

(2011) 08 MAD CK 0056
In the Madras High Court
Case No : A.S. No. 712 of 2008

Anbu and Others

APPELLANT

Vs

Chinnakarasamangalam Sunnath Val Jamath by its Patel and
Muthawalli K.K. Hajibasha (died) Present Managing Trustee
P.K. Khader Sheriff

RESPONDENT

Date of Decision : 09-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 111
Waqf Act, 1995 — Section 25, 3, 4, 4(3), 43

Citation : (2011) 08 MAD CK 0056

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : R. Margabandhu, for the Appellant; W.M. Abdul Majeed, for the Respondent

Final Decision : Dismissed

Judgement

T. Mathivanan, J.—Challenge is made in this appeal by the Defendants against the judgment and Decree dated 03.04.2006 and made in

O.S. No. 381 of 2003, on the file of the learned Subordinate Judge, Vellore.

2. The matrix of the facts required for the disposal of this appeal are detailed as under:

2.1. The Plaintiff is the owner of the schedule mentioned property being the mosque and burial ground for muslim for more than 100 years. The

Plaintiff, is in full and absolute possession of the schedule mentioned property and quiet enjoyment of the same, without let or hindrance. The said

mosque and burial ground of Karasamangalam has been registered with the Tamil Nadu State Wakf Board, as the Wakf as per Section 25 of the

Wakf Act, 1995 as 288A, North-Arcot. The Wakf has been administered by the

plaintiff Committee, headed by its Muthawalli and Patel. The said property has been vested with the Committee and registered as a Wakf for the benefit of the Muslim committee.

2.2. Whiles, unduly and unlawful elements, who have scant regard for law and Courts and peoples' right tried to encroach and to make use of the property for their nefarious purposes. With great difficulty, the Plaintiff was able to resist the same by lodging complaints with concerned authorities. Periodically, the Plaintiff would clear the area of shrubs and make it presentable and usable by contributions as aforesaid. The Karasamangalam Muslim Community has the schedule mentioned property only as burial ground and there is no other property available to bury their dead.

2.3. For annual rituals the ground used to be cleaned and it was also thought fit by the Tamil Nadu State Wakf Board and the Plaintiff that the property must be protected from vandals and encroachers, for which it was resolved to put up a compound wall surrounding the entire area by funds to be generated from contributions from the local community and also well wishers.

2.4. With that object in view when the Plaintiff was making arrangements to clear the area, the Defendants had suddenly attempted to trespass on the land, as if the land is belonged to them. When the Plaintiff protested, the defendants surrounded by their minions and interested intermeddlers raised a dispute claiming that they need a part of the land for their own purpose, claiming that it could be used for a cemetery or burial ground or even for cremation. Being a Muslim property, it cannot be used for such purpose and the Defendants can have no claim over the schedule mentioned property as it exclusively belongs to the Plaintiff and the Defendants are merely trying to make a false claim and also giving a communal colour and twist to the claim. Hence, the suit is filed for the relief of declaration and permanent injunction.

2.5. The Defendants 1, 3 to 7 have adopted the written statement of the second Defendant. They have contended that the Defendants and the Plaintiffs are living in Karasamangalam Village. Originally, there were ten houses for Muslims and fifty houses for Hindus. They are living amicably and harmoniously. There is a separate burial ground for Hindus in

Karasamangalam Village in Survey No. 263, measuring 0.65.0 Hectare and for Muslims in Survey No. 268/2, measuring 0.15.5 Hectare. If any Hindu dies his body will be buried in the land comprised in Survey No. 263.

Likewise, if any Muslim dies his body will be buried in the land comprised in Survey No. 268/2. Muslims have also constructed a mosque in the

above said survey number. The plaintiff is the owner of the mosque and burial ground in Survey No. 268/2, measuring 0.15.5 Hectare. He is not

the owner of Survey No. 263, measuring 0.65.0.

2.6. The site comprised in Survey No. 268/2, measuring 0.15.5 Hectare has been used as Muslim burial ground. On the other hand, the site

comprised in survey No. 263, measuring 0.65.0 Hectare has been used as Hindu burial ground for more than 100 years. The Muslims never used

this Survey No. 263 and they are also not in possession and enjoyment of the same. The Adangal itself will clearly show that Survey No. 268/2,

measuring 0.15.5 has been used by the Muslim as mosque and burial ground and Survey No. 263, measuring 0.65.0 Hectare has been used as

burial ground for Hindus. The Plaintiff has deliberately suppressed these facts in the plaint. 2.7. The Muslims tried to encroach the Hindus burial

ground in Survey No. 263 by putting up thatched house in the year 1984 and the same was prevented successfully. Besides this, the Muslims were

also trying to bury the dead body in the Hindus burial ground comprised in Survey No. 263 in the same year. This was also prevented by Hindus.

Again in the year 1989, the Muslims were tried to erect a board stating that the Survey No. 263 belongs to the Wakf property. It was also

prevented by the Hindus with the help of Police.

2.8. Apart from that, they had also tried to cut the trees standing in Survey No. 263 in the year 1992. The same was also reported to the Revenue

Divisional Officer, Vellore. A case was registered u/s 107 of the Code of Criminal Procedure in Crime No. 266 of 1993. An enquiry was

conducted by the Revenue Divisional Officer. In the said enquiry, the Plaintiff had failed to produce documentary evidence to substantiate their

case that the land in Survey No. 263 belongs to them. In the interregnum, the Muslims were again trying to bury a Muslim dead body in the Survey

No. 263. This was prevented by the Hindus. The Revenue Divisional Officer had intervened and subsequently the body was buried in Survey No.

263 at the protest of Hindus.

