IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 31ST MAY 2011 / 10TH JYAISHTA 1933

OP(C).No. 1245 of 2011(O)

PETITIONER.

O.R.MANOJ, PROPRIETOR,
AVANI STUDIO AND VIDEOS,
KRISHNANJALI BUILDING,
GURUVAYUR, THRISSUR - 680 101.

BY SENIOR ADV. SRI.V.CHITAMBARESH
SRI.T.C.SURESH MENON
SRI.JIBU P.THOMAS
SRI.P.S.APPU, SRI.NIMOD.A.R.
SRI.C.A.ANOOP AND SRI.MATHEWS RAJU.

RESPONDENTS:

1. GURUVAYUR DEVASWOM,
   REPRESENTED BY ITS ADMINISTRATOR,
   GURUVAYUR - 680 101.

2. PRADEEP U., S/O. UNNIKRISHNAN NAIR,
   RESIDING AT PONNOTHE VEEDU, PAYYUR,
   KOONAMOOCHI P.O., THALAPPILLY TALUK,
   THRISSUR - 680 504.

3. PRASAD, RESIDING AT ALANCHERRY HOUSE,
   KARAKKAD, GURUVAYUR, THRISSUR - 680 101.

4. BEENA PRASAD, W/O. PRASAD,
   RESIDING AT ALANCHERRY HOUSE, KARAKKAD,
   GURUVAYUR, THRISSUR - 680 101.

R1 BY STANDING COUNSEL SRI.V.KRISHNA MENON
R2 BY SENIOR ADV. SMT.SUMATHI DANDAPANI
SRI.MILLU DANDAPANI
R3 AND R4 BY ADV. SRI.JAYASANKAR.B.

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 31/05/2011,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 TRUE COPY OF THE TENDER NOTICE PUBLISHED BY THE GURUVAYUR DEVASWOM DATED 5.3.2011.

EXT.P2 TRUE COPY OF THE TENDER ALONG WITH A MANAGER'S CHEQUE DATED 24.3.2011.

EXT.P3 TRUE COPY OF THE COVERING LETTER ADDRESSED BY THE PETITIONER TO THE DEVASWOM DATED 24.3.2011.

EXT.P4 TRUE COPY OF THE ORDER OF INJUNCTION DATED 22.3.2011.

EXT.P5 TRUE COPY OF THE PLAINT IN O.S.NO.366 OF 2011 AS WELL AS THE APPLICATION FOR INJUNCTION IN I.A.NO.1713 OF 2011 ON THE FILE OF THE COURT OF THE MUNSIFF OF CHAVAKKAD DATED 22.3.2011.

RESPONDENTS' EXHIBITS:

EXT.R2(a) TRUE COPY OF AGREEMENT DATED 11.8.2010 ENTERED INTO BETWEEN THE SECOND RESPONDENT AND RESPONDENTS 3 AND 4.

EXT.R2(b) TRUE COPY OF AFFIDAVIT ACCOMPANYING THE PETITION FOR IMPLEADING FILED BY THE SECOND RESPONDENT IN O.S.NO.366 OF 2011 BEFORE THE MUNSIFF COURT, CHAVAKKAD.

EXT.R2(c) TRUE COPY OF REPRESENTATION SUBMITTED BY THE SECOND RESPONDENT DATED 25.3.2011 BEFORE THE ADMINISTRATOR, GURUVAYUR DEVASWOM, GURUVAYUR.

//TRUE COPY//

AHZ/

K.T.SANKARAN, J.

O.P.(C). NO. 1245 OF 2011 O

Dated this the 31st day of May, 2011

JUDGMENT

The question arising for consideration in the Original Petition is whether the High Court, in the exercise of its jurisdiction under Article 227 of the Constitution of India, would set aside an ad interim order of injunction granted by the trial court, challenged by an affected person who is not a party to the suit.

