

(2008) 07 MAD CK 0085
In the Madras High Court
Case No : A.S. No. 9 of 1999

Batcha

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Pondicherry Settlement Act, 1970 — Section 23(1)
Waqf Act, 1954 — Section 27, 4, 4(3), 5, 6

Citation : (2008) 07 MAD CK 0085

Hon'ble Judges : A.C. Arumugaperumal Adityan, J

Bench : Single Bench

Advocate : K. Chandramouli for S. Viswanathan, for the Appellant; M. Venkadashan, for R2 and R6 and A.S. Baradhi, Government Advocate for R1, for the Respondent

Final Decision : Dismissed

Judgement

A.C. Arumugaperumal Adityan, J.—The decree and judgment in O.S. No. 25 of 1997 on the file of the Additional District Judge, Pondicherry, is under challenge in this appeal. The unsuccessful plaintiff in O.S. No. 25 of 1997 is the appellant herein.

2.The averments in the plaint in brief are as follows:

2(a) One Kassim Sahib S/o.Ussain Sahib was resident of Melavanjore, T.R. Pattinam Cummune, Karaikal District, died leaving his only son Mahaboob Alisha @ Mohamed Saliah Sahib Maricar, the maternal grand-father of the plaintiff. The above said grand-father of the plaintiff died on 30.04.1961 leaving two daughters viz., Smt.Sabura Beevi, mother of the plaintiff, and Smt.Maiboob Beevi. The plaintiff, his sisters Mumtaj and Maiboob Beevi and his younger brother Shaik Babu are the LRs of their mother Sabura Beevi. Except the plaintiff other legal heirs of Sabura Beevi are in abroad. Smt.Maiboob had three daughters and two sons. Smt. Maiboob Beevi has no independent interest in the plaint schedule

property and therefore allowed her sister Sabura Beiv and her son, the plaintiff herein, to enjoy and look after the property. The plaint schedule property is comprised in R.S. No. 122/1, 122/2 & 122/6 with an extent of 1 Hec 9 Are (14 Are 88 Ca, and 7 Are). The above said properties are situated at No.37, Melavanjore Village, T.R.Pattinam Commune, Karaikal. The patta number to the plaint schedule property is 54, which was originally a "burial ground" and it is also called "Thaikkal".

2(b) One Haji Hasarath Syed Alisha, who was a saint and fore-father of the plaintiff, died several decades ago and buried at the suit property. The said burial ground was maintained and preserved by the descendants of the Hasarath Syed Alisha. The descendants of Haji Hasarath Syed Alisha were also buried on the same ground by their successors. Since Haji Hasarath Syed Alisha was a saint, a tomb was constructed with superstructure on the burial place by his successors. All the ancestors including the great grand-father, grand-father, mother and other family members of the plaintiff were buried in the suit property. In the year 1993 the plaintiff's mother Sabura Beevi died and has been buried in the same ground. The plaintiff's brother-in-law Rajee Vanllah died on 15.05.1994 and he has also been buried in the same ground. The other tombs found in the suit property were also constructed by the ancestors of the plaintiff on the burial place. The plaintiff and his ancestors had permitted the outsiders to visit the tomb and offer prayer without losing their control over the Theikkal. All the dead bodies of the family members of the plaintiff buried in the suit property. The old mathiris record which was maintained by the French Regime, stands in the name of Kassim Sahib S/o.Shaik Ussain Sahib ie., great grand-father of the plaintiff. After the death of Kassim Sahib, his son administered and managed the suit property. Kassim Sahib and his son paid tax to the Government and tax is also being paid upto Smt.Sabura Beevi ie., the mother of the plaintiff. Even after the merger of the erstwhile French Indian Territory with Indian Union, Revenue Assessment had been assessed in the name of Kassim Sahib. The plaintiff's ancestors alone used to clean the tomb stands on the burial ground and every Thursday they performed "Rathief" and made all arrangements to the people who frequently visit the tomb to offer prayer. Kanthuri Festival and Sandal worship prayer have also been performed every year by the plaintiff and his ancestors. People in and around Vanjore, Nagore, Karaikal visit the said tomb and offer prayer especially on Thursday.

