

(2003) 09 MAD CK 0109

In the Madras High Court

Case No : Writ Petition No. 3390 of 2002

A. Mukram Sheriff

APPELLANT

Vs

The Chief Executive Officer, Tamil Nadu Wakf Board and
Moinuddin Sheriff

RESPONDENT

Date of Decision : 19-09-2003

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2003) 09 MAD CK 0109

Hon'ble Judges : A.K. Rajan, J

Bench : Single Bench

Advocate : R. Krishmoorthy, for M.A. Kalam, for the Appellant; R. Parthasarathy, for Mohan Parasaran, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Rajan, J.—The petitioner prays for issuance of a writ of Certiorari to call for the records from the first respondent relating to the order

passed by the first respondent in Lr.No. Rc.No. 5024/C2/83/CH dated 01.02.2002 vide resolution item No. 3/2002 and quash the same.

2. In the affidavit filed along with the affidavit, it is stated as follows:

The Hazarath Motti Baba Durgah situate in Pantheon Road, Chennai is a Wakf property. The petitioner's father Dastagir Sheriff who died on

04.12.1999 was managing the wakf and after his death, the petitioner was managing the same. The petitioner was regularly paying contribution to

the Tamil Nadu Wakf Board and is conducting Urs function and submitting accounts to the Wakf Board. The petitioner's father Dastagir Sheriff,

as a Muthavalli, filed a suit O.S. No. 4522 of 1983 on the file of City Civil Court, Madras against one Mohamed Sheriff, the brother of the said

Dastagir Sheriff, for a declaration that the petitioner's father was the sole Muthavalli of the said Durgah and for permanent injunction restraining the

said Mohamed Sheriff from interfering with the administration of the Durgah. The suit was decreed as prayed for on 18.04.1986. But on appeal in

A.S. No. 313 of 1986, the first appellate Court allowed the appeal on 30.10.1987 on the ground that the question relating to Muthavalli has to be

settled through the Wakf Board, without the Wakf Board, the question of sole Muthavali cannot be decided and hence, the suit is not maintainable.

Thereafter the petitioner's father filed second appeal in S.A. No. 289 of 1988 on the file of this Court and this Court dismissed the second appeal

on 30.04.1987. Aggrieved by the said judgment, a SLP was filed before the Supreme Court in SLP. No. 6170 of 1997 which was admitted and

numbered as Appeal No. 977 of 1998. Subsequently that appeal was dismissed in the year 2000, without issuing any direction.

3. It is further stated that right from 1959, the petitioner's father was the sole Muthavalli and after his death the petitioner has been managing the

Wakf along with his brothers by paying contributions and submitting accounts to Wakf Board. On 24.08.2001, the respondent served a notice

stating that one Janab A. Mohamed Sheriff was appointed as Joint Muthavalli for Hazarath Mothibaba Durgah, along with the petitioner and his

brothers and directed to submit accounts to Tamil Nadu Wakf Board. That was challenged in W.P.No. 16305 of 2001. This Court passed an

order granting order of status quo, later on, the writ petition was dismissed on 03.10.2001 on the ground that it was only an intimation as to the

legal position and the respondent had not issued any independent orders. The said Mohammed Sheriff died on 22.08.2000, after his death, the

petitioner was managing the Durgah and conducting Urs Festival along with his brothers as per the deed of Wakf Management executed by the

former Muthavalli, even during the life time of Mohamed Sheriff. Since the first respondent has not come forward to open the hundials, inspite of

several reminders, the petitioner has approached this Court by filing W.P.No. 1576 of 2002 and this Court posted the matter on 05.02.2002 for

arguments. While so, on 04.02.2002, the petitioner was served with a notice informing that the Tamilnadu Wakf Board in its resolution has

recognised one Moinuddin Sheriff son of Mohamed Sheriff, along with the petitioner and his brothers as Joint Muthavali. That order is not

maintainable and that is being challenged in the present writ petition.

4. The first respondent filed a counter stating that earlier, a suit was filed by the father of the petitioner against the brother of the petitioner's father

(Mohammed Sheriff was the brother of Dastagir Sheriff) for declaration that the petitioner's father was the sole Muthavali and was managing the

Wakf. The High Court in S.A. No. 289 of 1988 has held that Dastagir Sheriff has not proved that he was the sole Muthavali but Mohamed Sheriff

has proved that he was also joint Muthavali or a Junior Muthavali. The communication given by Wakf Board is only by way of recognition of the

parties as Joint Muthavalli as per the orders of this Court. The status of the parties have been settled once for all by the competent civil Court.