2. From the pleadings, documents and the submissions made by the counsel, the following facts are revealed: Guruvayur Devaswom (hereinafter referred to as 'Devaswom') invited competitive tenders for the right to take photographs of the devotees in connection with "Choroon" and "Thulabharam", and video films of "Chembai Sangeethotsavam" for the period from 1.6.2011 to 31.5.2012. The tenderers should be persons proficient in photography and who run studio. Earnest Money Deposit of Rupees one lakh should be made by the tenderer. The tenders were to be submitted before 3 PM on 24-3-2011. Tenders were to be opened at 3.30 PM on the same day. The person who quotes the highest

tender would be conferred the right. He has to remit half of the tender amount within ten days. The balance amount should be deposited within three months.

3. The petitioner (O.R.Manoj, the proprietor of Avani Studio) submitted a tender for ₹85,55,555/-. He quoted the highest amount. K.V.Pramod of K.V.P.Studio quoted ₹82,53,313/-. Pradeep.U., the second respondent, quoted ₹34,75,000/-.

4. After the tenders were opened, Pradeep (the second respondent) produced copy of an ad interim order of injunction granted by the Munsiff's Court, Chavakkad in I.A.No.1713 of 2011 in O.S.No.366 of 2011. The order of injunction is to the effect that the respondents in the I.A./defendants in the suit shall not participate in the tender mentioned above, either by themselves or through relatives, friends, agents or benamis or in the name of Avani Studio, the benami. Obeying the injunction order, the Devaswom did not finalise the tender proceedings.

5. The ad interim order of injunction referred to above (Exhibit P4) is challenged by the petitioner in the Original Petition.

6. The petitioner is not a party to O.S.No.366 of 2011 filed by Pradeep. Though mention is made in the plaint and in the application for temporary injunction about Avani Studio, the petitioner was not arrayed as a defendant in the suit. Guruvayur Devaswom, who invited tenders was also not made a party to the suit. The defendants in the suit are Prasad (3rd respondent) and Beena Prasad (4th respondent- wife of the 3rd respondent).

7. The case of the plaintiff in O.S.No.366 of 2011, in brief, is as follows. The plaintiff and the 2nd defendant (Beena Prasad) were the successful bidders for the right to take photographs for the year 2009-10, in the temple owned by the Guruvayur Devaswom. They entered into a partnership under the name and style “THANA Digital studio”. Disputes arose between the partners on account of the unnecessary intervention of the first defendant. This led to O.S.No.636 of 2010 filed by the plaintiff in the present suit. The disputes were settled on mediation and an agreement was entered into between the plaintiff and the defendants. As per the agreement, the second defendant retired from the partnership. The plaintiff agreed to pay Rupees fifty lakhs to the second defendant.

Thereafter, the studio was being run as a proprietary concern by the plaintiff. Disputes arose regarding the payment to the second defendant. The second defendant filed O.S.No.60 of 2011. The parties agreed to settle that case also and a statement was prepared in the presence of the mediator. On payment of the amount to the second defendant, it was agreed that she would withdraw O.S.No.60 of 2011. It was also agreed that the defendants would not participate in the tender for taking photographs under the Devaswom, either by themselves or through near relatives, for the years 2011-12 and 2012-13. Contrary to the said agreement, the defendants attempted to participate in the tender for 2011-12 and made a threat to the plaintiff that his business would be ruined. In these circumstances, the suit was filed.

8. Heard Sri.V.Chitambaresh, Sr.Advocate for the Petitioner, Advocate Sri.Krishna Menon for the first respondent, Smt.Sumathi Dandapani, Sr.Advocate for the second respondent and Sri.Jayasankar for Respondents 3 and 4. Smt.Sumathi Dandapani submitted that the Original Petition is not maintainable since the Petitioner has an effective alternative remedy to file an Appeal under Order 43 Rule 1(r) of the Code of Civil Procedure challenging Ext.P4