2.9. The Revenue Divisional Officer, after full enquiry, had passed an Order on 30.09.1994 and thereby he had allotted an extent of 0.32.5

Hectare, on the eastern side, to Muslims and the remaining extent of 0.32.5 Hectare on the western side to Hindus as burial ground in Survey No.

263. In pursuant to the Order of the Revenue Divisional Officer, the Tahsildar of Gudiyatham, had sub-divided the Survey No. 263 in two parts

viz.263/1 and 263/2. Anyhow, the Hindus are also having half right in Survey No. 263 as per the Revenue Divisional Officer's Order. The

Defendants have specifically denied the other allegations made in the plaint.

3. Based on the pleadings of the parties to the suit, the Trial Court has carved out the following three issues for the better adjudication of the suit:

- i. Whether the Plaintiff is entitled for declaration and injunction
- ii. Whether the Defendants have title over the suit property in Survey No. 263
- iii. To what relief the Plaintiff is entitled

4. In order to substantiate their respective cases, five witnesses were examined on behalf of the Plaintiff and during the course of their examination

Exs. A1 to A17 were marked. On the other hand, three witnesses were examined on behalf of the Defendants and during the course of their

examination Exs. B1 alone was marked.

5. On appraising the evidences on record and on considering the related facts and circumstances, the Trial Court has proceeded to decree the suit

on 03.04.2006, after declaring the Plaintiff's title to the suit property and consequently granting the relief of permanent injunction in favour of

Plaintiff.

6. In order to arrive at the above conclusion, the Trial Court has observed that:

i. it was a customary right, extending over a long period, which is to be recognized by the Court and that the Court need not consider the specific

number of years to which the prescription has lasted;

ii. it has been established that the Muslims used to bury the dead bodies in Survey No. 263 for more than 40 years or 50 years and that the

Plaintiff has every right to succeed;

iii. based on the decision reported in *Shahi Jama Masjid Merta v. Kanhaiya Lal Bhagat and Ors.* AIR 1973 Raj 322, a person who is in long

possession of property can undoubtedly maintain a suit to turn out a trespasser who is to show a title better than that of the plaintiff, if the Plaintiff's

long possessions is otherwise established. In the absence of the Government or the Municipal Board the decree may not be binding on them. But,

the Defendants in the case cannot be heard to say that the suit cannot proceed without the government or the Municipal Board being made a party

to the suit.

Ultimately, it was held that to grant the relief of declaration in favour of the Plaintiff, the presence of Government in the suit is not at all required.

7. Being dissatisfied with the judgment and Decree of the Trial Court, the Defendants stand before this Court with this appeal on the following

grounds:

a) The Defendants are concerned only in respect of the property in Survey No. 263/1, measuring 0.32.5 Hectare of the land (Hindu burial

ground);

b) Survey No. 263 was originally classified as "Mayanam Promboke Land" and it was used by the Hindus as graveyard, whereas the Muslims are

having separate graveyard in Survey No. 268/2 and hence the suit has to be dismissed in respect of Survey No. 263/1, measuring 0.32.5 Hectare

of land, which has been entered as burial ground for Hindus in the settlement register dated 11.10.1994.; 11

c) There was no dedication in form of grant in favour of Muthavalli. There was also no anterior dedication mentioned either in Ex.A3 or Ex.A16.

Ex.A16 and Ex.A3 came into existence after dispute arose between Hindus and Muslims in the year 1984. Ex.A16 came into existence in the year

1999 after Ex.B1 in the year 1994, but these documents are subsequent to 1984 when the trouble started between Hindus and Muslims, which

resulted in passing of order u/s 107 and 111 Proceedings under the Code of Criminal Procedure.

d) The Plaintiff has not perfected title by way of adverse possession. The finding that the plaintiff's adverse possession was not pleaded by the

Plaintiff in their pleading, but on the other hand, they relied upon the title which was not proved.

8. Heard Mr. R. Margabandhu, Learned Counsel for the appellants/defendants and Mr. W.M. Abdul Majeed, Learned Counsel for the

Respondent/plaintiff.

9. The suit in O.S. No. 381 of 2003 has been filed by the plaintiff seeking the following reliefs:

- a) declaring the title of the schedule mentioned property to the Plaintiff;
- b) consequently grant an order of permanent injunction, restraining the Defendants, their men, agents, servants and others from in any manner, interfering with the rights of the Plaintiff over the schedule mentioned property; and
- c) directing the Defendants jointly and severally to pay the costs of the suit and other ancillary proceedings;

10. As per the plaint, the property has been described as under:

In N.A.A. District, Gudiyattam Taluk, Karasamangalam Village, Mosque and the burial ground in Survey Nos. 263 and 268.

As per the case of the Plaintiff, the suit schedule property is the Wakf property. Virtually, the Plaintiff has not pleaded that he is having prescriptive

title over the suit property by way of adverse possession. In short, the Plaintiff has not pleaded that he had prescribed adverse possession.

However, the Trial Court has proceed to pass a decree declaring the title of the Plaintiff over the suit property on the ground of adverse possession.

11. Sub-clause (r) to Section 3 of the Wakf Act, 1995 (43 of 1995) (hereinafter it may be referred to as Act) defines the expression "Wakf" as follows:

(r) ""wakf"" means the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognized by

the Muslim law as pious, religious or charitable and includes-

(i) a wakf by user but such wakf shall not cease to be a wakf by reason only of the user having ceased irrespective of the period of such cesser;

(ii) "" grants"", including mashrutul- khidmat for any purpose recognized by the Muslim law as pious, religious or charitable; and

(iii) a wakf- alal- aulad to the 14 extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or

charitable, and"" wakf"" means any Person making such dedication;

