

Executive Officer, Arthanareswarar Temple

Vs

R. Sathyamoorthy

Civil Appeal No. 2461 of 1991

(M. Jagannadha Rao, M. B. Shah JJ)

09.02.1999

JUDGMENT

M. Jagannadha Rao J

1. This appeal is preferred by the Executive Officer of the Arthanareswarar Temple against the judgment of the High Court of Madras dated 31.1.1991 in Civil Revision Petition No. 334 of 1987.
2. The following are the relevant facts :

The predecessors-in-interest of respondents 1 and 2 in this appeal, endowed various immoveable properties for the purpose of certain religious ceremonies in six public Hindu temples. The subject matter of the trust-deed companies of immoveable properties, lands and buildings and also jewels. The immoveable properties comprised 5.32 hectares of wet land situated in Sathampur village and 9 shop buildings situated in Netaji Streets, Erode. On 28.10.1986 the respondents 1 and 2, filed a petition O.P. No. 301 of 1985 under the Indian Trusts Act, 1882 before the District Judge, at Periyar to permit them to sell the lands and immoveable properties including the nine shops by public auction or by negotiations. Obviously the said petition was filed by respondents 1 and 2 as trustees under the trust-deed dated 19.4.1920. The learned District Judge by order dated 28.10.1986 dismissed the said petition holding that under the trust deed above mentioned, it was specifically stated that the trust properties should not be sold by the trustees and there was, in any event, no need to sell. Against the said order of the learned District Judge, a revision CRP 334 of 1987 was filed in the Madras High Court but the same was dismissed on 28.11.1988 again on the ground that the sale was prohibited by the trust deed and that circumstances which warrant a sale of the properties did not exist and there was no necessity to sell the properties. Against the said order passed by before the learned Single Judge, a review application was filed by the respondent 1 and 2. The said review application was however, allowed by the learned Single Judge on 3.3.1989 granting permission for sale. The learned Judge stated that the contention before him was that the property was not fetching proper income and that if the land was sold, the interest therefrom could be used for the purpose of the temple and such a sale of the immoveable properties would be beneficial and not detrimental to the temple. Accepting this contention, the learned Judge allowed the review application and granted permission of sale of the immoveable properties. It was also stated in the order dated 3.3.1989 that the tenants who appeared through counsel had no objection to the above course. It was further mentioned that the tenants offered to purchase the

properties for Rs. 9.25 lakhs. In view of the said offer, the learned Judge directed that the offer of Rs. 9.25 lakhs should be treated as upset price and offers above the said figure should be invited by publication through the District Court and the property be sold to the highest bidder. The entire sale proceeds were to be deposited by the purchaser to the credit of O.P. 301 of 1985 on the file of the District Court, Periyar Erode. The District Judge was directed to deposit the said amount in fixed deposit for a period of three years initially and thereafter renew the same once in three years. The deposit was to be made in the State Bank of India, Periyar, Erode in the name of trust for its use. The trustees (respondents 1 and 2) were to be permitted to withdraw the interest. It was directed that the sale proceeds should not be withdrawn except for depositing the same in some other better security and that too with the approval of the Court.

3. One of the hereditary trustees of the temple V.E. Nadanasabhabathy (respondent 5 in this appeal) filed a petition before the Commissioner, Hindu Religious and Charitable Endowment under Section 23 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, (Act 22 of 1959), (hereinafter called the Endowment Act, 1959) bringing to his notice that the properties had been ordered to be auctioned on 23.12.1989 by the learned District Judge, Periyar, Erode by orders passed in O.P. 301 of 1985 and this should be stopped. In that application, he prayed for stay of the public auction of the properties belonging to the specific endowment attached to the five Temples. He submitted that the District Court had no jurisdiction to auction the specific endowments without obtaining sanction under Section 34(1) of the Endowment Act, 1959. He also prayed the Commissioner H.R. & C.E. Department to issue directions to the Deputy Commissioner, H.R. & C.E., Salem and Assistant Commissioner, H.R. & C.E., Salem to get themselves impleaded in I.A. 2292 of 1989 and in the O.P. No. 301 of 1985 before the District Court, Periyar, Erode and stop the auction scheduled for 23.12.1989.

4. The Deputy Commissioner, H.R. & C.E. then filed an application on 21.12.1989 before the District Judge for impleading himself and for stay for auction. No order of stay was passed. The sale was held but confirmation was not made in view of certain other orders obtained by the Commissioner from the High Court in a petition under Article 227 of the Constitution of India.

