
(1982) 03 AP CK 0004

In the Andhra Pradesh High Court

Case No : C.R.P. No's. 1671, 1672 and 1673 and C.M.P. No's. 4246, 4247, and 4248 of 1981

Amjadulla Siddiqui and Another

APPELLANT

Vs

Mirza Nizamuddin Baig and Others

RESPONDENT

Date of Decision : 02-03-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92
Waqf Act, 1954 — Section 15, 55

Citation : AIR 1982 AP 342

Hon'ble Judges : Madhava Rao, J;Jeevan Reddy, J

Bench : Division Bench

Judgement

Jeevan Reddy, J.—The three revision petitions and the four C. M. Ps. can be disposed of under a common order. They arise in the following circumstances:

2. O. S. No. 750/73 was instituted by the Jumma Masjid, represented by the Muttavalli Abdul Rahim, for eviction of the tenant, Sri Radha Krishna Rice Mill. It was decreed by the trial Court. The tenant-rice mill filed A. S. No. 480/76 in this court. Pending the appeal. Abdul Rahim died in Karachi, Pakistan, in the year 1978. Thereupon the appellant-tenant filed C. M. P. 3635/78 for bringing on record one Abdul Gafoor as the Mutavalli and legal representative of Abdul Rahim. Before this petition was ordered, Abdul Gafoor also died in a plane accident on 19-8-1980. Thereupon, the appellant-tenant filed C. M. P. 18141/80 to bring on record Mohiuddin Ali Khan as Muttavalli of the plaintiff mosque. While this petition was pending a compromise was arrived at between the tenant-appellant and the mosque, which was also approved by the Government. Thereupon C. M. P. 2659/81 was filed by the appellant-tenant and the mosque represented by Mohiuddin Ali Khan, who claimed to be the Muttavalli of the mosque, for recording the compromise arrived at between them.

3. Yet another petition, C. M. P. 3300/78 was filed meanwhile by one Abdul Khuddus Ali to bring him on record as the legal representative of late Abdul

Rahim. He claimed that he has been nominated as the Muttavalli under a will executed by Abdul Rahim and therefore, he is entitled to act as Muttavalli. All the four petitions came up before us and by our order dated 17-3-1981, we allowed C. M. P. 18141/80 and impleaded Mohiuddin Ali Khan in the place of deceased Abdul Rahim as Muttavalli of the plaintiff-mosque, on the basis of an order of the Wakf Board, appointing him as the Muttavalli temporarily C. M. P. No. 3635/78 had become unnecessary because Abdul Gafoor, who was sought to be brought on record therein as Muttavalli, had himself died pending the petition. C. M. P. No. 3300/78 was dismissed by us observing that it shall be open to the petitioner in the said C. M. P., to establish his rights before a civil Court or other appropriate forum, as the case may be. Having done so, we recorded the compromise as requested in C. M. P. 2659/81 and the appeal was disposed of accordingly.

4. On 31-3-1981, these four petitions were filed by one Mir Shah Zahur. The main relief sought for in the C. M. Ps. is to recognise the petitioner therein as the Muttavalli of the plaintiff-mosque and to set aside the compromise decree in A. S. No. 480/76 in as much as it has been entered into by a person not competent to act on behalf of the plaintiff-mosque. The main basis upon which this relief is sought for is the order of the learned Subordinate Judge, Vijayawada, dated 7-3/1981 in I. A. Nos. 3517, 4431 and 4432 of 1980. It is necessary to mention the circumstances, in which the said three I. As. Came to be filed and ordered.

5. As far back as 1913, a suit, O. S. 113 of 1913 was filed to frame a scheme under S. 92 of the Civil Procedure Code, for this mosque. A scheme was accordingly framed by the Civil Court, in 1915. Clauses (1), (2) and (9) of the said Scheme are relevant for the present purpose and must be set out in full.

"(1) Abdul Hakeem shall be the first trustee of the mosque and its properties and he shall hold office for life and shall have power to appoint his successor, each succeeding trustee shall hold office, similarly for life and shall have power to appoint his successor. The first and succeeding trustees, shall appoint their successors from among the descendants of the founder Shah Musfir Saheb.

