
(1985) 09 MAD CK 0024
In the Madras High Court

Ameena Begum

APPELLANT

Vs

Kalbali Baig Mosque

RESPONDENT

Date of Decision : 27-09-1985

Acts Referred:

Citation : (1986) 99 LW 549 : (1986) 1 MLJ 342

Hon'ble Judges : K.M. Natarajan, J

Bench : Division Bench

Judgement

K.M. Natarajan, J.—The petitioner is the defendant in the suit for ejectment, viz. O.S. No. 251 of 1975 on the file of the District Munsif, Ranipet, filed by the respondent herein. The petitioner herein filed I.A. No. 1160 of 1975 in the said suit u/s 9 of the Madras City Tenants Protection Act praying for direction to the respondent herein to sell the petition-mentioned premises for a price to be fixed by the Court. According to the petitioner, she is the tenant of the vacant site belonging to the respondent herein, that she and her sons had put up a construction in the said site worth Rs. 15,000 that they are residing there and doing business, and that the Act was extended to the town wherein the petition mentioned property is situate only in 1973. The said claim was resisted by the respondent on the ground that the suit property is a Kabarssthan (burial ground) and hence it is exempted from the provisions of the Act and as such, the petition is liable to be dismissed.

2. The learned District Munsif, on a consideration of oral and documentary evidence before him allowed the application and directed the respondent herein to sell the vacant site of the petition-mentioned premises at Rs. 1,070 to the petitioner, holding that it is not a burial ground and there is no bar for the sale of the property in view of Section 36-A of the Wakf Act, 1954. Aggrieved by the same, the respondent preferred an appeal in C.M.A. No. 6 of 1977 before the learned First Additional Subordinate Judge, Vellore and the learned lower Appellate Judge reversed the finding of the learned District Munsif and allowed the appeal. Aggrieved by the same, this revision has been filed.

3. The learned Counsel for the petitioner mainly contended that in the instant case, the learned lower Appellate Judge allowed the appeal only on the ground that the respondent-wakf is represented by the Muthawalli, who is examined as R.W. 1 and he has no right to sell the petition mentioned property belonging to the mosque and as such, the petitioner has no right to ask for sale u/s 9 of the Tamil Nadu. City Tenants Protection Act and the said finding is erroneous, both in law and on facts. According to the learned Counsel, the lower Appellate judge has not reversed the finding of the trial Court that the petition mentioned property is not Kabarssthan (burial ground).

4. The learned Counsel for the petitioner drew my attention to the decision in *Madhi Hussain Khan Ashurkhana Endowments and Another Vs. Manivanna Naicker and Another*, which was also referred to by the learned district Munsif in his order. In the above quoted case, Ramaswami, J, after referring to the decision of the Division Bench of this Court in *Sree Siddhi Budhi Vinayakagar Sree Sundareswarar Devasthanam Vs. S.V. Marimuthu*, held that the lands belonging to a Wakf, in respect of which there was a valid tenancy, are not excluded from the operation of the provisions of Section 9 of the Madras City Tenants Protection Act. It was further held therein that Section 36-A of the Wakf Act is not a bar to the applicability of Section 9 of the City Tenants Protection Act to the lands held by Wakf, where there is a valid tenancy. It was further held therein that

Section 36-A prohibits voluntary transfer without the previous sanction of the Board and not involuntary transfers or transfers by orders of court. This is also clear from a reading of Section 57(2) of the Wakf Act which states that, whenever any Wakf property is notified for sale in execution of a decree of a civil Court or for the recovery of any revenue, cess, rates or taxes due to the Government or any local authority, notice shall be given to the Board by the Court, Collector or other person under whose order the sale is notified.

In the above quoted case, since the Wakf Board Itself was a party, it was held that the question of issue of notice does not arise. From the above decision it is very clear that Section 35-A of the Wakf Act is not a bar to the applicability of Section 9 of the City Tenants Protection Act to the lands held by the Wakf, where there is a valid tenancy. Though the trial Judge has referred to this decision, the learned lower. Appellate Judge has not at all considered the said decision while arriving at the finding that the respondent wakf has no right to sell the lands.

5. My attention Was also drawn to the decision in *Malayappa Nadar v. Masjid K. Hafeezinh* by Secretary Mohammed Iqbal (1985) 1 M.L.J. 58 : (1984) 97 L.W. 383 wherein it was held that

The more circumstance that the property in question is next contiguous to the mosque will not by itself make it *res extra commercium*.

It has been further held therein that Section 9 of the City Tenants Protection Act is certainly applicable to the properties other than the one which is not *res extra*

commercium.

6. It is relevant to extract the observation in the decision of the Division Bench of this Court in *Sree Siddhi Budhi Vinayakagar Sree Sundareswarar Devasthanam Vs. S.V. Marimuthu*, , which runs as follows:

The word "trustees" in the Explanation to Section 9 will be applicable to a mutavalli. A muthavalli though not a trustee in the sense of the property being vested in him, is accountable as such. The position of a Dharmakarthā of a Hindu temple is also the same. The statute unfortunately has used the word "trustee" in a loose sense and it will cover the manager of a Hindu as well as a Muslim religious institution....It (land in that case) is one which can be disposed of by a trustee of a Hindu temple in the context of justifying circumstances, or if it were to belong to a Muslim Wakf, by the muthavalli after obtaining sanction of a Court. In regard to such properties, the first question to be considered will be whether the original lease of the property is valid. If the lease is not a valid one, so as to bind the institution the person to whom the property has been let can hardly be said to be a tenant within the meaning of the Act. If, however, it is held that the lease of the trust property was one made, in the ordinary course of management or for the benefit or necessity of the institution or with the sanction of court, the tenant will be a lawful tenant.

In the instant case, even in the counter filed by the respondent herein, it has not been contended that the muthavalli has no right to sell the property and there is prohibition for sale. On the other hand, the only contention raised in the counter is that the property in question is a Kabarssthan, an exempted item, and therefore does not fall under the provisions of the Act. The learned District Munsif, after considering the oral and documentary evidence, adduced in this case, had rightly come to the conclusion that the petition mentioned land is not a Kabarssthan but only a village poramboke. The learned lower Appellate Judge had only observed that the question whether the property is a Kabarssthan or not is not a relevant issue for the decision in the appeal and hence, it is clear that the said finding has not been set aside by the learned lower Appellate Judge.

7. On going through the materials placed before me, I find that the finding of the trial Court that the petition mentioned land is not a Kabarssthan is supported by acceptable evidence and convincing reasons and there is absolutely nothing to hold that the said finding suffers from any manifest infirmity whatsoever. The learned Counsel for the respondent is also unable to convince me as to how the said finding is erroneous. In view of the finding that the petition mentioned property is not Kabarssthan, and that the muthavalli of the respondent has got a right to sell the property under the Wakf Act in view of the decision of this Court in *Madhi Hussain Khan Ashurkhana Endowments and Another Vs. Manivanna Naicker and Another*, quoted above, I am of the view that the order passed by the learned lower Appellate Judge is unsustainable and is liable to be set aside.

8. In the result, the Revision is allowed and the order passed by the learned

lower Appellate Judge is set aside and the order passed by the learned District Munsif is restored. There will be no order as to costs.