(1992) 12 MAD CK 0003

In the Madras High Court

Case No : S. A. No. 844 of 1982

Abdul Majeed APPELLANT

Vs

Syed Hussain Wakf by Power Agent Mr. Abdul Latif RESPONDENT

Date of Decision : 03-12-1992

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 92

Citation : (1992) 12 MAD CK 0003

Hon'ble Judges : Abdul Hadi, J

Bench : Single Bench

Advocate : P. Veeraraghavan, for the Appellant; R. A. Sundaravaradhan for Mr. P. B. Ramanujam, for the Respondent

Final Decision : Dismissed

Judgement

Abdul Hadi, J.—The first defendant is the appellant in this second appeal; The respondent plaintiff is one Syed Hussain Wakf represented

by its Power Agent Abdul Latif. The respondent filed the suit O. S. No. 6173 of 1976 on the file of the V Assistant Judge, City Civil Court,

Madras for recovery of possession of the suit building from the appellant had two other defendants. According to the plaintiff, the first defendant is

the tenant under the plaintiff Wakf and the second and third defendants are sub tenants under the first defendant. The suit was dismissed on the

ground that the plaintiff Wakf is a private trust to which G. O. Ms. No. 2000, Home, dated 16tb August 1976 is not applicable. If the said G. O.

is applicable. The Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 will not be applicable to, the suit building and the present suit for

ejectment in a Civil Court is maintainable.. But, on appeal by the plaintiff, the lower appellate court in A. S. No. 153 has decreed the suit on the ground that the plaintiff Wakf is a public trust coming under the said G. O. Aggrieved by the said decree, the first defendant alone has preferred

this second appeal impleading the plaintiff alone as respondent.

2. Learned counsel for the appellant no doubt initially began to ague on one other question namely that the plaintiff Wakf can be represented only

by its mutawalli and not by its alleged Power Agent Abdul Latif. But this point has not been taken as one of the grounds in this second appeal and

so, I did not allow him to argue on this point.

3. So, the only question to be decided, is regarding the above said applicability or otherwise of the above said G. O. No. doubt, the suit was filed

some months prior to the above said date 16.8.1976, when the said G. O. came into force. Prior to 16.8.1986, there was another earlier G. O.

dated 12.8.1974 which gave exemption to all religious trusts and charitable institutions and not merely public religious or charitable trusts. But,

since the stand of both the parties in this proceedings is that only G. O. Ms. No. 2000 dated 16.8.1976 is applicable. I proceed only on that

footing.

4. Regarding the above said question of the applicability or otherwise of G. O. Ms. No. 2000, the learned counsel for the appellant initially

submitted that there was no specific plea in this regard. In the plaint, the relevant plea is.

the suit premises being the Wakf property is exempt from Madras Buildings (Lease and Rent Control) Act.

According to the said counsel, there is no specific plea that the suit property was a public Wakf property. In the written statement, I find that the

first defendant pleads thus:

even assuming without admitting the suit property is a Wakf property, it being a private Wakf, the same has been released from the exemption

granted from the purview of the of the Rent Control Act.

The said counsel''s submission is that even subsequent to this plea in the written statement, no step was taken by the plaintiff to amend the plaintiff

or to file a reply affidavit stating that the suit Wakf was a public Wakf only. But, I do not think that in the light of the plea taken in the written

statement, it is absolutely necessary that the plaintiff should necessarily and specifically raise the plea that the suit Wakf is a public Wakf either by way of amending the plaint or by filing reply statement. Once the defendant takes up the plea that it is a private Wakf, then it is only a matter for

proof to be given by the plaintiff to substantiate that the suit Wakf is not a private Wakf and but only public Wakf and that has been actually done

at the trial.

5. No doubt, the learned counsel for the appellant also went to the other extreme, by saying that the G.O. exempts only ''trusts'' in the strict legal

sense and not a Wakf which is admittedly not a trust in the strict legal sense, since in a Wakf. Property vests not in any trustee but in God himself

and the mutawalli is only a human agency to carry out the objects of the Wakf on behalf of the Almighty. I am unable to appreciate this contention.