Therefore, the petitioner cannot deny the same and claim that he is the sole Muthavalli. The second respondent has been requesting the Wakf

Board to recognise him as Joint Muthavali and order was also passed. Since the petitioner lost the second appeal as well as SLP before the

Supreme Court. The impugned order was passed after hearing the learned counsel for the petitioner also. The petitioner contended that as per

Section 205A Mohammadan Law as stated by Mullah, there is a specific bar to the succession to the office of Muthavalliship. In fact if the bar

operates against the legal heirs of Mohammed Sheriff it will operate against the writ petitioner and his brothers as well who are the legal heir of

Dastagir Sheriff when Mohammed Sheriff was alive, even after the death of Dastagir Sheriff, in which case, the said Mohamed Sheriff would

become sole Muthavalli. Further averments found in Wakf Nama is totally irrelevant. The Wakf is not established by a document but it is a Wakf

by user; Wakf Nama which the petitioner refers to obviously, a document created by Dastagir Sheriff. It is self declaration by the petitioner's

father which is contrary to the decisions of the Courts. If the petitioner is aggrieved by the order of the Wakf Board, he should have moved the

Wakf Tribunal by way of appeal. The writ proceedings under Article 226 is not available legally and it is abuse of process of the Courts.

5. Heard learned counsel for the parties.

6. Learned Senior Counsel Mr. R. Krishmoorthy appearing for the petitioner submitted that the subject matter of the writ petition is Wakf by user.

The petitioner's grand parents along with others were buried in that place and

thereafter it is being worshiped as Durgah. The father of the petitioner was the sole Muthavalli and after his death the petitioner became the Muthavalli. In fact when the second respondent's father Mohammed Sherif objected to the management, the father of the petitioner filed O.S. No. 4522 of 1983 and obtained a decree for declaration and the petitioner's father was the sole Muthavali. But that was set aside and reversed in the first appeal and was confirmed in the Second appeal. Further, in the year 1949, the grand mother of the petitioner settled the property in the name of Dastagir Sheriff and Mohamed Sherif and in that the Durgah was situated and that has become wakf property by user. The petitioner's father has executed Wakf Nama before his death. In Wakf Nama, he has clearly stated that he was the sole Muthavali and after his death, his successor will become the sole Muthavalli and also has given the various charitable purposes for which, the income of the Wakf Board has to be used. The second respondent herein who is the son of Mohamed Sheriff has no right whatsoever in the Wakf. He cannot be appointed as Joint Muthavalli since the petitioner alone is the sole Muthavali. Learned counsel further submitted that even assuming that the petitioner's father as well as the second respondent's father were joint Muthavallis, after the death of the father of the petitioner Dastagir Sheriff, Mohamed Sherif was not managing the Wakf property but, it is only the petitioner who was managing the Wakf property. Therefore, the petitioner has got the right of Muthavalliship and after the death of Mohamed Sherif, even that right which Mohamed Sherif had also been lost. Muthavalliship does not pass by succession but passes only by survivorship as per Section 205-A of Mullah's Mohammadan Law, Muthavalliship is not succeeded and, therefore, the second respondent has no right to become the Muthavalli. Therefore, the order passed by Wakf Board appointing the second respondent as joint Muthavalli is not legally sustained and hence invalid.

7. Learned counsel appearing for the respondents submitted that Dastagir Sheriff and Mohamed Shriff were brothers. The property originally belonged to the grandfather of the petitioner and the second respondent. After the grand parents died, they were buried in that property, and it has become the worship place as Durgah and this Wakf by user was managed by both petitioner's father and second respondent's father jointly.

Therefore, they were joint Muthavallis. u/s 205A of Mullah's Mohammadan's Law. Muthavalliship passes by survivorship only when there is no

custom contrary to that. If there is any proof for customary right for joint Muthavalli or succession of Muthavalli, Section 205-A does not apply.

Further, if that provision is applied, the petitioner could not have become the Muthavalli at all, since on the date of death of his father, the second

respondent's father was alive. Therefore, the second respondent's father alone could have become the sole Muthavalli and after his death, the

second respondent alone would be entitled to be the sole Muthavalli. Since it was not the case of the respondents, and since the Courts also found

that the Durgah was jointly managed by both petitioner's father and the second respondent's father, the second respondent does not claim that he

is the sole Muthavalli. Further all this arguments regarding Section 205A have been advanced before the Wakf Board and only after considering all

these circumstances, the Wakf Board has rejected the contentions of the petitioner and appointed the second respondent as joint Muthavalli.

Therefore, the order of the Wakf Board is not illegal and hence, the writ petition is liable to be dismissed.

8. From the facts as stated above, it is clear that the petitioner's father Dastagir Sherif and the second respondent's father Mohammed Sheriff

were brothers; and under Ex.B.1 the property had been settled in favour of both of them by petitioner's grand mother in the year 1949. But

subsequently, the property is stated to have become a ""Wakf by user"". Further, there was proceedings in various Courts upto Supreme Court and

in all these proceedings, the property is referred to as ""wakf by user"". Therefore, this Court does not go against such description that the property

is a Wakf by user. Further none of the parties to the suit dispute that the property is not a wakf.