12. From the judgment of the Trial Court it appears that an argument was

advanced by the Learned Counsel for the Appellants/defendants that since the land was a Government land, the Government was not made as a party and hence the suit was bad. In support of his contention, the Learned Counsel for the Defendants before the Trial Court had placed reliance upon the decision reported in *Shahi Jama Masjid, Merta Vs. Kanhaiya Lal Bhagat and Others*, . In this case in Paragraph No. 22, the learned Single Judge of Rajasthan High Court has observed as follows:

21. Then I may deal with the question whether the Government and the Municipal Board, Merta City were necessary parties to the suit. Learned Counsel for the respondents argued that the Plaintiffs had not produced any title deeds for the disputed strip of land and their case was based on long possession. Therefore, the question of title could not be effectively adjudicated upon in the absence of the Government or the Municipal Board, Merta City. Now, it is true the Plaintiffs have not produced any title deeds, but long possession may be evidence of title as well. A person who is in long possession of property can undoubtedly maintain a suit to turn out a trespasser on the property, as it is the trespasser who is to show a title better than that of the Plaintiff, if the Plaintiffs long possession is otherwise established. In the absence of the Government or the Municipal Board the decree may not be binding on them, but the Defendants in the case cannot be heard to say that the suit cannot proceed without the Government or the Municipal Board being made a party to the suit. I therefore, do not find any force in this contention either.

13. Based on the above cited decision, the learned Trial Judge has rejected the contention made on behalf of the Defendants. But, the Trial Court has placed reliance upon the decision of this Court reported in *Mohamed Ali and Others Vs. Khader and Others*, . In this case two important questions were arisen as to whether specific dedication is necessary in order to create a wakf and whether the disputed property is wakf property. On these questions, the learned Single Judge of this Court has held in Paragraph No. 12 as follows:

12. Even subsequent to the decision of the learned single judge reported in *Abdul Rahiman Sahib Chowdry and Others Vs. Murugappa Naicker and Others*, cited above, many judgments have been rendered by the Privy Council as well as other High Courts holding the contra view. In the

very judgment relied on by the Learned Counsel for the Appellants for the proposition that the question of custom would be a mixed question of law and fact and namely, AIR 1950 56 (Privy Council) , the Privy Council has positively held that dedication was known only to English Law as something equivalent to an irrevocable licence granted by the owner for the use of the public. But a customary right can always be established by proper evidence to the effect that the said lands were used for generation as cremation or burial ground. A Division Bench of Andhra Pradesh Court, in its judgment reported in Gulam Mohideen v. Abdul Majid AIR 1957 A.P. 941, has held that though there may be no specific or public dedication, the user of the land as a Muhammadan burial ground for a long time would by itself make the land a wakf land. In the absence of direct evidence of dedication it was open to the parties to establish the right by long user, If dedication was proved or admitted, then mere non-user for some years may not detract from the character of the graveyard as a wakf. But when the evidence of user assumes importance and the continued user for a long time was sufficient to interfere in favour of a Wakf. Therefore, there is overwhelming authority to support the proposition that there need not be specific dedication in favour of the Muslim community in general in order to prove as to whether the property is a wakf property or not.

14. The learned Trial Judge has also placed reliance upon a decision reported in Gulam Mohideen v. Abdul Majid AIR 1957 AP 941, in which it is held that though there is no public dedication, the user of the land, as a Mohamedan burial ground for a long time would by itself make the land wakf land. Though a wakf may, in the absence of direct evidence of dedication, be established by evidence of user, the user from which dedication can be implied must be clearly established and must be of such a character as to be consistent only with dedication of the land as a graveyard. If dedication is proved or admitted, then mere non-user for some years may not detract from the character of the graveyard as a wakf. But, when the question is whether a land has become wakf by user without a dedication, the evidence of user assumes importance, for it is on continued user for a long time and in many cases that the inference of a wakf has to be drawn.

15. On coming to the instant case on hand, Mr. R. Margabandhu, Learned

Counsel for the appellants/defendants has contended that the property which has been described as suit property in the plaint is not a wakf property as evident from Ex.B1. Ex.B1 appears to be Form No. 156

settlement register of No. 129, Karasamangalam Village, Gudiyatham Taluk, North Arcot District. In this document, Survey No. 263, measuring

0.65.0 Hectare has been classified as Promboke and described as graveyard (burial ground). It is also seen from this document that Survey No.

263 has been divided into two compartments:

- i) Survey No. 263/1 measuring 0.32.5 Hectare classified as Promboke and described as Hindus graveyard, and
- ii) Survey No. 263/2 measuring 0.32.5 Hectare classified as Promboke and described as Muslims graveyard.

16. The Learned Counsel would submit further that as per the revelation of Ex.B1, settlement register, the land comprised in Survey No. 263 is the

Government Mayanam and as such no one can claim exclusive right over the said land. He would submit further that the Appellants/defendants are

not claiming any right over the land comprised in Survey No. 268 as the land has been used by the respondent/plaintiff as their burial ground. He

has also admitted that the Appellants/defendants do not have any dispute over the land as a mosque and burial ground are encompassed in the

above said land. Insofar as the appellants/defendants are concerned, they are disputing the land comprised in Survey No. 263.

17. The Learned Counsel has also added that the plaintiff has not produced any document to substantiate their claim that the suit properties have

been dedicated as wakf. He has also adverted to that the Government has also not issued any documents in favour of the Plaintiff to show that the

suit properties are the wakf properties.

18. The case of the Appellants/defendants is that a dispute was arisen between the Hindus and Muslims when the Muslims were trying to bury the

dead body in Survey No. 263. Then proceedings were initiated in Crime No. 266 of 1993 u/s 107 of the Code of Criminal Procedure. After due

enquiry, the Revenue Divisional Officer had passed an Order in Na.Ka. No. m3/9986 of 1993 dated 30.09.1994 and thereby he had allotted an

extent of 0.32.5 Hectare on the eastern side of the land in Survey No. 263 to Muslims and allotted the remaining extent of 0.32.5 Hectare on the

western side to the Hindus for using the same as burial ground. Hence, the Survey No. 263 Government burial ground was sub-divided into two parts viz. 263/1 and 263/2.