(2) If any trustee dies or vacates office without appointing his successor or if for any reason the office of trustee falls vacant, the Court may appoint a trustee from among the descendants of the founder on the applications of not less than 2 worshippers of Bezwada and if there is no person from among the descendants of the founder, qualified to fill the office the Court may appoint a stranger. Should the nominee of the outgoing trustee be a person not fit to hold the office, the majority of committee after passing their resolution (in writing) stating their objections to his nominations may move the Sub-Court of Bezwada exercising the original jurisdiction over the town of Bezwada for his removal.

(3) to (8) xx xx xx.

(9) The provisions of this scheme may be altered or modified as if it were in execution of the decree in this suit on the application of not less than three

worshippers residents of Bezwada to the Sub-Court exercising original jurisdiction over the town of Bezwada or in the absence of Sub-Court the District Court of Krishna....."

6. I. A. No. 3517/80 was filled by four persons (worshippers) to appoint a trustee from among the descendants of the original founder of this wakf on the ground that a vacancy has arisen in the office of Muttavalli on the death of Abdul Rahim. The executive officer was impleaded as the 1st respondent and the Wakf Board was the 2nd respondent. While this petition was pending, Mir Shah Zahoor came forward with I. A. 4431/80 under O. I. R. 10(2), C. P. C. to implead him as 5th petitioner in I. A. 3517/80. Another I. A. 4432/80 was filed by Mir Shah Zahoor to appoint him as the trustee of the Jumma Masjid. The Wakf Board contended before the learned Subordinate Judge that in view of the coming into force of the Wakf Act, 1954, the scheme framed earlier cannot be acted upon or enforced and therefore the Civil Court has no jurisdiction to appoint the Mutavalli or trustee, as the case may be in terms of the scheme, for this mosque. This objection was overruled and Mir Shah Zahoor was appointed as the trustee-Muttavalli of this mosque. It is relevant to notice that Mohiuddin Ali Khan applied to implead himself as a party in these three I. As (Vide I. A. 4584/80), which appears to have been ordered on 13-2-1981. Admittedly, Mohiuddin Ali Khan was represented and was heard before passing the final orders dated 7-3-1981.

7. Aggrieved by the orders of the learned Subordinate Judge in I. As.3517, 4431 and 4432 of 1980. Mohiuddin Ali Khan has preferred the three C. R. Ps. 1671, 1672, and 1673 of 1981.

8. The position, therefore, is this. If we uphold the order of the Court below appointing Mir Sah Zahoor as the Mutavalli of the plaintiff-mosque, the compromise recorded by us has to be set aside in as much as in the said compromise the plaintiff-mosque was represented by a person not competent to act on its behalf and whose claim for Muttavalliship was negated by the Civil Court earlier to the date on which we recorded the compromise. If, however, the C. R. Ps. are allowed then the further question would arise, whether there are any grounds for setting aside the compromise. The focus, therefore, has turned upon the correctness or otherwise of the order of the learned subordinate Judge dated 7-3-1981.

9. The first contention of Mr. Srikrishna the learned counsel for the revision petitioner (Mohiuddin Ali Khan) is that no vacancy had arisen in the office of Muttavalli for the Court to appoint a Muttavalli in terms of clause (2) of the Scheme. He relies upon Exs. B-29 B-30 and B-32 to contend that there was a valid nomination in favour of Mohiuddin Ali Khan to the office Muttavalliship, by Abdul Rahim, and that therefore there was no occasion for the court to appoint a Muttavalli under Clause (2) of the Scheme. We have already set out clauses (1) and (2) of the Scheme. A reading of Clause (1) makes it clear that a Muttavalli is empowered only to appoint his successor. A Muttavalli has no power to appoint his successor's successor and so on and so forth. In other words, a Muttavalli is

not competent under the terms of the scheme to lay down an order of succession or an order of devolution of Muttavalliship as it may be called. The power to appoint or nominate is limited only to the succeeding Muttavalli. If we examine the nomination of Mohiuddin Ali Khan from this standpoint, it would be evident that he has been nominated not by Abdul Gafoor, but by Abdul Rahim. Abdul Rahim not only nominated Abdul Gafoor as his successor but also nominated the successor to Abdul Gafoor. This would be evident from a perusal of Exs. B-29 and B-30. Ex. B-29 is styled as a document of Wakf and it is dated 2-11-1961 - the relevant portion whereof reads as follows :-

