

(2005) 02 CAL CK 0062
In the Calcutta High Court
Case No : C.O. No"s. 2688 and 2744 of 2002

Abul Kalam Mallick and Others

APPELLANT

Vs

Abdul Aziz Mallick and Others

RESPONDENT

Date of Decision : 25-02-2005

Acts Referred:

Constitution of India, 1950 — Article 227
Waqf Act, 1995 — Section 22, 25, 67(4), 67(6), 69(3)

Citation : (2005) 4 CHN 557

Hon'ble Judges : Joytosh Banerjee, J

Bench : Single Bench

Advocate : Bidyut Kr. Banerjee, Shila Sarkar and Arnab Roy, for the Appellant;
Sardar Amjad Ali, S. Munsu and N.S. Alam, for the Respondent

Final Decision : Allowed

Judgement

Joytosh Banerjee, J.—The present hearing arises out of an application under Article 227 of the Constitution of India and the same is directed against judgment and order dated 6th August, 2002 passed by the Addl. District Judge, 3rd Court, Howrah in Misc. Appeal No. 180 of 2000 reversing the order dated 11th July, 2000 passed by the Civil Judge (Jr. Division), 7th Court, Howrah in T.S.No. 64 of 2000.

2. Briefly stated the case of the petitioners is that as plaintiffs brought a suit being T.S. No. 64 of 2000 in the Court of Civil Judge, (Jr. Division), 7th Court, Howrah against the defendant/O.P. for a decree of declaration that the defendants/O.Ps. had no right, title and interest in the property comprised in Dag Nos. 672, 924 and 926 of Khatian Nos. 281 and 283 of Mouza Telehati, P.S. Jagatballavpur, District-Howrah measuring about 16 bighas 2 cottah and the said suit property consisted of a tank known as "Mahato Tank" and its bank and land described in the Schedule of the plaint and also for permanent injunction and other reliefs. In the said suit, the plaintiffs/petitioners claimed absolute title over the suit properties by purchase and that the predecessor-in-interest (Md. Ismail

Mallick) of the plaintiffs/petitioners obtained permanent lease on 11th March, 1938 from Atiar Rahaman Mallick and others pursuant to a permission granted by the then Commissioner of Wakf in 25-"" February, 1938 to the administrative committee of Bargachia Railallia Wakf Estate upon payment of selami to pay rent of Rs. 20/- per annum. On the death of the said predecessor-in-interest Md. Ismail Mallick his interest devolved upon his only son Md. Sultan Mallick. Subsequently, the plaintiffs/petitioners acquire the interest by purchase. It was alleged on 28th April, 2000 some persons came at the said property and threatened the plaintiff/petitioners with forcible dispossession. The plaintiff/petitioners, in this background were constrained to file the suit as such action on the part of the defendants clouded the title of the plaintiffs. It is further alleged that immediately after filing of the suit, the plaintiff's made an application for injunction and the Trial Court below by its order dated 23rd May, 2000 granted an ad interim order of injunction directing the parties to maintain status quo in respect of the suit properties. The defendants/O.Ps. after service of notice contested the application by filing a written objection. The defendant/O.Ps. filed an application u/s 90 of the Wakf Act, 1995 and plaintiffs/appellants filed a written objection against such petition contending, inter alia, that the petition u/s 90 of the Wakf Act was not maintainable as such provision had no manner of application in the facts and circumstances of the present case. By Order No. 9 dated 10th July, 2000 and Order No. 10 dated 11th July, 2000, the Trial Court (Civil Judge, Jr. Division, 7th Court, Howrah) dismissed the application u/s 90 and allowed the injunction application. The defendants/O.Ps. preferred an appeal against such order being Misc. Appeal No. 180/2000. Learned Appellate Court below, allowed the appeal holding, inter alia, that the property in suit appeared to be Wakf property and the same belonged to Mutawalli of Md. Abdul Aziz Maliick Wakf Estate and having regard to the provisions of Section 85 of the Wakf Act, 1995, the Civil Court had no jurisdiction to entertain a suit relating to such suit property and on the basis of such findings set aside the order passed by the Trial Court. In this background, the present application has been filed before this Court with a prayer for setting aside the order passed in the appeal.

