpetual lease.

8. The learned counsel for the petitioners further submitted that the action initiated under Section 78 of the Tamil Nadu HR & CE Act is barred by the law of limitation. According to him, the Tamil Nadu HR & CE Act was amended in the year 2003 and only after the amendment to Section 109, Limitation Act, 1963 became inapplicable to any suit for possession of immovable property belonging to any religious institution or for possession of any interest in the said property. He drew the attention of this Court to the law which was applicable prior to the amendment in the year 2003 and submitted that as per Section 109 of the old Act, Limitation Act was applicable, if the lands were vested with the predecessors in interest of the petitioners before 30.09.1951. According to him, since the lands were vested with the predecessors in interest of the petitioners in the year 1904 itself, the law applicable prior to the amendment in the year 2003 will apply and therefore the action initiated by the second respondent under Section 78 of the HR & CE Act is barred by the law of limitation.

9. It is also submitted by the learned counsel for the petitioners that the rule of alternative remedy is a discretion and not a rule of jurisdiction. For this proposition, the learned counsel for the petitioners drew the attention of this Court to a recent decision of the Hon'ble Supreme Court in the case of Balkrishna Ram versus Union of India and another reported in 2020 SCC Online SC 21. Relying on the aforesaid decision, the learned counsel for the petitioners would point out that there is no bar for this Court to entertain this writ petition, even though there is a statutory appellate remedy available to the petitioners, as against the impugned order.

10. The learned counsel for the petitioners also drew the attention of this Court to a Single Bench judgment of this Court in the case of S.Palaniswamy, S and others versus The Commissioner Hindu Religious and Charitable Endowments Department & etc. reported in 2001 2 LW 783 and submitted that once a Civil Court decree on the very same issue has become final, credit should be given to the Civil Court proceedings. But under the impugned order according to him, the second respondent has given a go-by to the judgment and decree dated 28.09.1954 passed in O.S. No.500 of 1946 by ignoring the findings contained therein.

11. Per contra, the learned counsel for the first respondent Temple would submit that the petitioners have taken a contradictory stand in the suit and in this writ petition. According to them in the suit O.S. No.500 of 1946, the petitioners predecessors in interest have claimed title by prescription, whereas in this writ petition, the petitioners claim that they are the permanent Lessees under the Temple.

12. He also drew the attention of this Court to the judgment and decree passed in A.S. No.26 of 1956 and submitted that the First Appellate Court has given a finding that the petitioners predecessors in interest are only Lessees under the Temple. Further he would point out that the dispute between the petitioners predecessors in interest and the Temple with regard to the nature of the petitioners predecessors in interest occupation of the property attained finality only on 11.02.1956 when the appellate suit A.S. No.26 of 1956 was disposed of by the Lower Appellate Court by giving a finding that the petitioners predecessors in interest are Lessees under the Temple. According to him, the law as applicable to religious institution prior to amendment in the year 2003 will not apply to the facts of the instant case as the property was vested with the petitioners predecessors in interest as Lessees only on 11.02.1956, pursuant to the judgment and decree dated 11.02.1956 passed in A.S. No.26 of 1956.

13. The learned counsel for the first respondent also drew the attention of this Court to the judgment of the Privy Council in the case of Srimath Daivasikhamani Ponnambala Desikar and another and Periyanan Chetti and another reported in Indian Appeals Vol.LXIII page 261. Relying upon the aforesaid decision, the learned counsel for the first respondent would submit that the managers of temples can execute lease deeds in respect of temple property only upto their lifetime and therefore there cannot be a perpetual lease of a temple property. According to him, the tenant cannot remain in possession after the death of the manager claiming that they are perpetual lessees.

14. The learned counsel also drew the attention of this Court to the impugned eviction order passed by the second respondent under Section 78 of the Tamil Nadu HR & CE Act. According to him, being a well considered order, the only remedy available to the petitioner is to file the statutory appeal as

prescribed under the Tamil Nadu HR & CE Act and hence, the writ petition is not maintainable as alternate efficacious remedy is available to the petitioners.

15. According to the learned counsel for the first respondent, the judgments relied upon by the learned counsel for the petitioners are not applicable to the facts of the instant case, as the petitioners cannot be treated as perpetual Lessees. Further according to him, the dispute with regard to the nature of occupation by the petitioners predecessors in interest attained finality only through the judgment and decree dated 11.02.1956 passed in A.S. No.26 of 1956 and hence, Limitation Act is not applicable for the facts of the instant case as seen from section 109 of the HR & CE Act, 1959 prior to the amending Act 2003.

Discussion :

16. It is not in doubt that the concept of perpetual lease is legally recognised. But it has to be seen whether the said concept is applicable to religious institutions like a Temple.

17. In the case on hand admittedly the Temple has executed the Permanent Counter Part agreement on 09.12.1904 and by virtue of the said document, the petitioners claim that their predecessors in interest were granted perpetual lease by the Temple.