order of injunction. It is submitted that after the filing of the Original Petition, an application was filed by the plaintiff to implead the petitioner as an additional defendant. The Petitioner can also approach the trial court to vacate the interim order of injunction. Without resorting to the alternative remedy, the Petitioner is not entitled to invoke the jurisdiction of the High Court under Article 227 of the Constitution of India. Sri.Chitambaresh submitted that the Petitioner could not approach the trial court as he was not a party to the suit. The counsel also submitted that no fetter can be placed on the jurisdiction of the High Court under Article 227 of the Constitution. If the order is found to be without jurisdiction and wholly illegal, nothing prevents the High Court to set aside the order invoking Article 227. He also submitted that the scope of the order of injunction is so wide that the plaintiff can say that any successful bidder is the benami or agent of the defendants. It is pointed out that the plaintiff waited till the opening of the tenders and when he realised that the tender submitted by the petitioner was the highest, the plaintiff produced the order of injunction before the Devaswom authorities. Sri.Krishna Menon, the learned counsel appearing for the Devaswom submitted that the Devaswom is also aggrieved by the order of injunction and that if the injunction continues, thousands

of devotees would be put to prejudice and irreparable injury.

9. At first, the question of maintainability of the Original Petition is to be considered. In **Surya Dev Rai V. Ram Chander Rai and others: AIR 2003 SC 3044,** the Supreme Court, inter alia, considered the scope of Article 227 of the Constitution of India and laid down the principles. The following excerpts are relevant in the context of the present case:

> "25. .....In exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior Court or Tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction may substitute such a decision of its own in place of the impugned decision, as the inferior Court or Tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised suo motu as well."

"26. In order to safeguard a mere appellate or revisional jurisdiction being exercised in the garb of exercise of supervisory jurisdiction under Art. 227 of the Constitution, the Courts have devised self- imposed rules of discipline on their power. Supervisory jurisdiction may be refused to be exercised when an alternative efficacious remedy by way of appeal or revision is available to the person aggrieved. The High Court may have regard to legislative policy formulated or experience and expressed by enactments where the legislature in exercise of its wisdom has deliberately chosen certain orders and proceedings to be kept away from exercise of appellate and revisional jurisdiction in the hope of accelerating the conclusion of the proceedings and avoiding delay and procrastination which is occasioned by subjecting every order at every stage of proceedings to judicial review by way of appeal or revision. So long as an error is capable of being corrected by a superior court in exercise of appellate or revisional jurisdiction though available to be exercised only at the conclusion of the proceedings, it would be sound exercise of discretion on the part of the High Court to refuse to exercise power of superintendence during the pendency of the proceedings. However, there may be cases where but for invoking the supervisory jurisdiction, the jurisdictional error

committed by the inferior court or tribunal would be incapable of being remedied once the proceedings have concluded."

"38. (4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly

and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and /or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis."

"39. .....The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But

there may be cases where a stitch in time would save nine'. At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge."

10. In **Radhey Shyam and another** v. **Chhabi Nath and others: (2009) 5 SCC 616,** the Supreme Court held that "the essential distinctions in the exercise of power between Articles 226 and 227 are well known and pointed out in **Surya Dev Rai** and with that we have no disagreement." However, a different view was taken with respect to the jurisdiction under Article 226 of the Constitution.

11. In **Jai Singh and others** v. **Municipal Corporation of Delhi and others: (2010) 9 SCC 385**, it was held thus:

"The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this article is, in some ways, wider than the power and jurisdiction under Article

226 of the Constitution of India. It is, however, well to remember the well-known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well-recognised constraints. It cannot be exercised like a "bull in a china shop", to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice."

12. In **State of Gujarat etc.** v. **Vakhatsinghji Vajesinghji Vaghela and others : AIR 1968 SC 1481**, the Constitution Bench of the Supreme Court held thus:

"Article 227 of the Constitution gives the High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any Act of the State Legislature. The Supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeing that they obey the law. "

13. In **Celina Coelho Pereira and others** v. **Ulhas Mahabaleshwar Kholkar and others: (2010) 1 SCC 217**, the Supreme Court relied on the decisions in **Bathutmal Raichand Oswal** v. **Laxmibai R. Tarta : (1975) 1 SCC 858, State** v. **Navjot Sandhu: (2003) 6 SCC 641** and **Shamshad Ahmad** v. **Tilak Raj Bajaj: (2008) 9 SCC 1** and held that the High Court cannot in the guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal and the jurisdiction cannot be exercised as the cloak of an appeal in disguise. Though the powers of the High Court under Article 227 are very wide and extensive over all courts and tribunals, such powers must be exercised within the limits of law. The power is supervisory in nature. The powers are required to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts and inferior tribunals within the limits of law.