2(c) Apart from that the burial ground the other items of the property which are manicut land enjoyed and managed by kassim Sahib ie., great grand-father of the plaintiff. The said manicut had been leased out by Mahaboob Alisha @ Saliah Sahib S/o.Kassim Sahib and Sabura Ummal ie., the mother of the plaintiff to different persons and collected the rent. The rent receipts are also filed along with the plaint. The suit property specifically dedicated for the purpose of burial of the dead bodies of the family members of the plaintiff and never dedicated for public purpose or religious purpose or charitable purpose. It is purely a private Wakf as the suit property was enjoyed, maintained and managed by the plaintiff

and his ancestors. When the property was administered by Sabura Beevi, the plaintiff stayed at Bombay and returned to Melavanjore when his mother died. When the plaintiff's brother-in-law died on 15.05.1994 and his body was brought to the suit property, the defendants 4 to 6 prevented the plaintiff and raised objection as if they have some right over the suit property. The defendants 4 to 6 also stated that they are "muthavallies" appointed by the Wakf Board, Pondicherry. The matter went to Police Station, T.R.Pattinam where the 4th defendant allowed to bury the dead body of the plaintiff's brother-in-law near the tomb. The plaintiff stated to enquire about the claim of the defendants 4 to 6 and as a result, he learnt that the settlement record was changed at the instance of the Wakf Board, Pondicherry. The plaintiff immediately approached the Settlement Officer and requested him to conduct a due enquiry by producing relevant records to show that he is entitled to manage the suit property without interference from outsiders. The matter is still pending before the Settlement Officer, Pondicherry. Taking advantage of the absence of the plaintiff the Wakf Board represented by the defendants 4 to 6 has assumed control without making due proper enquiry into the matter over the Thaikkal and the suit properties and left them with the control of the defendants 4 to 6. In the mean time, the plaintiff filed a suit before the Principal District Munsif, Karaikal, in O.S. No. 81 of 1995. The suit was meant for declaration against the defendants 4 to 6 and recovery of possession from some of the occupants of the suit property. The plaint was returned on the ground that the plaintiff has not paid sufficient Court fee. Since the plaintiff is intending only to manage and administer the property, he has not proceed with the said suit and filing this fresh suit for managing and administering the suit property as a Manager. The suit is not barred under law. The suit property never dedicated for public purpose, or Religious purpose or Charitable purpose. Therefore, it is not public Wakf as contemplated by the Wakf Act. It is also pertinent to note that none of the public buried on the suit land at any point of time. Therefore, Wakf Board has no right to foot their access into the property. The plaintiff, therefore, sent a legal notice to all the defendants u/s 80 of CPC on 28.08.1996. The defendants 2 & 3 issued a reply notice on 17.01.1996 claiming that the property is a Wakf Property. The defendants 4 to 6 have also sent their reply notice claiming that property is belonging to Wakf Board, Pondicherry. The contents of the reply is false and untenable in law. The plaintiff, as a descendants on Haji Hasarath Syed Alisha, is the competent person and has the right to administer the Thaikkal as Thaikkal meant for the burial of the family members of the plaintiff. Hence, the suit for declaration, for recovery of possession after removing all and every unauthorised encroachments at the instance of the defendants and for costs.

3. The second defendant remained *exparte*. The first defendant has adopted the written statement filed by D4, which runs as follows:

3(a) The plaintiff is not the legal heir of Kasim Sahib Maraicar. The allegation that Mohamed Alisha @ Mohamed Salih Sahib Maraicar is the only son of Kasim Sahib Maraicar and that Smt. Sabura Beevi and Smt. Mahamooda Beevi are the