"I therefore within those powers hereunder nominate my second son Mohd. Abdul Gafoor as my successor to the office of Muttavalli and Sajjada E Dargah to control and take possession accordingly of the dedicated wakf properly who in turn shall exercise powers to nominate his successor. In case no nomination made by him the eldest in his family shall succeed to that office. In case Mohd. Abdul Gafoor withdraws himself to discharge such duties the next nominee successor shall be my daughter K. Khaderunnissa Begum wife of Mohd. Mohiuddin Ali Khan to assume Muttavalliship. She shall have a right to nominate one of her children as successor after her as per Shariah Law to succession open to the next near relation".

It appears that after execution of Ex.B-29, Abdul Rahim's daughter died, whereupon he executed a deed of amendment, Ex. B-30, on 15-6-1977, the relevant portion whereof reads as follows :-

".....I therefore hereby constitute with concurrence of all children to nominate my second son Mohammed Abdul Ghafoor as successor Mutavalli and Sajada Dargah shall control and take possession to exercise all powers and duties as enjoyed by me to nomination, the eldest in his family shall be entitled to Muttavalliship.

In case he for some reason withdraws to continue in office then Mohiuddin Ali Khan shall assume Muttavalliship. He is my maternal nephew. He shall have the right to nominate any of his children. If for some reason no nomination then person under Shariath near relation to be the successor."

10. The above recitals make it clear that the nomination of Mohiuddin Ali Khan is not by Abdul Gafoor, who had admittedly come into office of Muttavalliship on the death of Abdul Rahim, but by Abdul Rahim himself. This according to us is not warranted or permitted by the scheme. One can understand a situation where a Muttavalli may nominate two persons, saving that if the first of them dies before assuming office of Muttavalliship the second one will assume office. But, here is a case where the nominee or appointee as he may be called. Abdul Gafoor, assumed the office of Muttavalliship in 1978 on the death of Abdul Rahim. Hence, at the death of Abdul Gafoor who could nominate his successor and admittedly he did not nominate any one. We are therefore, of the opinion that Abdul Rahim was not entitled to nominate his successor's successor and therefore, the nomination

by Abdul Rahim in favour of Mohiuddin Ali Khan is neither valid nor within the terms of the scheme. It is inoperative and void. If so a vacancy must be said to have arisen in the office of Muttavalliship, which has to be filled by the court in terms of clause (2) of the Scheme. The first contention of Mr. Srikrishna is accordingly rejected.

11. The second contention of Mr. Srikrishna is that once the Wakf Act, 1954 came into force the scheme framed by the Court in 1915 for this wakf/mosque became inoperative and unenforceable. His contention is that once the Act came into force, all the wakfs in the country are governed by the provisions of the said Act and it is only the Wakf Board that is competent to exercise supervisory control over all the wakfs, and that the court can have no more jurisdiction or power over such wakfs. Alternatively, it is contended that even if the scheme is held to be operative after enforcement of the Act, it should be read in harmony with the Act which means that wherever the word "Court" occurs in the scheme, it should be read as "Wakf Board". In other words, the alternate contention is that the powers conferred or duties cast upon the Court under the scheme shall now be exercised and performed by the Wakf Board. Otherwise, it is argued, the whole Act will remain inapplicable to the wakfs covered by schemes framed by Civil Courts, which would frustrate the object of the very enactment. On this aspect, Mr. Srikrishna is supported by Mr. Syed Sadatullah Hussaini the learned counsel appearing for the Wakf Board, we shall now examine this contention.

12. The Wakf Act, 1954 has been enacted to provide for better administration and supervision of wakfs. Section 2 declares:

"Section 2. Save as otherwise expressly provided under this Act, this Act shall apply to all wakfs whether created before or after the commencement of this Act.