14. In **Abdul Razak (dead) through LRs. and others** v. **Mangesh Rajram Wagle and others: (2010) 2 SCC 432** the Supreme Court relied on the decision in **Syed Yakoob** v. **K.S.**

Radhakrishnan: AIR 1964 SC 477 and **Surya Dev Rai** v. **Ram Chander Rai** and set aside the order of the High Court on the ground that the High Court did not follow the principles laid down in those decisions with respect to jurisdiction under Article 226 and Article 227 respectively.

15. In **Vijayappa Kurup** v. **Padmanabhan: 2009 (2) KLT 939**, the Division Bench held:

> "It is trite that the jurisdiction of this Court under Art. 227 is a visitorial jurisdiction. The said jurisdiction is not to be invoked for correcting every order which is passed by a Subordinate Court even if the order is found to be wrong. The supervisory jurisdiction under Art. 227 is invoked only when the order passed by the lower court can be said to be without jurisdiction or per se illegal in the sense that it violates clear provisions of law- statutory or settled. The supervisory jurisdiction can also be invoked when the order passed by the court below is so wholly unreasonable that it can be branded as a perverse order in the sense that such an order will not be passed by any person having reasonable learning and training in law."

16. In the light of the principles laid down in the aforesaid decisions, let us examine whether the jurisdiction under Article 227 should be exercised in the present case. The Devaswom is not made a party to the suit. The order of injunction affects the right of the Devaswom to auction the right to take photographs by inviting tenders. The plaintiff has no cause of action against the Devaswom. Devaswom is not a party to the agreement between the plaintiff (2nd respondent) on the one hand and the defendants (Respondents 3 and 4) on the other. The relief sought for in the suit is based on the agreement. The Devaswom is not bound by the terms of the agreement. The plaintiff is not entitled to ask for a relief against the Devaswom. A relief which could not be directly sought for by the plaintiff against the Devaswom is aimed at by seeking the injunction against respondents 3 and 4. By granting the injunction, the Devaswom is prohibited from auctioning the right to the highest tenderer to engage photographers for rendering service to the worshipping public. The plaintiff has no right to continue to engage in the work after 31-5-2011, unless he bids for the highest amount. The amount quoted by the plaintiff for the period from 1-6-2011 to 31-5-2012 is only ₹34,75,000/- as against the highest tender submitted by the petitioner for ₹85,55,555/-. Even if the Petitioner is

prevented from submitting the tender, the plaintiff would not get the right for the aforesaid period since K.V.Pramod had submitted the tender for ₹82,53,313/-. If the injunction continues to be in operation, it would have the result of preventing the Devaswom from granting the right to the highest tenderer.

17. The Petitioner is also not made a party to the suit. Though mention is made about Avani Studio in the plaint and in the affidavit accompanying the interlocutory application, neither Avani Studio nor the Petitioner is made a party to the suit. The prayer for injunction is widely worded so that the plaintiff could say that any highest tenderer is an agent, relative, friend or benamidar of the defendants. Except the averment in the plaint, there is no material to indicate that the Petitioner is an agent, relative, friend or benamidar of the defendants.

18. Even if all the averments in the plaint are taken as true, and even if it is taken that the petitioner is an agent, relative, friend or benamidar of the defendants, the plaintiff is not entitled, prima facie, to get an order of injunction as prayed for. At best, the plaintiff could sue the defendants for damages. It is averred by the plaintiff that the

agreement between him and the defendants was made agreeing to pay a huge sum of money to the defendants, only on taking into account the probable income which the plaintiff may derive after securing the tender for the years 2011-12 and 2012-13 under the Devaswom. How could the plaintiff anticipate that he would get the right under the Devaswom for the years 2011-12 and 2012-13? The Devaswom could only auction the right by inviting tenders. Anybody could submit the tender, who satisfies the conditions. Any such person could be the successful tenderer also. The plaintiff and the defendants, by executing an agreement between them, cannot bind the Devaswom in respect of the tenders for the subsequent years. Such an agreement would not bind the tenderers as well.

