

(2002) 01 MP CK 0009
In the Madhya Pradesh High Court
Case No : Civil Revision No. 964 of 2001

Amil Hakimuddin and Others

APPELLANT

Vs

Abbas Husain and Others

RESPONDENT

Date of Decision : 02-01-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 9
Madhya Pradesh Wakf (Amendment) Act, 1994 — Section 112(3)
Waqf Act, 1954 — Section 5(2), 6(1), 6(4)
Waqf Act, 1995 — Section 112, 3, 4, 40, 40(1)

Citation : (2002) ILR (MP) 991 : (2002) 5 MPHT 181 : (2002) 2 MPLJ 50

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

Advocate : Imtiaz Husain, for the Appellant; A.B. Khan, for the Respondent Nos. 1 to 9 and Nidhi Verma, Panel Lawyer for the Respondent No. 10, for the Respondent

Judgement

S.P. Khare, J.

This is a revision by the defendants against the order by which their application under Order 7 Rule 11, CPC has been rejected.

The plaintiffs have filed this suit in the Civil Court for declaration of their title on the lands bearing Khasra Nos. 114-115 area 1.036 hectare and Khasra No. 117 area 1.408 hectare at Sehore. They have also claimed the relief of permanent injunction for restraining the defendants from interfering with their possession on these lands. According to them Shafiq Hussain was the Bhumiswami of these lands and the plaintiffs are his heirs. These lands are not the Wakf property. Defendant No. 3 M.P. Wakf Board has also been impleaded as one of the defendants.

The defendants have not filed their written statements. They have submitted an application under Order 7 Rule 11, CPC for rejection of the plaint on the ground that the Civil Court has no jurisdiction to decide this dispute and it can be

decided only by Wakf Tribunal constituted under the Wakf Act, 1995. It is stated that there had been a survey by the Wakf Board after year 1961 and the suit lands have been recorded as "Bohra Kabrastan" in the list of wakf properties and has been registered as such. It is further stated that there was survey in the year 1987 also and as per gazette notification of the State Government published on 25-8-1989 the suit lands have been notified as wakf property. Therefore, if there is any dispute on the point that the suit lands are the wakf property or not that can be decided by the Wakf Tribunal only and not by the Civil Court. Defendant No. 3 has submitted a separate application stating therein that according to Section 6 of the Wakf Act, 1995 the dispute can be decided only by the Wakf Tribunal constituted under this Act. It is said that the lands in dispute are registered as wakf property in the Register of Wakfs. In reply to these applications the plaintiffs have submitted that Shafiq Hasan who was the Bhumiswami of these lands never made their dedication as wakf and the present suit is within the jurisdiction of the Civil Court.

The Trial Court has held that the question of jurisdiction of the Civil Court can be decided after the defendants file their written statements and the evidence is recorded.

In this revision it has been argued on behalf of the petitioners that in view of Sections 6, 40 and 85 of the Wakf Act, 1995 the jurisdiction of the Civil Court has been specifically excluded and it has been conferred on the Wakf Tribunal constituted u/s 83 of this Act. On the other hand it is argued that the question of jurisdiction of the Civil Court in this suit is mixed question of law and facts and it can be decided after the filing of the written statement by the defendants and the trial of the suit. It is pointed out that as per Section 9, CPC the Civil Court has the power to decide the jurisdictional facts.

The Wakf Act, 1995 has come into force from 1-1-1996. Section 112 of this Act repeals the earlier law on the subject. By virtue of Section 112(3) the Wakf (Madhya Pradesh Amendment) Act, 1994 which came into force on 5-1-1995 stands repealed. The relevant provisions of the new Act must be examined. Section 4 provides for appointment of Survey Commissioner of Wakf by the State Government for the purpose of making a survey of wakfs existing in the State at the date of the commencement of this Act. The Survey Commissioner is required to make such inquiry as he may consider necessary and submit a report to the State Government in respect of the existing wakfs. As per Section 5 the State Government has to forward a copy of this report to the Wakf Board. The Board has to examine this report and publish it in the official gazette as per Section 5(2). This is known as "list of wakfs" defined in Section 3(g). Section 6 is the provision which is heavily relied upon by the petitioners. According to this section if any question arises whether a particular wakf property specified as wakf property in the list of wakfs is wakf property or not, the Wakf Board or the Mutawalli of the Wakf or "any person interested therein" may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in

respect of such matters shall be final: Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of publication of the list of wakfs. There is an Explanation added to Section 6(1) which has a material bearing. It provides that for the purposes of this section and Section 7, the expression "any person interested therein", shall, in relation to any property specified as wakf property in the list of wakfs published after the commencement of this Act, shall include also every person who, though not interested in the wakf concerned, is interested in such property and "to whom a reasonable opportunity had been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry u/s 4". Sub-section (4) of Section 6 provides that the list of Wakfs shall, unless it is modified in pursuance of a decision of the Tribunal under Sub-section (1), be final and conclusive. Sub-section (5) of Section 6 further provides that on and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a Court in that State in relation to any question referred to in Sub-section (1).

Section 40(1) provides that the Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not, "after such inquiry as it may deem fit", decide the question. As per Section 40(2) the decision of the Board on question under Sub-section (1) shall, unless revoked or modified by the Tribunal, be final. u/s 83(1) the State Government has been empowered to constitute a Tribunal "for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act". As per Section 83(7) the decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a Civil Court. Section 85 provides 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 which is required by or under this Act to be determined by a Tribunal.