5. At that stage the Commissioner, H.R. & C.E. filed special leave petition in this Court praying for setting aside the judgment of the High Court dated 3.3.1989 passed in review application. The same was admitted and registered as C.A. 1930 of 1990. This Hon'ble Court by Judgment dated 10.4.1990 disposed of the said Civil Appeal stating that apart from other considerations, the review petition was disposed of without the Commissioner, H.R. & C.E. being made a party. It was not necessary to go into the question whether he was a necessary party or not to the petition inasmuch as it was agreed by all the parties that the appeal might be allowed and the order passed in the review application be set aside. The Supreme Court consequently directed the High Court to implead the auction purchasers, the Commissioner H.R. & C.E. and the Executive Officer of the temple in the main C.R.P. 334 of 1989 which was reopened for fresh disposal. This Court directed that the said C.R.P. be disposed of "on merits and according to law". It was further stated by this Court that nit would be open to all the parties to take up such contentions before the High Court as permissible in law including any contentions which the auction purchaser and the trustees might raise stating that the property in question was not part of trust property but that there was only a charge on the properties of the trust. In view of the renamed the notice which had been issued to trustees (respondents 1 and 2 in the present appeal) by the Commissioner, for allegedly violating the provisions of the Endowment Act, 1959 should be dropped. The Civil appeal was accordingly

allowed and the matter was remitted to the High Court.

6. On 7.1.1991 the trustees, namely respondents 1 and 2 herein filed a Memo in the High Court seeking permission under Order 23 Rule 1 of C.P.C. to withdraw C.R.P. 332 of 1987 as well as O.P. 301 of 1985. In the said memo it was stated that the properties mentioned in the Schedule to O.P. 301 of 1985 before the District Judge had not been absolutely dedicated to any temple or other institution but only a charge was created on the income from the property for the purpose of certain specific services to be performed in the temple as per the trust-deed dated 19.4.1920 and the trustees were reserving the right to raise the said contentions as and when they arose again. The revision petitioners sought leave of the High Court to withdraw the C.R.P. 334 of 1987 as well as O.P. 301 of 1985 on the file of the District Court.

7. To the above said Memo, the Commissioner, H.R. & C.E. filed a reply on 13.1.1991 stating that the Supreme Court had directed the High Court to dispose of the matter on merits and in accordance with law and to decide all questions including the question whether there was only a charge on the property. It was stated by the Commissioner that the department was in possession of important documents to show that the properties were absolutely endowed for the purpose of certain religious service in six temples and there were specific endowments and that the department was having actual control over the trust for almost five decades. He stated that the revision petitioners were wanting to withdraw the C.R.P. as well as O.P. only to defeat the ends of justice. If the withdrawal was granted, the department would be put to great difficulties. It was further stated that the Supreme Court ordered the disposal of the C.R.P. on "merits and according to law" and also dropped certain proceedings taken by the Commissioner against the hereditary trustees and the department had to abide by the order of the Supreme Court and dropped the said proceedings against the hereditary trustees. Having benefited from the order of the Supreme Court, the trustees could not be permitted to withdraw the C.R.P. and the O.P. On these contentions, the High Court passed the impugned order dated 31.12.1991 permitting withdrawal as prayed for both of the C.R.P. as well as O.P. 301 of 1985 in the District Court. The learned Judge observed that the direction of this Court for disposal of the C.R.P. on merits would have become necessary only if there was an adjudication of the question as raised by the parties. But when the parties who approached the District Court with application for permission to sell, wanted to withdraw the application itself, thus avoiding a decision on any question which might arise in the application, it was not for the High Court to compel the parties to continue the O.P. and to insist upon a decision in the matter. While granting permission to withdraw, the Court was not deciding any question and no advantage would be gained by the revision petitioners by withdrawal of the proceedings. The Executive Officer and the Commissioner who were respondents 14 and 15 in the C.R.P. were not placed in any disadvantageous position. If there was any finding in their favour which might get nullified by the withdrawal, in that event, it could be said that they would be prejudiced by the withdrawal but that was not the position. Here the District Judge had proceeded on the basis that the property was a private trust. there was no finding by the District Court which was in favour of the respondents or the Executive Officer which would get nullified and hence they could not object to the withdrawal of the original petition. The character of the property whatever it was before the filing of O.P. 301 of 1985, continued to be the same and it was not altered by the withdrawal of the O.P. It was necessary that a separate petition should be filed under Order 23 Rule 1 and a Memo was sufficient. For the above reasons the C.R.P. and O.P. were permitted to be withdrawn. It was also stated that in the sale which took place on 23.12.1989 in favour of the auction purchasers confirmation had not taken place and therefore those purchasers should be allowed to withdraw the sum of Rs. 31.36 lakhs deposited by them in the bank.