Provided that nothing in this Act shall apply to Durgah Khawaja Saheb, Ajmer to which the Durgah Khawaja Saheb Act, 1936 and the Durgah Khawaja Saheb (Emergency Provisions) Act, 1950 apply".

Section 4 provides for preliminary survey of wakfs while S. 5 provides for publication of list of wakfs after such a survey. Section 6 provides that any person aggrieved by the publication of the list of wakfs under S. 5 can institute a suit in a competent Court, within one year thereof. The decision of the Court is declared to be final, Section 15 vests the general superintendence of all the wakfs in a State in the Board established for the State. It is also declared that it shall be the duty of the Board to so exercise its power under the Act as to ensure that the Wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended. Sub-sec. (2) of S. 15 elaborates the several functions of the Board. In particular clause (d) thereof empowers the Board to settle schemes of management for a wakf. Sub-sec. (3) is relevant and it reads as follows:-

"(3) Where the Board has settled any scheme of management under clause (d)

of sub-sec. (2) or given any direction under clause (e) of sub-sec. (2) any person interested in the Wakf or affected by such settlement or direction may institute a suit in a civil Court of competent jurisdiction for settlement or directions and the decision of the Civil Court thereon shall be final."

13. Section 42 provides for the appointment of a Muttavalli of a Wakf by the Wakf Board, while S. 43 provides for removal of a Muttavalli. Sec. 43-A provides for assumption of direct management of wakfs by the Wakf Board in certain contingencies. Section 55, which is highly relevant on this aspect, provides for institution of suits under S. 92 of the Civil Procedure Code. It reads:-

"Section 55(1): A suit to obtain any of the reliefs mentioned in S. 92 of the Code of Civil Procedure, 1908, relating to any Wakf may, notwithstanding anything to the contrary contained in that section, be instituted by the Board without obtaining the consent referred to therein.

(2) No suit to obtain any of the reliefs referred to in S. 92 of the Code of Civil Procedure, 1908, relating to any wakf shall be instituted by any person or authority other than the Board without the consent in writing of the Board and for the institution of any such suit, it shall not be necessary to obtain the consent referred to in that section, notwithstanding anything contained therein:

Provided that nothing in this sub-section shall apply in relation to any such suit against the Board."

Section 57(1) provides that in every suit or proceeding relating to a title to wakf property or the right of a Muttavalli, the Court shall issue notice to the Board at the cost of the party instituting suit or proceeding. Section 69 provides for repeal of certain enactments and also contains a savings clause. Sub-sec. (1) repeals as many as five Acts, namely

(1) The Bengal Charitable Endowments, Public Buildings and Escheats Regulation, 1810, (2) The Religious Endowments Act, 1863, (3) The Charitable Endowments Act, 1889, (4) The Charitable and Religious Trusts Act, 1920 and (5) The Mussalman Wakf Act, 1923. Sub-sec. (2) is the savings clause. But it is unnecessary to refer to the same in as much as the scheme with which we are concerned in this case was not one framed under any of the five enactments repealed under sub-sec. (1) of S. 69.

14. Now, there is no provision in the Act, which expressly says that the scheme framed under S. 92 of the CPC in respect of Wakfs, prior to the coming into force of the Act, shall cease to be operative on the coming into force of the Act, nor is there any provision which says that wherever such schemes confer certain powers or cast certain duties upon the Court, such powers and duties shall be exercised and performed by the Wakf Board. Mr. Srikrishna, however, contends that such a conclusion follows by necessary implication, on a combined reading of several provisions, particularly Ss. 15, 42, 43 and 43-A. We are not inclined to agree. Indeed, a reading of clause (d) of sub-section (2) of S. 15 along with sub-