The intention with which the above said G. O. is issued is quite clear and it is applicable to all public religious or charitable endowments of Hindus,

Christians and Muslims. Just for an analogy, even under S. 92 of the Code of Civil Procedure, though the terms ''trust'' is used, Courts have held

that it would apply even to a Wakf vide Muhammad Kazim v. Ali Saghir 1932 11 Pat.288 (33) A.P.33 and it has also been held in Saratchandra

v. Rabindranath 1957 AC 11 that the word trust as used in S. 92, C. P. C. is not used in the technical sense and would include Hindu or

Muhammadan religious endowments. Therefore, I hold that the G. O. is applicable even to Wakfs. No. doubt, as per the very term of the G. O. it

would apply only to public Wakfs because the G. O. says:

the Governor of Tamil Nadu hereby exempts all the buildings owned by the Hindu, Christian and Muslim religious public trusts and public

charitable trusts from all the provisions of the said Act. (Tamil Nadu Act 18 of 1960)

6. Then, it is only to be seen whether the finding of the lower appellate court that the suit Wakf is a public Wakf is correct. The documents that

were relied on by the first appellate court for holding that it is a public Wakf are Exs.A1, A4, A5 and A7. EX.A7 which was marked at the first

appellate stage is only a certificate given by the Secretary of Tamil Nadu Wakf Board that the suit Wakf is a public Wakf. The learned counsel for

the appellant contends that this document should not have been relied on at all. Anyway, I do not think it necessary to rely on Ex.A7 at all in the

present case. I think Ex.A-4 alone is enough to hold that the suit Wakf is a public

Wakf. Ex.A4 is the proforma report prepared by the Wakf

Commissioner pursuant to the relevant provision under the Wakf Act and the consequent survey that was conducted in about 1955 after Wakf Act

was enacted. ExA.4 which is the proforma relating to the suit Wakf mentions inter alia the following details in the respective columns

The property that is referred to in column 13 is the suit building The above said column 4 gives out the name of the suit Wakf. Regarding the nature

of the Wakf, column 6 says that it is religious and charitable. Under the Muslim Law, Wakf-alal-aulad is a private Wakf and any Wakf which is not

a Wakf-alal-aulad will be a Public Wakf. While describing the nature of the Wakf in column 6 above, though within bracket and underneath the

expression nature of the Wakf, different kinds of Wakfs are mentioned including Wakf-alal-aulad, on the corresponding portion of the column

Wakf-alal-aulad is not mentioned. This clearly indicates that the said Wakf is only a public Wakf. Wakf-alal-aulad is no doubt or two kinds.

Wakf-alal-aulad simplicitor is where beneficiaries are only the settlor''s family and his descendants, In a composite Wakf-alal-aulad apart from the

benefit to the settlor and his defendants there would be public beneficiaries also. But, in the present case it is nobody''s case that the beneficiaries

are either wholly or partly the settlor''s family and his descendants. Further, the above said column 7 of the proforma report also says that the

object of the Wakf is the performance of Fathehah of MeeladiNabi and Meelassani. That means that the Wakf has been created for the purpose

of Fathehah in memory of the prophet and also for the Saint Sheik Khadir Jeelani. When such is the object of the Wakf, the Wakf cannot be called

a private Wakf. The learned counsel for the respondent also drew my attention to the case Kutub Uddin Vs. Waqf Alalaulad of Mt. Fatima

Begam, where it has been held that the performance of fatehas can be held as religious and the dedication of property for the performance of

fatehas is valid. Therefore, it is clear that the suit property is a public Wakf. The other document Ex.A5 has no relevance to decide the question

since it is only a receipt given by the Wakf Board for the contribution paid to the Wakf Board under the Act. The other document Ex.A1 (dt.

21.9.1960) purports to be a document transferring the mutawaliship from Syed Ghulam Dastagir to Syed Hussain. The said Syed Ghulam Dastagir is mentioned as mutawalli in the proforma report also. In Ex.A1 also, it is mentioned that the property is a Wakf in favour of Holy Prophet

Mohammed and Hazarath Sheik Abdul Khader Jeelani, it having been dedicated for the purpose of fathema on the 12th day of Rabiul Awal and

11th night of Rabuissani. The learned counsel for the appellant, no doubt, sought to lay emphasis on certain expressions used in Ex.A1 as if the

property belonged to the transferee absolutely and on certain deposition given by P.W.1 the above said Abdul Latif regarding the objects of the

Wakf. On reading the whole of the document it is clear to me that the transferor therein admits that the suit property is only a Wakf property. That

apart, any expression used in Ex.A1 or the above said deposition of P.W.1 cannot alter the original character of the property as borne out by

Ex.A4. Anyway, relying only on Ex.A4 it can be held safely that the suit building is only a public Wakf property. The decision cited by the learned

counsel for the appellant The Idol of Sri Kannika Parameswari Amman v. The Educational Trustee Co. Ltd. 1990-1-L.W.291 has strictly no

application to the present case. Therefore the trial court committed substantial error of law in coming to the conclusion that the suit Wakf is not a

Public Wakf, despite what is contained in Ex.A4 and that the lower appellate court is perfectly right in the conclusion it reached. Therefore, this

appeal is dismissed with costs.