18. The Hon'ble Supreme Court had an occasion to consider this issue in the case of Sridhar Suar versus Jagannath Temple reported in 1976 3 SCC 485 after extracting page 489 of Mulla's Treatise on Principles of Hindu Law (11th Edition) held that a Hindu Temple cannot grant a permanent lease, unless it has been granted for a legal necessity. The relevant portion of the said judgment reads as follows :

"14. Now assuming without holding that the sanand amounted to a lease, it cannot even then be held to be valid as permanent alienation of the temple debutter property is prohibited. The position is stated thus at p. 489 of Mulla's Treatise on Principles of Hindu Law (11th Edition):

"The power of a shebait or a mahant to alienate debutter property is analogous to that of a manager for an infant heir as defined by the Judicial

Committee in Hunooman Pershad v. Mussamat Babooee [6 MIA 393] . As held in that case, he has no power to alienate debutter property except in a case of need or for the benefit of the estate. He is not entitled to sell the property for the purpose of investing the price of it so as to bring in an income larger than that derived from the property itself. Nor can he, except for legal necessity grant a permanent lease of debutter property, though he may create proper derivative tenures and estates conformable to usage."

15. In the present case, the position of the Raja of Puri who granted the sanand (Exhibit I) was merely that of a shebait. He could not have granted a permanent lease of the property in question to the great grandfather of the plaintiff without necessity or without benefit to the estate which have not at all been made out in this case.

16. Again the lease being a permanent one for a fixed rent could not have been granted at all by the Raja of Puri. Reference in this connection may usefully be made to p. 931 of Mayne's Treatise on Hindu Law (11th Edn.), where the position is stated as follows:

"It is beyond the powers of a manager to grant a permanent lease at a fixed rent in the absence of unavoidable necessity; for, to fix the rent, though adequate at the time, in perpetuity in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty on the part of the manager. In Palaniappa Chetty v. Streemath Deivasikamony [AIR 1917 PC 33 : (1971) 44 IA 147] Lord Atkinson observed:

'Three authorities have been cited which establish that it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debutter lands at a fixed rent, however adequate that rent may be at the time of granting, by reason of the fact that, by this means, the debutter estate is deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased.'

17. In Palaniappa Chetty v. Deivasikamony Pandara alluded to in the abovequoted passage, it

was also held:

"A permanent lease of temple lands at a fixed rent, or rent free for a premium, whether the lands are agricultural lands or a building site, is valid only if made for a necessity of the institution. It is not justified by a local custom, or by a practice of the institution, to grant lands in that manner.

The phrase 'benefit of the estate', as used in the decisions with regard to the circumstances justifying an alienation by the manager for an infant heir or by the trustee of a religious endowment cannot be precisely defined, but includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from inundation, and similar circumstances."

19. As seen from the Permanent Counter Part agreement, the necessity for the temple to grant a perpetual lease in favour of the petitioners predecessors in interest has not been mentioned. Without declaration of any legal necessity for the temple to perpetually lease the property to the petitioners predecessors in interest, it cannot be construed that the petitioners predecessors in interest are perpetual Lessees.

20. Even in the suit O.S. No.500 of 1946 filed by the petitioners predecessors in interest against the Temple, the pleadings in the plaint reveals that the predecessors in interest of the petitioners claimed title by prescription as they claimed that they are in possession and enjoyment of the property for more than 40 years without any disturbance. Only by the First Appellate Court judgment and decree dated 11.02.1956 passed in A.S. No.26 of 1956 which has attained finality, the petitioners predecessors in interest were declared as a Lessee and there is no finding given by either the Trial Court in O.S.No.500 of 1956 or the First Appellate Court in A.S. No.26 of 1956 that the petitioners predecessors in interest were perpetual Lessees. The judgment relied upon by the learned counsel for the petitioners in the case of State of U.P. And others versus Lalji Tandon (Dead) reported in 2004 (1) CTC 359 is not applicable to the facts of this case as the subject property in this writ petition is a Temple property whereas the property involved in the aforesaid decision is not a temple property nor does it belong to any religious institution.

21. Contradictory stands have been taken by the petitioners predecessors in interest in the suit O.S. No.500 of 1946 and in this writ petition. In the suit O.S. No.500 of 1946, the petitioners predecessors in interest had claimed title by prescription on account of long usage of the property, whereas in this writ petition, the petitioners claim that they are perpetual Lessees of the Temple.

22. For the foregoing reasons, this Court is of the considered view that the petitioners are not perpetual Lessees under the Temple and they are only encroachers. The Civil Court decree passed in A.S. No.26 of 1956 has recognised the petitioners predecessors in interest only as a Lessee and not as a permanent Lessee. Admittedly, the petitioners predecessors in interest were inducted as a tenant under the Permanent Counter Part agreement dated 09.12.1904. Since there cannot be a perpetual lease without any legal necessity and the contents of the Permanent Counter Part agreement also does not disclose any such legal necessity for the Temple, the petitioners will have to be treated only as encroachers. Even before the Trial Court in O.S. No.500 of 1946 as well as before the Lower Appellate Court in A.S. No.26 of 1956, the first respondent Temple has taken a consistent stand that the petitioners predecessors in interest do not have any legal right to occupy the Temple property. When the Temple has been consistently disputing the petitioners right to occupy the property, no legal right is vested with them and they cannot claim that they are perpetual Lessees that too when the Permanent Counter Part agreement dated 09.12.1904 does not disclose any legal necessity for giving the property on perpetual lease.