It will be seen from the statutory provisions mentioned above that the matters which have relevance for the present purposes and which are required to be determined by the Tribunal are under Sections 6 and 7, that is disputes regarding the properties specified as wakf property in the list of wakfs published by the Board and appeal to the Tribunal u/s 40(2). It is clear that in respect of matters which are not required by or under this Act to be determined by the Tribunal, the jurisdiction of the ordinary Civil Court is not ousted. Under Sections 6 and 7 the list of wakfs published by the Board is final and binding on the Mutawalli of the wakf or any person interested therein subject to the result of the suit filed before the Tribunal within the stipulated time. The Explanation to Section 6 lays down that "any person interested therein" shall include also every person who, though not interested in the wakf concerned, is interested in such property and to whom a reasonable opportunity has been afforded to represent his case by notice served on him in the course of the survey enquiry. This Explanation applies to

Section 7 also. Where such notice has not been given to such a person who though not interested in the wakf concerned, is interested in the property, he is not bound by the list published by the Board and is entitled to challenge the same in a Court of competent civil jurisdiction. His remedy of civil suit is not barred by Section 85. This is the view expressed by Justice S.A Kader, Former Judge of High Court of Madras in his book on "The law of Wakfs", 1999 Edition page 267, which is a lucid commentary on the Wakf Act, 1995.

There is inbuilt safeguard in the provisions of the Wakf Act, 1995 in the form of the principles of natural justice at every stage before a property is declared to be wakf property. The provision in Explanation to Section 6(1) specifically requiring reasonable opportunity of hearing to the person affected during the course of enquiry by the Survey Commissioner has already been seen. The same is the requirement in Section 40(1) which empowers the Board to collect information regarding wakf property and decide whether a particular property is wakf property or not "after making such inquiry as it may deem fit". This inquiry also envisages the observance of the principles of natural justice, that is, a reasonable opportunity of hearing to the person affected by the decision. Such a decision of the Board which has been arrived at after hearing the person affected, unless revoked or modified by the Tribunal, has been given finality.

The Supreme Court held in Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, , that where a stranger is in possession of a certain property his right, title and interest therein cannot be put in jeopardy merely because the property is included in the list published under Sub-section (2) of Section 5 of the Wakf Act, 1954. The failure of such a person to institute a suit in a Civil Court of competent jurisdiction for decision of such question within a period of one year, as provided for under Sub-section (1) of Section 6 does not make the inclusion of such property in the list of wakfs published by the Board final and conclusive under Sub-section (4) of Section 6 of that Act. It appears that as a sequel to this decision the Explanation to Section 6(1) was introduced by the Amendment Act 69 of 1984 in the Wakfs Act, 1954. The amendment in this respect in 1984 was never enforced and that Explanation has been retained in Section 6(1) of the Wakf Act, 1995. As already discussed the phrase "any person interested therein" used in Section 6(1) has been defined in the Explanation to Section 6(1) and it is only when an opportunity of hearing has been afforded to him by the Survey Commissioner, such a person will to file a suit within one year of the publication of the list before the Tribunal challenging the inclusion of the said property in the list of Wakfs. This is also the view of Justice S.A. Kader in his book mentioned above at page 118. It has been held by Karnataka High Court in Karnataka Wakf Board v. State of Karnataka AIR 1996 Kar 55, that in conducting the enquiry, the Survey Commissioner has to follow the principles of natural justice. Where no such enquiry is held, his report and the list published by the Wakf Board on the basis of his report are illegal.

Now in the present case the plaintiffs' case is that Shafiq Hasan or his heirs, the

plaintiffs, never made any dedication of the lands as wakf. The question would arise whether any inquiry was made by the Survey Commissioner u/s 4 or by the Board u/s 40(1) after affording an opportunity of hearing to Shafiq Hasan or his heirs and an order was passed declaring the suit lands as wakf property. If that has been done the jurisdiction of the Civil Court may be excluded. These jurisdictional facts will have to be determined by the Civil Court after the written statement is filed by the defendants and the evidence is adduced. It is well settled that the Civil Court has jurisdiction to decide these jurisdictional facts. Even where the jurisdiction of the Civil Court is barred, it can still decide whether the provisions of the Act have been complied with or whether the order was passed dehors the provisions of law. In *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, it has been laid down that where the statute gives a finality to the orders of the special Tribunals the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such, provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the Statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.

The learned Counsel for the petitioners has placed reliance on *Subhan Shah through Lrs. Ramjan Khan and Others Vs. Madhya Pradesh Wakf Board and Others*. That was a case in which the provisions of the Wakf (Madhya Pradesh Amendment) Act, 1994 were considered which now stands repealed by the Wakf Act, 1995. In that case the provision in the Explanation to Section 6(1) of the Wakf Act, 1954 has not and could not be considered as that had not been brought in force.

In view of the above discussion the application under Order 7 Rule 11, CPC filed by the defendants has been rightly rejected by the Trial Court. The defendants shall file their written statement and both parties shall produce the documentary and oral evidence. The Trial Court will then decide whether an opportunity of hearing was afforded to the plaintiffs or his ancestors by the Survey Commissioner or the Wakf Board and whether any order has been passed by either of the two after observance of this principle of natural justice. Then the question of the ouster of jurisdiction of the Civil Court will be decided in view of the statutory provisions of the Wakf Act, 1995 mentioned above.