sec. (3) of S. 15 and S. 55 leads us to a contrary conclusion. Section 15(2) (d) contemplates the Wakf Board itself framing or settling a scheme of management for a wakf, but such a scheme is declared to be subject to the decision of a Civil Court in a suit, whose decision is declared to be final. Obviously, the Civil Court can modify, set aside or otherwise alter a scheme framed by the Board. This clearly shows that the decision the Civil Court is given the supremacy and primacy over the orders and decisions of the Wakf Board. Section 55 indeed is clinching on this issue. It contemplates institution of scheme suits under S. 92, C. P. C. even after coming into force of the Act. This provision leaves no room for an inference or implication of the nature sought to be drawn by the learned counsel. It is no doubt true that S. 2 says that the Act shall apply to all wakfs, save as otherwise expressly provided under this Act, but this provision has to be read along with the aforesaid provisions and if so read, there will be little room to contend that existing schemes become inoperative on the coming into force of the Act. We, are, therefore, of the opinion that the Act does not nullify, obliterate or affect in any manner the schemes framed by the Court and in force on the date of the coming into force of the Act. Of course it is always open to the Wakf Board to apply for modification of an existing scheme under S. 55 of the Act, but there again the modification has to be, and can be, effected only by the Court. We are mentioning this aspect, because it was contended before us that under the scheme, as it now stands, only the worshippers in the mosque can apply for modification and none else. Section 55(1) statutorily confers upon the Board, the right to apply for modification.

15. Mr. Srikrishna, then contended that the Act contains specific provisions for appointment and removal of Muttavalli which are inconsistent with the provisions of the scheme. Even so, it follows from the above discussion that it is the scheme alone that prevails and not the provisions of the Act. In other words, in so far as the scheme provides for certain matters, the applicability of the act is excluded to the extent. But in respect of the matters not provided for by the scheme, the provisions of the Act do undoubtedly apply. Thus, we see no contradiction or inconsistency between the scheme and the Act. Both can operate, but as we have made it clear herein before it is the scheme which has the primacy and wherever the scheme does not provide for any matter or situation, the Act applies. The conclusion of ours is supported by a decision of a single Judge of the Court in W. P. No. 1692 of 1972, D/- 29-10-1973. Obul Reddy, J. (as he then was) came to the same conclusion on a reading of Ss.15 and 55. To the same effect is the judgment of Ismail, J (as he then was) of the Madras High Court in Palani Muslim Dharamaparipalana Sangam v. Wakf Board (1975) 1 Mad 201. The learned Judge clearly held that the schemes continue to be operative and that with respect to matters provided for by the scheme, it is the scheme alone that has to be implemented and acted upon. The learned Judge also observed that it is always open to the Wakf Board to apply for modification in accordance with law if it so pleases.

16. Mr. Srikrishna, however, relied upon a decision of the Madras High Court in

C.S. Peeran Sahib Vs. The State Wakf Board, . It was a second appeal arising from a suit instituted by the Muttavalli for a declaration that the proceedings of the Wakf Board calling upon him to have the suit Darga and its properties registered as Wakf under the 1954 Act and to submit accounts, budgets and returns to the Wakf Board, are illegal and without jurisdiction. That was also a case where a scheme was framed by a Civil Court and which was in operation on the date of the coming into force of the Act. Venkatadri, J. held that on coming into force of the Act and in particular having regard to the language of S.15 of the act all the powers hitherto exercised by the Court under the scheme become exercisable and have to be exercised by the Wakf Board. Accordingly, it was held that the plaintiff is bound to submit his accounts to the Wakf Board and also have it registered according to law. Reliance was placed by the learned Judge upon a decision of the Division Bench of the Madras High Court in State of Madras v. Mahalingaswamy Devasthanam ILR (1957) Mad 752. On a perusal of the said Bench decision, however, we are of the opinion that it does not support the proposition enunciated by the learned Judge. State of Madras v. Sri Mahalingaswamy Devasthanam, ILR (1957) Mad 752 was a case arising under the Madras Hindu Religious and Charitable Endowments Act, 1951. In respect of the endowment concerned therein, a scheme was framed earlier to the coming into force of that Act and it was in operation. The question that arose was whether after the coming into force of the Act, the Court continues to exercise the powers and perform the duties assigned to it under the Scheme. The Bench held, on the basis of S.103(e) (ii) of the Act, that all the powers conferred upon and all the duties placed upon the Court in a scheme shall have to be performed, from the date of the commencement of the Act, by the Area Committee, if there is one and in the absence of Area Committee, by the Commissioner. It would be appropriate at this stage to set out S.103 (e) (ii).