19. What should the Devaswom do if the tender submitted by the Petitioner is rejected? Could it grant the right to the plaintiff? Certainly not. If so, what is the benefit the plaintiff would derive? The plaintiff could only prevent the petitioner from deriving the right. Can such a situation be created by granting the interim injunction of the nature granted by the court? Can the right of the Devaswom be curtailed when there is no privity of contract between the Devaswom and the plaintiff? The answers to these questions would lead to the

only conclusion that the trial court was not justified in granting the order of injunction.

20. Prima facie, it would appear that the agreement entered into between the plaintiff and the defendants cannot be specifically enforced. If so, an injunction cannot be granted in favour of the plaintiff, going by Section 41(e) of the Specific Relief Act which provides that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced.

21. It would appear that the trial court did not advert to the averments in the plaint and in the affidavit accompanying the application for temporary injunction. Had the same been adverted to, the trial court would not have granted an ad interim order of injunction without hearing the Petitioner and the Devaswom. The trial court also would not have granted injunction which would result in causing irreparable injury to the Devaswom, the tenderers and the worshipping public.

22. Applying the principles laid down in the aforesaid

judgments of the Supreme Court and the High Court to the facts of the present case, I am of the view that in the interests of justice, it is essential to exercise the jurisdiction under Article 227 of the Constitution to set things right. The contention raised by the plaintiff (2nd respondent) that if the interim injunction is vacated, the suit would become infructuous and therefore no interference should be made, is unsustainable. It is not the function of the court to keep in tact the orders which are liable to be vacated, only for the purpose of avoiding the suit becoming infructuous. If no injunction should be granted, nevertheless it was erroneously granted, the court is bound to vacate the same, unmindful of the consequences. If the suit becomes infructuous as a consequence of vacating the interim injunction, that event would take place. It cannot be attributed as the error committed by the court. Instances are galore where unmerited suits would be filed by litigants and they may become successful in getting an interim injunction. By the continuance of the interim injunction, the object sought to be achieved would, to a great extent, achieved by the plaintiff. The suit may be taken up for trial after a few years. By that time, the defendants would be put to irreparable injury and great hardship and they would not be able to regain the position which they occupied before the suit, even if the suit is

subsequently dismissed. The courts should be cautious in granting interim injunction in such cases. The practice of applying for interim injunction, grant of which would have the immediate effect of adversely affecting persons who are not parties to the suit, should be deprecated. Courts should, after carefully considering the pleadings and documents, refuse interim injunction in such cases. Courts should not be allowed to be used as a venue for oppression of persons, without even making them parties to the suit. Even now, the Devaswom is not made a party to the suit. Though an application for impleading the petitioner was filed by the plaintiff, the application has not been allowed. Thus, the petitioner is not a party to the suit at present. If the order of injunction is not set aside, the petitioner, the Devaswom and the worshipping public of Guruvayur temple would be put to irreparable injury. The balance of convenience is certainly in their favour and against the plaintiff.

23. In the facts and circumstances of the case, I am also not inclined to accept the contention that the Petitioner should file an appeal challenging the ad interim order of injunction and only thereafter, if unsuccessful, he can approach the High Court invoking its jurisdiction under Article 227 of the Constitution. The order of

injunction, on the face of it, is illegal and unsustainable. The plaintiff is not entitled at all to get the interim injunction as prayed for and which was granted. If the interim injunction is not vacated, though the plaintiff would not gain anything, persons who are not parties to the suit would be adversely affected. By the continuance of the order of injunction, the maximum that the plaintiff could aspire is to get sadistic pleasure.

For the aforesaid reasons, the Original Petition is allowed and Exhibit P4 order of injunction is set aside.

(K.T.SANKARAN)
Judge

ahz/