3. O.P. No. 1 contested the proceeding by filing affidavit-in-opposition alleging that the suit properties belonged to Ramjau Ali Mallick Wakf Estate which was registered with the Board of Wakf's, West Bengal. The suit properties, which are commonly known as "Mahato Tank", comprised an area measuring about 16 bighas of land. There was another Wakf estate which was enrolled under E.C. No. 228 and the said Wakf estate (E.C.228) moved the Commissioners of Wakfs for leasing out Wakf properties and the said administrative committee managed the Wakf estate got the permission from the Commissioner of Wakf to lease out the Wakf property although the Commissioner was not vested with such authority to grant sanction for transfer of Wakf properties. Besides these through the affidavit-in-opposition the O.P. also denied all the material allegations.

4. The impugned order has given rise to two proceedings. The earlier proceeding being No. 2628 of 2002 is one under Article 227 and it is in connection with the

order by which the learned Appellate Court allowed the application u/s 90 of the Wakf Act, 1995 hereinafter be referred to as the Act and the other proceeding being C.O. No. 2744 of 2002 is against the order passed by the lower Appellate Court in connection with the injunction order passed by the Trial Court. In these proceedings, the only question, which posted for consideration of this Court, is whether there is a total ouster of the jurisdiction of the Civil Courts, through the provision of Section 85 of the Act.

5. Before I proceed further in the matter I should reproduce the language of Section 85 of the Act for better appreciation of the question in issue.

"Section 85. Bar of jurisdiction of the Civil Courts.--No suit or other legal proceedings shall lie in any Civil Court in respect of any issue, question or other matter relating to any Wakf property or other matter which required by or under this Act to be determined by a Tribunal."

It is contended by the learned Counsel of the petitioners that the bar of the jurisdictions of the Civil Courts under the aforesaid provision is not total but is restricted to any dispute, question or other matter relating to any Wakf, Wakf property or other matter which is required by or under this Act to be determined by the Tribunal. In this respect, he has drawn my attention to different sections of the Act where Tribunal is vested with different powers in respect of the Wakf property or related to any Wakf. Thus, he has referred to proviso to Sub-section (4) of Section 67 where the Wakf Board for any reason supersede any committee appointed by the Wakf, any person aggrieved by such order may file an appeal to the Tribunal. He has further referred to proviso to Sub-section (6) of such Section 67 of the Act where a member of the committee removed by the Board may appeal to the Tribunal. He has also pointed out to the provisions contained in proviso to Sub-section (3) of Section 69 of the Act where Wakf Board is vested with the power of framing scheme for removal of the Mutawalli of the Wakf and any person aggrieved by any such order may appeal before the Tribunal. He has referred to the specific provisions of Sub-section (3) of Section 73 of the Act wherein any bank or other person who is under Sub-section (1) of that section to make any payment may prefer an appeal against such order before the Tribunal. In this way, the learned Counsel for the petitioner has also brought to the notice of this Court about certain other provisions where the Tribunal has been vested with the power to deal with some specific questions referring to aforesaid provisions of the Act. It is contended that the Civil Court is not completely denuded of its jurisdiction to decide a question of title etc. in respect of a Wakf property or Wakf under the provisions of Section 85 of the Act.

6. The learned Counsel for the O.Ps., on the other hand, has contended that the language of Section 85 of the Act is clear to show that it is the Tribunal, which alone has got the jurisdiction as to the dispute relating to a Wakf property. In this connection, the learned Counsel has also drawn my attention to the provisions contained u/s 83(1) of the Act, which runs as follows :

"The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a Wakf or Wakf property under this Act and define the local limits and jurisdiction under this Act of each Tribunals."

7. In support of the contention that Section 85 cannot create a total bar to the jurisdiction of the Civil Court, the learned Counsel for the petitioners has referred to the case of State of Rajasthan Vs. Harphool Singh (Dead) Through His L.Rs., . The learned Counsel has placed his reliance on paragraph 11 of the judgment where the Apex Court made the following observation:

"1. The learned Counsel for the appellant strongly relied upon Section 22 and Section 25 of the Act to contend that the order passed by the ADM in exercise of his powers u/s 22 of the Act has become final and the jurisdiction of the Civil Court stands ousted in respect of such matters by virtue of Section 25 and therefore the suit could not have been entertained at all by the Civil Court. Section 25 of the Act stipulates that a Civil Court shall not have jurisdiction in any matter which the Collector is empowered by that Act to dispose of and shall not take cognizance of the manner in which the State Government or Collector or any officer exercise any power vested in it or in him by or under the said Act. Section 22 provides for a summary eviction of any person who occupies or continues to occupy any land in a colony to which he has no right or title or without lawful authority by treating such person as a trespasser in the manner and after following the procedure prescribed therefore. The respondents on the decisions reported in Abdul Waheed Khan v. Bhawani and Firm of Illuri Subbayya Chetty & Sons. v. State of A.P. to substantiate their claim that the bar of suit will not be attracted to a case of this nature, have placed reliance. In our view, the principles laid down in Abdul Waheed Khan case while considering a provision like the one before us, that the bar is with reference to any matter which a Revenue Officer is empower by the Act to determine and the question of title is foreign to the scope of proceedings under the Act, would apply to this case also with all force, that is on the provisions of Section 25 of the Act, as it stands. Even that apart in State of T.N. v. Ramalinga Samigal Madam this Court, after adverting to Dhullabhai case held that questions relating to disputed claims of parties for title to an immovable property could be decided only by the competent Civil Court and that in the absence of a machinery in the special enactment to determine disputes relating to title between two rival claimants, the jurisdiction of the Civil Court cannot be said to have been ousted. In the case on hand, a citizen is asserting a claim of acquisition of title by adverse possession in derogation of the rights and interests of the State in the property in question. In our view, determination of such claims are not only outside the purview of Section 22 which only provides for a summary mode of eviction but in respect of such disputes relating to title to immovable property the jurisdiction of ordinary Civil Courts to adjudicate them cannot be said to have been ousted. The powers and procedure u/s 22 of the Act, in our view, are no substitute for the Civil Court's jurisdiction and powers to try and adjudicate disputes of title relating to

immovable property."

In reply thereto, the learned Counsel of the O.Ps. has submitted in view of the clear provision containing in Section 83 as noted above, the decision of the Apex Court cannot stand in the way of O.Ps. contentions that Section 85 of the Act creates a total ouster of the Civil Court's jurisdiction.

8. Having heard the learned Counsel of both sides in this way and on going through the record and the relevant provisions of the Act I find that the bar of jurisdiction of Civil Courts as envisaged u/s 85 of the Act cannot be an absolute bar. The language of the section itself indicates that no suit or other legal proceeding shall lie in any Civil Court in respect of any dispute, question or other matter relating to any Wakf, Wakf property or other matter, and this provision is further qualified by the words which is required by or under this Act to be determined by a Tribunal. So it can be said without hesitation that through Section 85, the suit or legal proceeding touching the question of dispute or other matter relating to Wakf or Wakf property, which is required by or under the Act to be determined by a Tribunal, cannot be entertained by the Civil Court. Section 83 of the Act relates to constitution of Tribunals Act, Clause (1) of that section clearly indicates that the State Government shall constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to Wakf or Wakf property under the Wakf Act, 1995. So, if we read these two sections together effect will be that the State Government is empowered to constitute Tribunals to determine any dispute, question or other matter relating to Wakf or Wakf property under the Wakf Act, 1995, which is required by or under the Wakf Act, 1995 to be determined by a Tribunal. By going through those provisions, it cannot be said that due to the provisions as noted above in the Wakf Act, 1995, the jurisdiction of the Civil Court has been completely ousted. In the case of *State of Rajasthan v. Harphool Singh (dead) through his LRs.* (supra), the Hon"ble Supreme Court considered certain provisions of Rajasthan Colonisation Act. It was contended before the Apex Court that the authority concerned, namely, A.D.M. of the area passed the order of eviction in exercise of his powers u/s 22 of the Act and this became final as the jurisdiction of the Civil Court stood ousted in respect of such matters by virtue of Section 25 of that Act. Therefore, no suit could be filed against such eviction. In deciding the question at issue the Hon"ble Court noted that Section 25 of the Act stipulated that a Civil Court had no jurisdiction in any matter which the Collector was empowered by that Act to dispose of and Section 22 of that Act provided for a summary eviction of any person who occupied or continued to occupy and land in a colony to which he had no right or title or without lawful authority by treating such person as a trespasser in the manner and after following the procedure prescribed therefor. In the reported decision, the Apex Court mentioned few other decisions of that Court, namely, in the case of *Abdul Waheed Khan Vs. Bhawani and Others*, and *Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh*, and also the case in *State of Tamil Nadu Vs. Ramalinga Samigal Madam, , Dhulabhai and Others Vs. The State of Madhya Pradesh* and