19. It is significant to note here that the Plaintiff challenging the order of the Revenue Divisional Officer dated 30.09.1994, had preferred a criminal revision before this Court in CrI.R.C. No. 565 of 1994. This Court, after hearing both sides and on deep analysis of the relevant materials on record had ultimately quashed the impugned order dated 30.09.1994 with an observation that the parties are at liberty to work out their respective rights in appropriate forum. In view of the Order passed by this Court dated 15.12.1997 and made in CrI.R.C. No. 565 of 1994 quashing the impugned order of the Revenue Divisional Officer dated 30.09.1994, the evidentiary value of Ex.B1, settlement register in respect of No. 129 Karasamangalam Village has become under question.

20. Ex.A1 is the proceedings of the Chairman, Tamil Nadu Wakf Board, Madras-4. As per his proceedings in Proc. No. 19324/88/C4/NA, dated 29.03.1989, "The wakf known as Karasamangalam Masjid & Burial Ground Wakf, Karasamangalam Village, North Arcot District has been registered as No. 228/NA with the Tamil Nadu Wakf Board as required u/s 25 of the Wakf Act, 1954.

21. Ex.A2 is the letter dated 08.05.1990 addressed to erstwhile Muthavalli of Karasamangalam Masjid & Burial ground by the Secretary, Tamil Nadu Wakf Board, enclosing the proceedings of the Chairman of Wakf Board, Madras-4 in which it is stated that the Karasamangal Mosque and Burial Ground, Karasamangalam Village, Latteri Post, Gudiyatham Taluk, North Arcot District has been registered with the Tamil Nadu Wakf Board as per Section 25 of the Wakf Act, 1954 and its registration number is 288/NA.

22. During the course of his argument, the Learned Counsel appearing for the Defendants has made reference to Section 4(3), 5 and 6(1) of the Wakf Act, 1995. In this circumstance, it is imperative on the part of this Court to have reference of Sections 4(3), 5 and 6(1) of the Act Wakf Act, 1995. Sections 4(1) and 4(3), 5 and 6(1) enacts as follows:

4. Preliminary survey of wakfs:

(1) The State Government may, by notification in

the Official Gazette, appoint for the State a Commissioner of Wakfs and as many additional or assistant commissioners of wakfs as may be

necessary for the purpose of making a survey of wakf properties existing in the State at the date of the commencement of this Act.

(2).....

(3) The Survey Commissioner shall, after making such inquiry as he may consider necessary, submit his report in respect of wakfs existing at the

date of the commencement of this Act in the State or any part thereof, to the State Government containing the following particulars, namely-

(a) the number of wakfs in the State, or as the case may be, any part thereof], showing the Shia wakfs and Sunni wakfs separately;

(b) the nature and objects of each wakf;

(c) the gross income of the property comprised in each wakf;

(d) the amount of land revenue, cesses, rates and taxes payable in respect of such property; (e) the expenses incurred in the realisation of the

income and the pay or other remuneration of the mutawalli of each wakf; and

(f) such other particulars relating to each wakf as may be prescribed.

5. Publication of list of wakfs.-

(1) On receipt of a report under Sub-section (3) of Section 4, the State Government shall forward a copy of the same to the Board.

(2) The Board shall examine the report forwarded to it under Sub-section (1) and publish, in the Official Gazette, a list of Sunni wakfs or Shia

wakfs in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates and

containing such particulars as may be prescribed.

6. Disputes regarding wakfs-

(1) If any question arises whether a particular property specified as wakf property in a list of wakfs is wakf property or not or whether a wakf

specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a

civil court of competent jurisdiction for the decision of the question and the decision of the civil court in respect of such matter shall be final:

Provided that no such suit shall be entertained by the civil court after the expiry of one year from the date of the publication of the list of wakfs

23. In accordance with Section 4 at the date of commencement of the Act, the State Government may appoint a Survey Commissioner for the

purpose of making a wakf existing in the state. Sub-section (3) to Section 4 contemplates the duty of the survey commissioner so appointed to the

Government. He has been vested with the duty to submit a report to the Government containing the details of number of wakfs both Shia and

Sunni wakfs existing in the State. The report shall contain the nature and objects of wakf, gross income, land revenue, taxes payable in respect of

each wakf, the expenses incurred in the realisation of the income and the pay or other remuneration of the mutawalli of each wakf.

24. As per Section 5(1) of the Wakf Act, 1995, on receipt of such report from the Survey Commissioner, the State Government shall have to

forward a copy of the same to the Board of Wakfs. The Board of Wakfs, after examining the report, shall publish the list of wakfs and other

details in the Official Gazette, differentiate the numbers of Sunni wakf or Shia wakf in the state. 25. Section 6 of the Wakf Act, 1995 deals with the

disputes regarding the wakfs. To get resolved the disputes either the board of wakf or muthavalli of the wakf or any person interested therein may

institute a suit in a Tribunal.

26. As discussed earlier, it may be appropriate to remember Ex.A1 i.e. the Proceedings of the Chairman of the Tamil Nadu Wakf Board,

Madras-4, dated 29.03.1989 and made in Proceedings No. 19324/88/C4/NA. This proceedings speaks about the appointment of Committee for

Karasamangalam Masjid and burial ground. It also speaks that the wakf known as Karasamangalam Masjid and Burial Ground Wakf,

Karasamangalam Village, North Arcot District has been registered with the Tamil Nadu Wakf Board as required u/s 25 of the Wakf Act, 1954. In

Page No. 3, in the first paragraph it is stated that the Muthavalli should put up fence in and around the burial ground and mosque situated in Survey

No. 268 and 263 respectively to protect the lands from encroachments. The muthavalli should prepare and submit a proposal to construct

shopping complex under Urban Development loan scheme or housing complex at Survey No. 263 since the said land is situated in the main road

of Katpadi to Gudiyatham Trunk Road as there is no regular income to the wakf for the present.