"103. Notwithstanding the repeal of the Madras Hindu Religious Endowments Act 1926 (hereinafter in this section referred to as the said Act) -

(a) to (d) xx xx xx (e) In any scheme settled or deemed to have been settled under the said Act (including a scheme settled under S. 92 of the Code of Civil Procedure, 1908) and in force immediately before the commencement of the Act.

(i) xx xx xx xx

(ii) all powers conferred and all duties, imposed by such scheme on any court or Judge or any other person or body of persons not being a trustee or trustees or a paid or an honorary officer or servant of the Religious Institution, shall be deemed to have been conferred or imposed on the Area Committee if the institution is subject to the jurisdiction of such a Committee and on the Commissioner, in other cases; and the Area Committee or the Commissioner, as the case may be, shall exercise such powers and discharge such duties in accordance with the provisions of the scheme subject to such restrictions and conditions, if any, specified in the scheme."

17. Thus there was a specific provision in the 1951 Act which substituted the Area Committee or the Commissioner, endowments, as the case may be for the Court. The Bench decision must, therefore, be understood in the light of the said provision. The other decision referred to "by Justice Mayadhar Subudhi Tana and Another Vs. Orissa Board of Wakfs and Another, . We have seen the decision, but we are unable to see in what manner the said decision can be said to be relevant on the question at issue. That was not a case where any scheme was in force nor did any question arise whether after the commencement of the Act, the scheme operates.

18. The other decision referred to is Narayana Murthy v. Achayya, AIR 1925 Mad 411 which contains a general observation that it is not desirable for the Courts to assume supervision of institution. It was observed that such duties are neither in the interests of the institutions nor of the court.

19. For the above reasons, we are of the opinion that, with the greatest respect to the learned Judge, the observations of Justice Venkatadri are too wide and cannot be accepted, as laying down the correct law.

20. The other decision relied upon is Mohammad Ali v. Ahmed Ali, AIR 1945 All 261 (FB). The observations relied upon in this judgment merely explain, how the Courts have come to acquire jurisdiction over the Wakfs. It is explained that the powers of Kazi under the Mohammedan system of law are vested in the Courts under the British Indian system and that for that reason, the District Judge, as the principal civil court of original jurisdiction has a general power of nominating a Muttavalli when there was a vacancy in the officer, in a summary proceeding. The observations in our opinion, do not in any manner advance the case of the petitioners herein.

21. For the above reasons, we see no ground warranting interference with the order of the Court below in C. R. Ps. Nos. 1671, 1672 and 1673 of 1981 which are accordingly dismissed, but, in the circumstances, there shall be no order as costs.

22. Once we dismiss the revision petitioners, it follows that the person who entered into and signed the compromise, which was recorded by us by our order dated 17-3-1981, was not competent to act on behalf of the plaintiff-Institution. The Court had appointed Mir Shah Zahoor as the Muttavalli, negating the claims of Mohiuddin Ali Khan, even prior to the date of recording of compromise, but, unfortunately, it was not brought to our notice. Accordingly, the order dated 17-3-1981. in so far as it ordered C. M. P. No. 2659/1981 and recorded the compromise filed by the appellants and the plaintiff-respondent represented by the Muttavalli Mohiuddin Ali Khan is set aside. We direct that the Appeal should be posted for hearing in the ordinary course.

23. Mr. M. S. R. Subramanyam, the learned counsel for the defendants appellants submits that this order should not preclude the defendants, as and when the appeal is poseted for hearing, from contending that the compromise already

entered into between the parties and which was also approved by the Government, binds the Institution, as such, notwithstanding the fact who acts as its Muttavalli. But this is a question which the appellants can urge, if they are so advised, as and when the appeal comes up for hearing. We need not express any opinion on the question.

24. For the reasons recorded in this order, the order in C. M. P. No. 18141 of 1980 is also set aside and C. M. Ps. 4246 to 4248 of 1981 are ordered.

25. Order accordingly.