8. It is now on record that after the order of the High Court permitting the withdrawal of the C.R.P.

and the O.P. was passed, the respondents 1 and 2, the hereditary trustees have again sold the properties on 21.2.1991 under sale deeds Rs. 18.50 lakhs as opposed to the sum of Rs. 28.25 lakhs realised in the earlier auction dated 23.12.1989. It is not in dispute that the sale dated 21.2.1991 is without the permission of the District Court. Obviously, the trustees have sold the land as if it was not even trust property, a stand which they had earlier taken in the O.P. In this appeal, we have heard submissions of the learned senior counsel for the appellant Shri R. Sundaravardhan and of the learned senior counsel for the auction purchasers, Shri S. Siva Subramaniam and of the learned counsel for the hereditary trustees, Shri V. Balachandran.

9. The point for consideration is : whether the order of the High Court permitting withdrawal of the C.R.P. and the O.P. is liable to be interfered with ? It will be noticed that in the earlier order dated 28.11.1988, the High Court, while dismissing the C.R.P. rejected the contention of the trustees that there was no dedication of the corpus that there was only a charge on the income. The Court referred to *Official Trustee, W.B. v. Sachindra, AIR 1969 SC 823* for the proposition that the District Court had no power to grant permission to the trustees to sell property if such a sale was prohibited by the deed of trust. The High Court rejected the contention of the trustees that there was only a charge in the income and distinguished the decision in *V.K. Srinivasachariar v. K. Ramanujam and 4 others, 1986 TNLJ 129*. The High Court observed while dismissing the revision.

"In the case on hand, by virtue of the trust deed, the *properties were dedicated* for the performance of religious charities in the temple, the mere fact that the management vested with the members of the family would not mean that they can go against the wishes of the person who created the trust and alienate the properties. Even otherwise, on facts, I find that the petitioners have not made out any case of necessity for sale of the properties."

Accordingly, the C.R.P. was dismissed.

10. The subsequent event can be summarised as follows :

A Review Petition C.M.P. No. 16722 of 1988 was filed and was as stated earlier, allowed on 3.3.1989 by the same learned Judge granting permission to sell for price above upset price of Rs. 9.25 lakhs, which was the amount offered by the tenants. It was at that stage that the Commissioner, HR & CE, passed orders on 20.12.1989 on the petition of the 5th respondent filed on 20.12.1989, directing the Deputy Commissioner, HR & CE, Salem to intervene, and implead himself as a party and get stay of the sale of the auction dated 23.12.1989. The Deputy Commissioner filed IA 3390 of 1989 and 3391 of 1989 in the O.P. before the District Judge but no such orders were passed. Auction on 23.12.1989 of AC 5.32 hectares of wet land and 9 shops yielded Rs. 28.25 lakhs. However, in Article 227 proceedings, the Commissioner obtained orders that confirmation of sale be withheld. According to the plea of Deputy Commissioner, the property was a specific endowment which vested, under Section 23 of the Endowment Act, 1959 in the Commissioner and sale thereof required permission of the Commissioner under Section 34(1) of the said Act. The Commissioner, HR & CE filed SLP and his appeal was admitted, and ultimately the Civil No. 1930 of 1990 was allowed by this Court on 10.4.1990 and the High Court was asked to decide the revision afresh "on merits and according to law". It was at that stage that the respondents 1, 2 filed the Memo on 30.1.1991 for withdrawal of the CRP and the OP. The Commissioner, H.R. & C.E. opposed by counter dated

13.6.1991 but the High Court felt that by permitting withdrawal of the CRP and also the OP, no finding arrived at by the District Judge in favour of the H.R. & C.E. Department was being nullified and that in such an event there could be no objection to permit the withdrawal of the CRP and the OP.

11. It is true that in a large number of cases decided by the High Courts, it was held while dealing with applications under Order 23, Rule 1, CPC, that if an appeal was preferred by an unsuccessful plaintiff against the Judgment of the trial Court dismissing the suit and if the plaintiff appellant wanted to withdrawal not only the appeal but *also the suit* unconditionally, then such a permission so far as the withdrawal of the suit was concerned, can be granted if there was no question of any adjudication on merits in favour of the defendants by the trial being nullified by such withdrawal. On the other hand, if any such findings by the trial court in favour of the defendant would get nullified, such permission for withdrawal of the suit should not be granted. (See *Thakur Singh v. A. Achuta Rao*, 1977(2) APLJ 111; *Kedar Nath v. Chandra Karan*, AIR 1962 All. 263; *V. Dube v. Harcharan*, AIR 1971 All. 41; *Charles Samuel v. Board of Trustees*, 1978(1) MLJ 243; *Lala Chetram v. Krishnamoni*, 1984(1) MLJ 28; *Jubedan Begum v. Sekhawat Ali Khan*, AIR 1984 P&H 221; *Ram Dhan v. Jagat Prasad*, AIR 1982 Raj. p. 225. In the present case, the learned Judge felt that no such finding in favour of the Commissioner was being nullified by the withdrawal of the OP at the stage of revision and therefore the withdrawal of OP was permissible.