27. Ex.A2 also speaks about the registration of Karasamangalam Mosque and Burial Ground with the Tamil Nadu Wakf Board. Ex.A3 is the

proforma report signed by the Secretary, the Tamil Nadu Wakf Board, Madras, dated 07.05.1990. In this report Column No. 7 describes the

particulars of wakf properties. In the tabular column under Clause (a) the details of immovable properties (1) Kind i.e.land or building, (ii)

Location, (iii) Area, (iv) value and (v) other particulars including details of superstructures are given. In serial No. 1, the land comprised in Survey

No. 263 at Karasamangalam Village, measuring 1 Acre 60 Cents valued at Rs. 40,000/- has been specified. In serial No. 2, the land comprised in

Survey No. 268 at Karasamangalam Village, measuring 37 Cents valued at Rs. 15,000/- has been stated. With regard to the kind of properties

(land or building), in Serial No. 3 it has been stated as Mosque, Madras tiled roof (20 X 15) out of 0.37 in Survey No. 268 has been stated.

28. As contended by the Learned Counsel for the appellants/defendants, the Defendants do not have any dispute over the land comprised in

Survey No. 268. But, they are having dispute in respect of the land comprised in Survey No. 263 and particularly in respect of sub-division of

263/1.

29. P.W. 1 says that the Defendants were indulging in anti-social activities in the suit properties and therefore they had sent complaints to the

Tahsildar and Revenue Divisional Officer. In pursuant to the complaint, the wakf board had sent a letter dated 29.11.1989 (Ex.A4) to the

Inspector of Police, Gandhi Nagar, Vellore. In this letter, it is stated that a petition dated 28.11.1988 was received from Mr. K.M. Khader Basha

(erstwhile muthavalli) stating that one Jaganathan, s/o.Govindaswamy and his associates by name Ravi were selling arrack in the mosque land

comprising in Survey No. 263 of Karasamangalam Village. Therefore, he had requested the Inspector of Police to take necessary action to

remove them from the mosque land.

30. Under Ex.A6, the Commissioner of Panchayat Union, Katpadi, had also written a letter to the Sub-Inspector of Police, Katpadi to take

necessary action.

31. P.W. 1 has admitted that on 30.09.1994, the Revenue Divisional Officer had passed an Order. In this regard, the second Defendant, who has

been examined as D.W.1 would state that in the year 1984 a dispute was arisen between the Hindus and Muslims in respect of the land measuring 1Acre 60 Cents as the Muslims were trying to put up houses. He would state further that since the place was a Government puramboke land, they had objected not to put up houses in the said land. He would depose further that the Revenue Divisional Officer and Tahsildar had intervened and declared that the disputed land was belonged to the Government and it was not belonged to either Muslims or Hindus. He would state further that after two years when the Muslims were trying to bury a dead body in the disputed site, again a dispute was arisen between the two groups and on account of this, the Revenue Divisional Officer had initiated proceedings u/s 107 of the Code of Criminal Procedure and after enquiry, the disputed site measuring 1 Acre 60 Cents was divided into two parts and the eastern portion was allotted to Muslims and the western portion was allotted to Hindus.

32. In support of his case, Ex.B1, settlement register pertaining to No. 129, Karasamangalam Village, Gudiyatham Taluk has been marked on behalf of the Defendants. It is to be remembered that in the opening paragraph of this Judgment, we have discussed elaborately on this document.

As deposed by D.W.1, it is seen from Ex.B1 that Survey No. 263 was sub-divided into two compartments viz.263/1 and 263/2. 263/1 seems to have been allotted as graveyard for Hindus. The other part ie.263/2 seems to have been allotted as graveyard for Muslims. This document has been vehemently objected by the Plaintiff and in this connection, the Plaintiff has heavily banked on Ex.A7, the Order of this Court dated 15.12.1997 and made in Crl.R.C. No. 565 of 1994. This Order would go to show that the Proceedings of the Revenue Divisional Officer dated 30.09.1994 in Na.Ka. No. m3/9986 of 1993 was quashed.

33. It is the contention of the Plaintiff that in view of the Order of this Court under Ex.A7, the Order of the Revenue Divisional Officer including Ex.B1 has become pale into insignificance and hence Ex.B1 did not have any evidentiary value. Even D.W.1 has also admitted that the Revenue Divisional Officer's Order dated 30.09.1994 was quashed by the High Court. He has also conceded that after 30.09.1994, he did not give any petition to the revenue authority to declare that the Survey No. 263/1 as the

graveyard for Hindus. In his cross-examination, he has deposed that the Hindus had been burying the dead bodies in the bank of the lake called Thangal. He has also fairly conceded that the Defendants did not claim any right in the lands comprised in Survey No. 268/2. However, he would maintain that nobody was in possession and enjoyment of the land comprised in Survey No. 263. This is absolutely wrong. The testimonies of P.W. 2, P.W. 3, P.W. 4 and P.W. 5 are much helpful to the case of the Plaintiff.

34. It is significant to note here that the age of P.W.2 is 65 years, P.W. 3 75 years, P.W. 4 61 years, whereas the age of P.W. 5 is 65 years.