daughters of said Mohamed Alisha @ Mohamed Salih Sahib Maraicer are all not true. The plaintiff has to prove that Smt.Sabura Beevi is the mother of the plaintiff and her two daughters Smt. Mumtaj and Maiboob Baevi and her only son Shaik Babu. It is not correct to say that Maiboob Beevi had three daughters and two sons. The suit is bad for non-joinder of necessary parties like the three daughters and two sons of Smt.Maiboob Beevi. The allegation that the other legal heirs of Maiboob Beevi are out of India and they have no interest in the suit property cannot be accepted. The first item scheduled to the plaint is a tank. The suit property was not at all a burial ground but it is a Tahikkal of Hazarath Syed Alisha, who was a saint. Hazarath Syed Alisha was the disciple and the contemporary of Nagore Andavar and the said Tahikkal was originally founded by Mahddom Alisha Syed Alisha and Renga Lisha who belonged to Oman. They were unmarried and they have dedicated their life to the Alimighty Allah and hence, the allegation that the plaintiff is the legal heir of the holy saint is a misnomer and it cannot be believed and the plaintiff and her fore-father Kasim Sahib are in no way related to the holy saint Hazarath Syed Alisha. The suit property is not a burial ground and it consists a various shops and behind the shop, there is tank and close to the tank there are two tombs belonging to Hazarath Syed Alisha. Likewise, all the relations of the plaintiff were not buried in the suit property but they were buried in the plot called Paravaikulam far away from the suit property. All the tombs were not constructed by the ancestor of the plaintiff. Further muslim women were not allowed to do religious rites inside the Darga and Tahikkals and the fact that the mother of the plaintiff is managing the property is only a myth.

3(b) The matrice stands in the name of Kasim Sahib is named as "Gerand" which is meant only a manager but not as the owner of the suit property. The defendant-4 alone is paying the taxes and doing Rethief and Kanduri and Sandal Paste Festival for the last several years and the plaintiff's ancestor were never cleaned to tombs at any point of time. There is no document available to show that the suit property is a private property. Out of sympathy permission was given to the plaintiff to bury his brother-in-law's body in the suit property. The two ladies viz. Smt.Sabura Beevi, the mother of the plaintiff, and Tmt.Mahamooda Beeiv, who are the two daughters of Mohamed Sahib Maraicar, who is the only son of Kasim Sahib, claimed that the Melavajur Thaikkal is owned by their ancestors and it is not a public property and they were the present owners. The Additional Commissioner Wakf conducted an enquiry to find out the fact, the then Muthawailies represented the matter to the competent Settlement Office, Pondicherry. After due enquiry the Settlement Officer decided that the property in question belongs to the Hazarath Syed Alisha Thaikkal Melavanjur by the order dated 24.2.1987.

3(c) The Wakf Act (Central Act) was extended to the Union territory of Pondicherry with effect from 1st December 1969. Before the extension of the Wakf Act the former French Government had issued an order called "Arrette" in Frech Parlance in the year 1918. Now u/s 4 & 5 of the Wakf Act, 1954, the

Commissioner of the Wakfs should prepare a report on the survey of Wakf properties and forward the same to the Government which in turn could forward it to the Wakf Board. The Wakf Board after scrutiny and examination of the survey report should cause the list of Wakf properties of the survey report should cause the list of Wakf properties to be published in the official Gazette. The Pondicherry Government had created a special Officer and his staff on 5.6.1981 will conduct the survey of Wakf properties in the Union Territory of Pondicherry and submit a report to the Government so that the list of properties could be published in the Gazette. During the survey of the suit properties, it was found that it was a sunni Wakf and it belongs to Hazarath Syed Alisha Thaikkal Melavanjur and it was published in Gazette on 19.12.1994 as per Gazette No.108. The plaintiff did not come forward with any kind of suit within one year u/s 6 of the Wakf Act 1954 from the date of Gazette publication and hence the suit is time barred. Further the order of the Settlement Officer is final and hence, it is barred by Res Judicata.

3(d) Further the plaintiff had already filed a suit before the Principal District Munsif, Karaikal and it was numbered as O.S. No. 81 of 1995 in which he has asked the relief of declaration that the plaintiff is the absolute owner of the suit property and directing the defendants / tenants 2 to 5 to deliver vacant possession of the suit property after removal of the superstructures. In the present suit, the plaintiff has asked the relief of declaration that the Thaikkal and tomb of Haji Hazarath Syed Alisha is a private Wakf of the plaintiff's family and that the plaintiff is the lawful manager of the suit properties entitled to exclusive possession and management there of and put the plaintiff in possession of the suit properties and tomb after removing all and every unauthorised encroachments at the instance of the defendants or otherwise. So, it is admitted that he is not in possession of the suit property and the properties in both the suits are one and the same. But in O.S. No. 81 of 1995, the plaintiff has asked for a declaration that he is the absolute owner of the suit property. The suit was valued at Rs. 6,54,000/- and the Court fee of Rs. 48,750/- is to be affixed and hence, the plaint in O.S. No.81 of 1995 was returned to the plaintiff, who had been directed to file the same before the District Court, Karaikal on or before 30.04.1996, since the Principal District Munsif has no jurisdiction. But he has not represented the plaint in O.S. No. 81 of 1995 before the District Court, Karaikal, but has come forward with the present suit. The plaintiff has not filed any title deed to prove his title in respect of the suit property. The defendants have voluminous documents in their favour to show that they are the fit persons to manage the suit property. Thaikkal was electrified in the year 1980 and it was under the control of the Muthawallies for the last several decades. The 4th defendant has leased out the various shops to various person and he is collecting the rents from them and he has leased out the tank for fishing for every year and the 4th defendant has engaged an imam to offer prayer for several decades. Hence, the suit is liable to be dismissed with costs.