9. Admittedly, Dastagir Sheriff was Muthavalli; The case of the petitioner is that he was the sole Muthavalli; that the second respondent claims that

Dastagir Sheriff was joint Muthavali along with Mohamed Sherif. In the Second Appeal No. 289 of 1988, the substantial questions of law framed

at the time of admission of the above said second appeal are as follows:

1) Whether the concept of ""Muthavalli"" has been properly constructed by the Court below?

2) Whether the onus was not on the respondent to prove that he was the joint "Muthavalli"?

3) Whether Ex.B.7 is admissible in evidence at the appellate stage in view of the stand taken by the appellant?

4) Whether the appellant has perfected his right as a sole "Muthavalli" by adverse possession?

This Court has ultimately held as follows:

.... On question of law 1 to 3, I answer the same as follows:-

The lower appellate Court has properly understood the concept of "Muthavalli", and has rightly found that the plaintiff, on evidence, has not proved

that he is the sole "Muthavalli" or that he is in management of the Durgah. The lower appellate Court has also rightly found that on evidence,

respondent has proved that he is also a joint "Muthavalli" or a junior "Muthavalli". On question No. 3, I find that the lower appellate Court has

properly exercised the discretion in admitting additional evidence. In fact, the lower appellate Court has marked as Ex.B.7 on the ground that to

pronounce the judgment and also to find out the real truth, the document will be of much use. From Ex.B.7, it is clear that the respondent was also

managing the affairs of the Durgah and was maintaining accounts and those accounts were handed over to Income Tax and Sales-tax Officers and

approved by them as genuine. Question Nos. 1 to 3 are found against the appellant.

On question NO. 4, I find that the plaintiff has not put forward a case anywhere in the plaint that he has title to the "Muthavalliship" by prescription.

Plaintiff has put forward a case of prescription as to admit that the defendant is also a owner and it is against him he has prescribed his title. No

such case is put forward anywhere in the plaint. Even in the year 1973, as evidenced by Ex.B.3, the plaintiff and defendant have jointly advertised

about the celebration of festival in the Durgha. The suit was filed in the year 1983. There cannot be any question of any prescription within that

time. Further, in the earlier portion of discussion in this judgment, I have held that the defendant has been participating in the function, and that itself

is sufficient to hold that there cannot be any prescription by plaintiff. Question No. 4 is also, therefore, found against the appellant".

10. Therefore, the issues that are to be decided for disposing the writ petition

had already been finally decided in the second appeal as cited above. That is, the Durgah was managed by joint Muthavallis, (the petitioner's father and the second respondent's father). Therefore, after the death of the second respondent's father, the second respondent is entitled to become Muthavalli. Further, the impugned order is a well considered one. The Wakf Board has also taken into account the arguments put forth by the petitioner on the basis of 205-A of Mullah's Mohammadan's Law. As rightly stated by the Wakf Board, if the argument of the learned counsel for the petitioner is to be accepted, the petitioner would not have been the Muthavalli on the death of his father. But the second respondent's father Mohammed Sheriff alone would have been the sole Muthavalli and after his death, the second respondent becomes the sole Muthavalli. Therefore, the argument of the learned counsel for the petitioner that the Muthavalli does not pass by succession, is not acceptable. The petitioner has no prescriptive right over the office of the Muthavalliship. Only by succession the petitioner became Muthavalli.

11. The reliance of the petitioner on the Wakf Nama executed by his father is not acceptable. That deed is not valid at all. A property can be dedicated as Wakf only by the owner of the property. When the grandmother of the petitioner settled the property equally in favour of the her sons Dastagir Sherif and Mohammed Sherif, one of them cannot convert the entire property as Wakf property. Further, the case of the petitioner is that the property was a Wakf property for a long period. If the property had already become Wakf property, the father of the petitioner had no right to convey the wakf property by a deed and call it as a Wakf management deed and call himself as ""Wakif"". Only a person who create wakf is called as ""Wakif"" therefore, the contents of the documents ""Management Deed"" is of no value and that cannot be looked into for any purpose. For all practical purposes it is non-est in law.

12. Inasmuch as this Court has found in the second Appeal that the petitioner's father and the second respondent's father were joint Muthavallis and inasmuch as after the death of the petitioner's father, the petitioner has been appointed as Muthavalli and after the death of Mohammed Sheriff the second respondent as his son is entitled to become joint muthavalli. Therefore, the order of the Wakf Board, appointing the second respondent

as joint muthvalli is perfectly legal and justifiable and there is no reason to set aside the same and hence, the writ petition is devoid of merit and the same is dismissed.