From their vast rich experience, they have deposed that the landed property specified in Survey Nos. 268/2 and 263 have been in possession and

enjoyment of the Plaintiff from time immemorial. In order to throw more clarity on the subject matter, which is issue in this case, this Court finds

that it would be quite relevant to refer Ex.A8. Ex.A8 is the letter addressed to the Tahsildar, Gudiyatham by the Superintendent of Wakfs, Vellore

Zone. Along with this letter, an abstract of Government of Tamil Nadu in G.O. Ms. No. 133, dated 21.01.1977 has been tagged with. In this

letter, it is stated that the Government had issued instruction in their order in G.O. Ms. No. 133 dated 21.01.1977 that the religious institutions be

permitted to put up compound walls as the land used by them as burial ground. The first paragraph of the above Government Order reads that in

Paragraph No. 4 of G.O.(Rt) No. 1800 Revenue dated 20.11.1974 first read above, the Government ordered, along other things, that in respect

of Government lands occupied by the religious institutions like temple, mosque, church etc., such lands should be sub-divided separately and patta

issued to the institutions concerned, with permission to put up compound walls to prevent unauthorized occupation of the lands by outsiders.

35. In Paragraph No. 5 of the above said Order, the Government have stated that the Government also consider that it is not desirable to grant

patta in respect of Government lands occupied by religious institutions for denominational purposes as such indiscriminate grant of patta would

amount to transfer of exclusive right of the Government to the pattadar, with the result the land cannot be treated as Government property.

Moreover, issue of patta in such cases would encourage encroachment on

Government land by institutions pertaining to serve a particular religious set and resumption by Government will be impossible where a patta is granted.

36. Ex.A13 is the plan showing the proposed construction of compound wall of the burial ground at Survey Field No. 263, Karasamangalam

Village, Gudiyatham Taluk.

37. Ex.A15 is the letter dated 19.01.1990 addressed to the Village Administrative Officer, Karasamangalam Village by Superintendent of Wakf,

Vellore Zone, in which it is shown that the wakf known as Karasamangalam Masjid and burial ground wakf, Karasamangalam Village,

Gudiyatham Taluk together with the following properties viz. Survey No. 263, measuring 1 Acre 60 Cents and Survey No. 268, measuring 37

Cents has been registered with the Tamil Nadu Wakf Board, Madras as required u/s 25 of the Wakf Act, 1954. This letter also reveals that the

above properties viz. Survey Nos. 263 and 268 are coming under the supervisory control of the wakf institution under the purview of the Wakf

Act 1954. In this letter, the Superintendent of Wakf has stated that it was brought to the notice that while two sign boards were taken away by

third parties one was removed and taken by by the Village Administrative Officer, Karasamangalam Village, without the knowledge of the Office

of the Superintendent of Wakf and therefore the Village Administrative Officer, Karasamangalam Village was requested to hand over the sign

board to the Muthavalli K.K. Khader Basha under intimation to his office.

38. Mr. R. Margabandhu, Learned Counsel for the appellants/defendants while maintaining his argument has made reference to Ex.A17, letter

dated 02.02.1990 written by the Tahsildar, Gudiyatham to the Superintendent of Wakfs, Vellore Zone and would submit that under this letter the

Tahsildar, Gudiyatham had rejected the permission sought for by the Plaintiff wakf to put up compound wall. This portion of argument is not

discernible, because the Tahsildar, Gudiyatham has stated in this letter that the Superintendent of Wakfs, Vellore Zone had sought for permission

to put up compound wall around Survey No. 263/1 of Karasamangalam Village. While seeking permission, the Superintendent of Wakf had stated

that Survey No. 263/1 has been in use as Muslim burial ground. The Tahsildar had also stated that in pursuant to the request made by the

Superintendent of Wakfs, Vellore, he had inspected the Survey No. 263 of

Karasamangalam Village and it measured 1.60 Acres. He has also stated that there was no subdivision in the Survey No. 263. This northern rectangular portion about 0.20 Acres had not been used as burial ground. The remaining portion was occupied by the Muslim community as burial ground. There were burial places in this portion. As per the provision of G.O. Ms. No. 133, Revenue Department, dated 21.01.1971 (Ex.A9) Government land can be permitted to be used for denominational purposes such as for temple, mosque, church, prayer hall and bajan mandapam along with a permission to put up compound wall. He has also stated that in the case of Superintendent of Wakfs, Vellore Zone, he had required the land for burial purposes. As there were no objections in the village to use the Survey No. 263 as burial place, the Superintendent of Wakfs, Vellore Zone was requested to maintain status-quo. Only under the above circumstance, the permission, sought for by the Superintendent of Wakfs, Vellore Zone, to put up a compound wall in S. No. 263 was not granted by the Tahsildar, Gudiyatham.

39. The Learned Counsel for the Appellants/defendants has also adverted to that there was no details in the pleadings of the plaint as to how the property was belonged to wakf and how long they were in possession. He has also urged before this Court that the Government was not a party to the suit and since the Plaintiff had sought the relief of declaration the Government should have been impleaded as a party and without the presence of the Government the declaratory relief could not be granted as the disputed site is belonged to Government. 40. In support of his contention, the Learned Counsel has placed reliance upon the decision reported in Radhakishan and Another Vs. State of Rajasthan and Others, .

He has also maintained that in Page No. 9 at Paragraph No. 6 of the Trial Court Judgment, the Trial Court has observed that the Plaintiff has prescribed their title as they were in possession more than 30 years and in this connection he has submitted that there was no pleadings with regard to the prescription of adverse possession and that without such pleadings no such finding could be given. He has also submitted that as revealed from Page No. 10 of the judgment of the Trial Court, the entire judgment was rendered only on the basis of the adverse possession, for which there was no pleadings or evidence and hence the finding of the Trial Court was

absolutely an erroneous one.