Another, , to arrive at a conclusion that bar was with reference to any matter which a Revenue Officer was empowered by the Act to determine and the question of title was foreign to the scope of proceedings under the Act and that the questions relating to disputed claims of parties for title to an immovable property could be decided only by the competent Civil Court and that in the absence of a machinery in the special enactment to determine disputes relating to title between two rival claimants, the jurisdiction of the Civil Court could not be said to have been ousted. Therefore, in deciding the question whether Section 85 of the Act completely ousted jurisdiction of the Civil Court or not, what is to be looked into is whether by such Act that is to say Wakf Act, 1995, a machinery has been provided in the Act to determine disputes relating to title between the two rival claimants. I have already noted that the learned Counsel for the appellant/petitioner has taken me through different provisions of the Act to show that the Tribunal created by the Act has got some powers to deal with some definite questions relating to Wakf property, Wakf, but nothing has been shown even by the learned Counsel for the respondent/O.P. that the Tribunal will act as a Civil Court in determining title etc. of the parties in dispute. What has been shown by the learned Counsel for the respondent/ O.P. is Clause (5) of Section 83 where it has been provided that the Tribunal shall be deemed to be a Civil Court and shall have the same powers as may be exercised by a Civil Court under the Code of Civil Procedure, while trying a suit, or executing a decree or order. But that is not sufficient to indicate that the Tribunal has got the jurisdiction to try every kind of suit of civil nature and determine the question of title. It transpires from the petition itself that the petitioners brought the T.S. No. 64 of 2000 in the Court of Civil Judge (Junior Division), Howrah praying for a declaration of title, injunction etc. and the suit property was a tank called "Mahato Tank" measuring 16 bighas 2 cottah. The plaintiffs/ petitioners claimed that they were in possession of the suit property and if it is found that the plaintiffs/ petitioners claim of possession over the property was based on a void document, then further question would be whether in the facts and circumstances of the case, they have acquired a title over the suit property based on adverse possession. It is evident that the Tribunal set up by the Act cannot decide these questions under the Act. The ratio of the decision in State of Rajasthan v. Harphool Singh (dead) through his LRs. (supra) is in the absence of any provision for deciding title etc. in the special statute, Civil Court will have the power to determine such question. In this connection, I should point out the contents of the Annexure-A to the application for taking note of subsequent events for appropriate orders. Such annexure is the certified copy of the Wakf Boards Resolutions dated 29.6.98 and 30.6.98 and there, Board clearly noted that the transfer of "Mahato Tank" was void ab initio and directed the Mutawalli of the Wakf Estate to take all legal steps towards instituting the civil suit in a competent Court of law for a decree of declaration. From all these, it is evident that in the facts and circumstances as discussed above, there cannot be a total ouster of the jurisdiction of the Civil Court by virtue of the provision as contended by the learned Counsel for the O.P./respondents. Even the Wakf Board

was aware of the legal position for which a resolution was adopted directing the Mutawalli to take steps for filing a regular suit before the Civil Court over the matter.

9. In the result, I find that the ultimate conclusion of the learned Appellate Court below that in view of the provisions of Wakf Act, 1995, the Civil Court had no jurisdiction to try the suit is erroneous. I further find that the learned Trial Court till the determination of the question raised in the suit directed the parties to maintain status quo in respect of the suit property and learned Appellate Court simply dismissed the suit for want of jurisdiction for which such order of injunction was vacated. Therefore, in view of my finding regarding the jurisdiction I am of the opinion that misc. appeal, which is against the dismissal of the injunction, should also be dismissed. Accordingly, both the proceedings mentioned above, which have been taken up together, are allowed. The order passed by the Appellate Court below is hereby set aside. The learned Trial Court is directed to try the suit and dispose of the same without giving unnecessary adjournment. The parties are directed to maintain status quo as on this day till the disposal of the suit by the Trial Court.