11. The above approach of the High court is legally correct but there are, in our opinion, certain other factors which ought to have been taken into consideration by the High Court. The most important aspect was that on the ground that they would agree for an adjudication as to the nature of the property, the hereditary trustees prayed in this Court in Civil Appeal No. 1930 of 1990 that the proceedings initiated by the Commissioner against them under the Endowment Act, 1959 should be directed to be dropped. This Court thought that in view of the agreement by the trustees to have an adjudication on merits, the Commissioner could and should drop the proceedings. In fact, by the date of the Memo filed for withdrawal of the CRP and the OP, the Commissioner had dropped the proceedings initiated against the hereditary trustees. In our view, having obtained such an advantage from the order of remand, the hereditary trustees could not have precluded the High Court from adjudicating the matter on merits by withdrawing the CRP and the OP.

12. Further, the OP was filed in the District Court by the respondents without impleading the Commissioner, HR & CE. At the state of confirmation of sale, the Deputy Commissioner, HR & CE had intervened. Again in the CRP there was initially a finding by the learned Judge that there was dedication not merely of the income but of the property. It was also held that in view of a judgment of the Supreme Court in *Official Trustee W.B. v. Sachindra*, AIR 1969 SC 823 it was not permissible for the Court to give sanction for sale if under the trust deed, such a sale was prohibited. When the Review petition was heard, the Commissioner HR & CE was a party before the High Court and he filed objections claiming that property was a specific endowment and permission of the Commissioner under Section 34 of the Endowment Act, 1959 was necessary and permission of the District Court under the Trust Act was not sufficient. Further, in the Civil Appeal 1930 of 1990 it was agreed by the HR & CE Commissioner, the auction purchasers and the trustees and interested persons that the matter shall be decided "on merits by the High Court and in accordance with law". After the Memo for withdrawal was filed, the Commissioner contended, in addition, that he having dropped proceedings against the trustees as directed by the Supreme Court, he was entitled to an adjudication on merits.

13. It is, therefore, clear that this Court by consent of parties wanted an adjudication by the High

Court, on the questions whether there was a dedication of the corpus of the property or only a charge on the income, and even if it was so whether there was a specific endowment vested in the Commissioner, HR & CE and whether the property could be permitted to be sold when there was a prohibition in the trust deed, whether permission of the District Court under Section 34 of the Trust Act was sufficient and whether permission under Section 34 of the Endowment Act, 1959 was necessary. Further, the Courts have a general '*parens patriae*' jurisdiction over trusts for charitable and religious purposes and a question of public interest was involved because of the contentions raised by the Commissioner, HR & CE.

Therefore, we are of the view that the High Court should go into the above aspects on merits and in accordance with law.

14. A question was raised by the learned senior counsel for the respondents as to whether the High Court could go into these issues for the first time in revision in the absence of fresh evidence. Primarily here, the deed of trust is the crucial document upon which these issues turn and we think there can be no difficulty in construing the same for the purpose of deciding whether there is a dedication of the corpus or the income of the property so as to attract the jurisdiction of the Commissioner, HR & CE because it is the case of the Commissioner in the objections already filed (which are found in the record of the CA No. 1930 of 1990) that this is a 'specific endowment' and that the nature of the property is such that the District Court cannot entertain the OP and grant permission for sale and that only the Commissioner can, and that too, it is permissible to grant permission on the facts of the case.

15. In the present case the District Court has no doubt not granted permission to sell but it has proceeded on the basis that it has jurisdiction in relation to the subject matter of the OP. In our view, the District Courts' Jurisdiction under section 34 of the Trusts Act depends upon the decision as to the nature of the property in question. By wrongly deciding its nature, the District Court cannot assume jurisdiction upon itself to grant permission for sale. Whether the District Court has wrongly decided the jurisdictional fact or not can certainly be gone into in jurisdiction under section 115 Code of Civil Procedure. It has been held by this Court in *Chaube Jagdish Prasad v. Ganga Prasad*, AIR 1959 SC 492 that even in matters arising under section 115 CPC, the High Court can certainly decide whether jurisdictional facts have been correctly decided by the subordinate court or not, on the basis of the well-known principles laid down by Lord Esher M.R. in *Queen v. Commissioner of Income Tax, 1888(21) QBD 313*. There can, therefore, be no jurisdictional flaw in directing the High Court to decide these issues. In view of the consent order passed by this Court earlier in the Civil Appeal, if it is felt that some more evidence is necessary, it will be open to the High Court to receive the same directly or direct the District Court to record such oral or documentary evidence as the parties may want to adduce, and have the same brought up to the High Court for use in the revision for decision on these issues.

16. The appeal is allowed and the matter is, therefore, remitted to the High Court for decision on merits and in accordance with law in the light of the earlier judgment of this Court and the present judgment. It will, however, be open to the High Court to pass such interlocutory orders as it may deem fit in the circumstances of the case. There will be no orders as to costs.