42. In order to fortify his contention, the Learned Counsel for the Appellants/defendants has also placed reliance upon the decision in Neelavathi

Vs. Shanmugam and Arulmigu Ramapiran Koil at Senthamangalam, . In this case, the learned single Judge of this Court has in Paragraph No. 7

has observed that when Plaintiff had relied upon a particular document of title, namely, Ex.A-1 gift deed, in order to claim right and title to suit

property, she cannot claim it by adverse possession, because when once she claims title upon a particular document, then whatever right Plaintiff

claims would be flowing if at all under that document, in which case there is no element of adverse nature of possession in order to make out a case

of prescription by title. 43. On the other hand, Mr. W.M. Abdul Majeed, Learned Counsel for the Respondent/plaintiff has fairly admitted that

there was no dedication in respect of the schedule mentioned properties and he would add that by way of long usage the wakf board can declare a

property as wakf property.

44. The Learned Counsel has also maintained that the plaintiff was the owner of the schedule mentioned property being the mosque and burial

ground for muslim for more than 100 years and that the Plaintiff had been in full and absolute possession of the schedule mentioned property and

quite enjoyment of the same without let or hindrance. He has also submitted that the Plaintiff wakf had been recognised by the Tamil Nadu State

Wakf Board through its Inspector of Wakf by its Office report. According to the evidence of P.W. 1 and P.W. 2, Karasamangalam Village is in

two parts viz. Chinna Karasamangalam and Peria Karasamangalam. As per the evidence of P.W. 2, Hindus used to bury their deads on the

northern side of the burial ground.

45. The Learned Counsel has taken this Court through the testimonies of D.W.1 to D.W.3, wherein D.W.1 in his cross-examination at Page No. 4

has stated that the Hindus used to bury their deads in the place called Thangal. D.W.2 and D.W.3 have also corroborated the evidence of D.W.1.

46. After referring Column No. 10 of Ex.A3, Proforma Report, he would submit that the rule of succession to the Office of the Muthavalli was by

selection among the Jamathar of Karasamangalam Village according to custom and usage. Further, he has laid emphasis on his earlier submission

that though the Government was not a party in the present suit by way of long usage, the schedule mentioned property became wakf property.

47. In support of his contention, he has placed reliance upon a decision in Shahi Jama Masjid, Merta Vs. Kanhaiya Lal Bhagat and Others, . It is

pertinent to note here that the ratio laid down in this decision has already been quoted in the opening paragraphs of this Judgment, which has also

been cited by the Trial Court. It is significant to note here that the learned Single Judge of Rajasthan High Court in Paragraph No. 21 has

specifically made a keynote saying that in the absence of the Government or the Municipal Board the decree may not be binding on them, but the

Defendants in the case cannot be heard to say that the suit cannot proceed without the Government or the Municipal Board being made a party to

the suit. 48. The Learned Counsel for the Respondent/plaintiff has also made a stress upon the decision in Mohammad Shah Vs. Fasihuddin Ansari

and Others, . In this case, the Division Bench of the Hon''ble Supreme Court of India in Paragraph No. 16 has observed that it can therefore be

accepted that this was the origin of the mosque. It can also be accepted as a matter of law that a wakf normally requires express dedication but ""if

land has been used from time immemorial for a religious purpose.....then the land is by user wakf although there is no evidence of an express

dedication"". (Mulla's Mohamedan Law Edn.14, P.173).

49. The Learned Counsel has also placed reliance upon the decision in M. Kallappa Setty Vs. M.V. Lakshminarayana Rao, . In this case, the suit

was filed by the Plaintiff for the following two reliefs:

1. declaring that the Plaintiff is the absolute owner of the plaint schedule site being in possession and enjoyment of the same, and that the Defendant

has no right whatever in this site, nor is he in enjoyment of the same, and

2. granting permanent injunction restraining the Defendant from unlawfully and forcibly entering upon the suit site, and disturbing the plaintiff's

possession and also from constructing the house by unlawfully obtaining a licence from the Municipality.

The Trial Court had decreed the suit as prayed for. The first appellate court affirmed the decision of the trial court. In second appeal the High

Court reversed the decree of the court below and dismissed the Plaintiff's suit with costs, primarily on the ground that the Plaintiff has failed to

establish satisfactorily his title to the suit property. Challenging the reversal judgment of the High Court, the Plaintiff had preferred the civil appeal

before the Hon''ble Supreme Court of India. After hearing both sides, the Division Bench of the Apex Court headed by His Lordship Hon''ble

JUSTICE K.S.HEGDE has held in Paragraph No. 5 as follows:

5. So far as the question of possession is concerned, as mentioned earlier, both the trial court and the first appellate court have accepted the

plaintiff's case that he was in possession of the suit site ever since he purchased the same in 1947. This is essentially a finding of fact. That finding is

based on evidence. The High Court, in our opinion, erred in coming to the conclusion that the possession of the Plaintiff after the sale deed in his

favour is not a relevant circumstance. We are of opinion that it is an extremely important circumstance. The Plaintiff can on the strength of his

possession visit interference from persons who have no better title than himself to the suit property. Once it is accepted, as the trial court and the

first appellate court have done, that the Plaintiff was in possession of the property ever since 1947 then his possession has to be protected as

against interference by some one who is not proved to have a better title than himself to the suit property. On the findings arrived at by the fact

finding courts as regards possession, the plaintiff was entitled to the second relief asked for by him even if he had failed to prove his title

satisfactorily. Therefore in our opinion, the High Court was not right in interfering with the judgment of the trial court as affirmed by the first

appellate court regarding relief No. 2.

50. The Learned Counsel for the Respondent/plaintiff in order to add additional strength to the case of the respondent/plaintiff has placed reliance

upon the decision in Gulam Mohideen Khan and Ors. v. Abdul Majid Khan AIR 1957 AP 941 (V44 C296 Nov.). This judgment has also been

quoted by the Trial Court in its Judgment.