23. The Hon'ble Supreme Court in the case of Shiromani Gurdwara Parbandhak Committee, Amritsar vs. Somnath Dass and others reported in AIR 2000 3 SC 1421 has held that the deity is a minor and if the property is dedicated for religious purposes, welfare of the Deity could be looked into by the Shebait / Sarvakar / Manager appointed in accordance with the Deed of Dedication or by the Management as Guardian as Deity never attains majority and always remains a minor. The Hon'ble Supreme Court has held that any transfer made against the interest of the Deity will be void as other minors may attain majority, but Deity cannot.

24. It is clear from the decision cited supra that there

must be a legal necessity for any transfer of Temple property. The claim of the petitioners is that they are perpetual Lessees under the Temple but the counter part agreement does not disclose any legal necessity for the Temple to execute a perpetual lease in favour of the petitioners predecessors in interest.

25. In the case of Srimath Daivasikhamani Ponnambala Desikar and another and Periyanan Chetti and another reported in Indian Appeals Vol.LXIII page 261relied upon by the learned counsel for the first respondent, it has also been held by the Privy Council that it is a rule of law that tenant under a Temple cannot claim permanent tenancy possession by paying the rent and cannot thereby acquire title by adverse possession against the owner. The relevant portion of the said judgement reads as follows :

SIR GEORGE RANKIN: Adverse possession in the case of a void deed would begin to run from the date of the deed.]

It is a rule of law that a tenant cannot by remaining in possession and paying rent say that he has got a permanent occupation by prescription. Payment of rent down to five years before action brought is proved. In Vidya Varuthi Thirtha v. Balusami Ayyar, the Privy Council apparently approved of a distinction putting the manager of a temple as in exactly the same position as the head of a math, and saying that the time only runs from when the successor becomes entitled to possession. In Ram Charan Das v. Naurangi Lal, it has been pointed out by this Board that that right in the mahant is not a life right, but only during the tenure of office. The statement in the High Court judgment that "In the case of a permanent lease also seeing that a temple manager has no beneficial interest which he can lawfully convey, the adverse possession would run from the date of the lease, if as a question of fact it is found that the lessee asserted his rights to the knowledge of the dharmakarta adversely to the temple," is an entire misunderstanding of the principle in Vidya's case; it is plain from that case that the head of a math is not the owner for life of the math property. The High Court seem to say that the doctrine of Vidya's

case, as to adverse possession is to be confined to the case of a math. There is in this connection no distinction between the powers of the head of a math and those of the manager of a temple. The present is the case of a temple, not of a math, and when the manager granted the cowle in 1865 he was acting as the manager of the temple. Vidya's case was the case of a math. Mahomed v. Ganapati is the case of a temple, and is referred to in Vidya's case. Sathianama Bharati v. Sarvanabagi Ammal is the case of a math and the Court in that case does couple together cases of temples and maths as being subject to the same rules."

26. A single Bench judgment of this Court in the case of S. Palaniswamy, S and others versus The Commissioner Hindu Religious and Charitable Endowments Department & etc. reported in 2001 2 LW 783 relied upon by the learned counsel for the petitioners, even if applied to the facts of the instant case, the petitioners can only be treated as Lessees and not perpetual Lessees as the conclusive finding given by the First Appellate Court, dated 11.02.1956 in A.S. No.26 of 1956 is that the petitioners predecessors in interest are only Lessees. Therefore, the said judgement will not support the contention of the petitioners.

27. Under the impugned order, the second respondent has passed eviction order under Section 78 of the HR & CE Act on the ground that even if the petitioners claim a permanent lease, they can only hold on to the property only for a period of 99 years. The second respondent has held that the period of 99 years after execution of the Permanent Counter Part agreement dated 09.12.1904 has come to an end after the lapse of 99 years, the eviction order has been passed. Though this Court is of the considered view that the finding given by the second respondent under the impugned order that 99 years is the maximum period for any lease is not correct, the finding that the petitioners are encroachers is correct in view of the reasons stated above. The writ petition is of the year 2013. At this stage, no useful purpose would be served if the petitioners are directed to approach the statutory appellate authority under the HR & CE Act as against the impugned order that too when there is no merit in the contentions raised by the petitioners.

28. For the foregoing reasons, this Court is of the

considered view that there is no merit in this writ petition.
Accordingly the writ petition stands dismissed. No costs.

Sd/-

Asst.Registrar (CS V)

/true copy/

Sub Asst. Registrar

To

1. The Executive Officer,
Arulmighu Vedagirishwarar Temple,
Thirukazhukundram,
Kanchipuram District.

2. Joint Commissioner,
H.R. & C.E. Department,
Vellore - 9.

+1 cc to the Special Government Pleader (HR & CE) sr18427

+1 cc to M/s.Rank Associates Advocate sr17792

Pre-delivery order in
W.P.No.18229 of 2013

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