51. Insofar as the present case on hand is concerned, admittedly there is no express dedication pertaining to the suit property. But, the usage of

the land as a Mohamedan burial ground for a long time would itself make the land as wakf property. From the evidences led on behalf of both

parties, this Court can draw inference that the suit property comprised in Survey Nos. 263 and 268/2 have been in possession and enjoyment of

the Respondent/plaintiff. This cannot be denied and there is also no rebuttal evidence on the part of the Appellants/defendants. But the facts

remains as to whether the usage of the land for a long time would entitle the Respondent/plaintiff to claim exclusive right to have the relief of

declaration as claimed by them in the plaint. In other words, this Court could say that whether the Respondent/plaintiff is entitled to the relief of

declaration by prescription of title by way of adverse possession as concluded by the Trial Court

52. It is unambiguously established that the land comprised in the above said survey numbers are belonged to the Government and hence

presumably the Government is the owner of the land. Ofcourse the wakf known as "Karasamangalam Masjid and Burial Ground",

Karasamangalam Village, North Arcot has been registered with the Tamil Nadu Wakf Board as required u/s 25 of the Wakf Act and its

registration number is 228/NA. Ex.A2 has also affirmed this fact. As observed earlier, in Ex.A8, the Superintendent of Wakfs, Vellore Zone has

stated that the suit property comprised in Survey No. 263 has been in possession and usage of the Muslims in time immemorial and that some

miscreants were trying to encroach upon the burial ground by putting up huts. Hence, after quoting the Government Order in G.O. Ms. No. 133,

Revenue Department, dated 21.01.1971, he had requested the Tahsildar Gudiyatham to permit to put up the compound wall around the land.

53. Ex.A9 is the concerned Government Order in G.O. Ms. No. 133, Revenue Department, dated 21.01.1971, in which the Government has

stated that in Paragraph No. 4 of G.O.(Rt) No. 1800 Revenue dated 20.11.1974, the Government ordered, along other things, that in respect of

Government lands occupied by the religious institutions like temple, mosque, church etc., such lands should be sub-divided separately and patta

issued to the institutions concerned, with permission to put up compound walls to prevent unauthorized occupation of the lands by outsiders.

54. In G.O. Ms. No. 3424, Revenue Department, dated 23.09.1974, the Government has prescribed a set of conditions to be adopted in cases

involving grant of Government land for any denominational purposes such as for temples, mosques, church, prayer hall and bhajan mandapam.

According to this Order, the institutions in question will merely be given possession of the land subject to the conditions specified in that

Government Order.

55. In Paragraph No. 3 of Ex.A9 ie.E3/1996/75, dated 30.08.1975, the Board of Revenue has raised the presumption that the issue of Patta to a

religious institution, as indicated in Para 4 of G.O.(Rt) No. 1800, Revenue, dated 20.11.1974 is also a grant under Para 10 of B.S. 0.24-A and in

Paragraph No. 4 of the said Government Order it is stated that therefore the Government have examined the matter and the correct position is that

the permission given in Para 4 of G.O. Rt. No. 1800 Revenue dated 20.11.1974 to the religious institutions is intended only to enable these

institutions to construct compound walls in order to prevent unauthorised occupation of the Government land by the outsiders and this permission

should not be treated as a grant under B.S. 0.24 A-10 according to which the land is given for a denominational purpose, subject to certain set of

conditions and gives the Government the right to resume the land without assigning any reason and without payment of compensation.

56. In Paragraph No. 5 of the said Government Order, the Government has stated that the Government also consider that it is not desirable to

grant patta in respect of Government lands occupied by religious institutions for denominational purposes as such indiscriminate grant of patta

would amount to transfer of exclusive right of the Government to the pattadar, with the result the land cannot be treated as Government property.

Moreover, issue of patta in such cases would encourage encroachment of Government land by institutions pretending to serve a particular religious

set and resumption by Government will be impossible where a patta is granted. Hence, under Paragraph No. 6, the Government accordingly direct

in modification of the orders issued in Para 4 of G.O. Rt. No. 1800 Revenue dated 20.11.1974 that the permission granted to religious institutions

to use Government lands should not be interpreted as a grant for denominational purposes under B.S.0.24-A.10 and that such institutions will be

permitted only to use the Government land and build compound walls so as to prevent unauthorized occupations of the Government land by the

outsiders and that pattas should not be issued for such lands.

57. Therefore, it is thus clear that the Government have clearly explained the reasons for the non-issuance of patta in respect of the suit properties.

But, the plaintiff was given permission to build compound wall so as to prevent

the encroachment of outsiders in consideration of long usage of the land. Therefore it is clear that the plaintiff/respondent have been in use and enjoyment of the suit land for a long time ie.time immemorial. But, their long usage of the land will not confer them any exclusive title as the land is belonged to the Government. Since there is a threat on the part of the Appellants/defendants to the Respondent/plaintiff to cause hindrance to the long usage and enjoyment of the suit property their attempt can be turned down by way of prohibitory order i.e. an Order of injunction. But, the exclusive title of the respondent/plaintiff to the suit land cannot be declared as claimed by them.

58. As observed by the Apex Court in M. Kallappa Setty Vs. M.V. Lakshminarayana Rao, , the respondent/plaintiff can, on the strength of their possession, resist interference from the Defendants. The plaintiff has been in possession of the suit property for a long time and therefore their possession has to be protected as against interference by someone more particularly by the Defendants. As regards the possession, the Court is of considered view that the Plaintiff is entitled to the second relief, sought for by them, as the title is vested with the Government.

59. In the result, this appeal is partly allowed and the judgment and Decree dated 03.04.2006 and made in O.S. No. 381 of 2003, on the file of the learned Subordinate Judge, Vellore are modified and the suit is decreed in respect of the prayer portion-"b" and in respect of prayer portion-"a" the suit is dismissed. Consequently, connected miscellaneous petitions are closed. Considering the nature of the suit and other circumstances, there is no order as to costs.