3(e) The other defendant have not filed any written statement.

4. On the above pleadings the learned trial Judge has framed as many as 10 issues and one additional issue for trial. Before the learned trial Judge, the plaintiff has examined himself as P.W.1 besides examining two others witnesses on his side as P.W.2 & P.W.3. Ex.A.1 to Ex.A.33 were marked on the side of the plaintiff. D4 has examined himself as D.W.1 and Exs.B.1 to Ex.B.40 were marked on the side of the defendants. An Advocate Commissioner was appointed in the suit, who has filed Ex.C.1 - report. The learned trial Judge after giving due consideration to the submissions of the learned Counsel on both sides and after scanning the evidence both oral and documentary has come to the conclusion that the plaintiff is not entitled to the relief as prayed for in the plaint and accordingly, dismissed the suit with costs, which necessitated the plaintiff to approach this Court by way of this appeal.

5. The points that arose for consideration in this appeal are as follows:

1) Whether the suit is not barred by Limitation?

2) Whether the decree and judgment in O.S. No. 25 of 1997 on the file of the Court of Additional District Judge, Pondicherry at Karaikkal, is liable to be set aside for the reasons stated in the memorandum of appeal?

6. Point No.1 : The plaintiff as P.W.1 would claim that the plaint schedule property is a Thaikkal belonging to his family and that it is a private Wakf and the defendants are not entitled to treat the plaint schedule property as a public Wakf and that they have no right to meddle with the property and are liable to handover the possession of the suit property to him after evicting the tenants. Admittedly the suit was filed in the year 1997. According to the contesting defendants 1 & 4, as per Section 4 of the Wakf Act, the Commissioner has conducted an enquiry and submitted a report to the Government and on the basis of his report u/s 4(3) of the Wakf Act, the State Government has forwarded the same to the Board and after due scrutiny of the report filed by the Commissioner, the Board had forwarded the report to be published in the Official Gazette, a list of Wakf and that the plaint Wakf in respect of the plaint schedule property was published in the Official Gazette under Ex.B.8 dated 30.11.1994 and since the suit was not filed within one year as contemplated under the proviso to Section 6 of the Wakf Act, 1954, the suit is barred by limitation.

6(a) The learned Senior Counsel Thiru. K.Chandramouli appearing for the appellant / plaintiff would contend that even as per Ex.B.8 no notice was served on the plaintiff, who in the capacity of Mathavalli is managing the property after his mother, and before her his fore-fathers. The learned Senior Counsel for the appellant relying on Section 27 of the Wakf Act 1954 would contend that since no notice has been served under Ex.B.8 - Gazette Publication, the Board is competent to collect further information regarding any property which it has reason to be Wakf property and if there is any dispute the same can be enquired by the Board itself and decide the question and that the decision of the Board will be final until the same is modified or set aside by a Civil Court of competent

jurisdiction. In support of this contention the learned Senior Counsel would rely on a ratio in Abdul Kareem (Died) and Others Vs. The Special Officer for Wakfs, Madras and Others, , wherein the ratio decidendi is that "the declaration of a property as a Wakf property without notice to the party affected violates the principles of natural justice". The short facts of the said case are that the plaintiff filed the suit for declaration that the publication dated 6.5.1959 in the official Gazette in respect of the suit property declaring that it is a wakf property is illegal, ultra vires and void in so far as it is against the plaintiff and defendants 2 to 5 and for setting aside the same. According to the plaintiff, the suit property in that suit belongs to the plaintiff and D2 to D4 and that D5 is the usufructuary mortgagee of the said property and that the suit property is not wakf property within the meaning of the Wakf Act but private property belonging to the plaintiff & D2 to D4. But the authorities called upon the plaintiff to register the suit property as wakf property and the plaintiff was resisting the claim. In the mean time the suit property was notified as Wakf property and a publication was made in the Gazette dated 6.5.1959 declaring the suit property as a wakf property. It was contended on behalf of the plaintiff that no enquiry was conducted and that the report was filed behind his back and the publication is ultra vires. The trial Court dismissed the suit on the ground that the suit was barred by limitation since the same was not filed within one year from the date of publication of the notification in the Gazette. The said finding was confirmed in the first appeal. In the Second Appeal while setting aside the findings of the Court below, the learned Judge of this Court has held as follows:

The learned Counsel for the appellant contends that the publication in the Gazette was made without making the requisite enquiry and without notice to him. There is considerable force in the contention of the learned Counsel. The learned Subordinate Judge, in paragraph 7, observed that no witnesses were examined by the Assistant Commissioner of the Wakf Board. It is further seen that the particulars entered (in the?) publication in the Gazette are vague inasmuch as under Clause NO.1 the name of the Wakf alone is given as Puduapalayam Burial ground Wakf, without specifying its exact location. Under the head "Name of the village" the entry is Maniakuppam; and in column No.3 it is shown "pious religious and charitable for the support of the burial ground". Except that the place of the wakf is given as South Arcot District, there is no other indication to identify the property. There is an annexure to the notification and entry No.11 of the annexure shows that no notice was served on the Mutavalli. The actual entry No.11 in the annexure runs; "The Mutavalli is absent at Pondichery and his address is not known". It is, therefore, clear that no attempt was made to serve the Mutavalli. I am therefore satisfied that the complaint of the appellant that he has not been served with notice of the enquiry prior to the making of the report has been made out.

It is pertinent to note at this juncture that the said suit was filed by the plaintiff for declaration that the publication in the official Gazette dated 6.5.1959 in respect of the suit property declaring that it is a wakf property is illegal, ultra

vires and void. But that is not the case on hand. In the present suit the plaintiff has not asked for any declaration that Ex.B.8-publication in the Gazette in respect of the plaint schedule property declaring that the same as a wakf property is illegal, ultra vires and void. No where in the plaint in O.S. No. 25 of 1997 the plaintiff has challenged Ex.B.8 as illegal, ultra vires and void. But the fact remains that the plaintiff has not filed the suit within one year from the date of Ex.B.8-Gazette publication, which is clearly barred under proviso to Section 6 of the Wakf Act, 1954. So the facts of the ratio in Abdul Kareem (Died) and Others Vs. The Special Officer for Wakfs, Madras and Others, will not be applicable to the present facts of the case.

6(b) Placing his reliance on AIR 1974 Kar 28 (Mysore State Board of Wakfs v. K.S. Lakshmaiah Setty), the learned Senior Counsel appearing for the appellant would contend that there is absolutely no material placed on the side of the defendants to show that the grant in favour of the plaintiff was lost. The exact observation in the above said ratio relied on by the learned Senior Counsel in support of his contention is as follows:

The Manager or a person who was supervising the "Sandal or Urs" has not been examined by the defendant, although it is stated by D.W.1 that they were available. In order to hold that the property had become Wakf by user by applying the principle of lost grant, there must be satisfactory evidence to show that the grant itself was lost in antiquity and the evidence about it was not available and further that the property was being used as Wakf property for a long time without interference. Admittedly from 1958, after the plaintiff purchased the property, no "Urs" prior to that is hopelessly discrepant and unreliable. In this state of affairs, it is very difficult to hold that the defendant had established that the property was Wakf by user by applying the principle of lost grant. Mere presence of 2 or 3 graves on a piece of land is not sufficient to hold that the property on which the graves are situated had been dedicated as Wakf property.

To meet this point, the learned Counsel for the respondent would draw the attention of this Court to Ex.B.6-order of Settlement Officer dated 24.2.1987, under which a petition was filed by one M.Nathar Sahib, Muthawalli, Hajrath Syed Alisha Dargah, Melavanjoor, Karaikal, against 1.Tmt.Sabura Beevi (mother of the plaintiff) and 2.Tmt.Mohamada Beevi (sister of Sabura Beevi) u/s 23(1) of the Pondicherry Settlement Act 1970 praying to make the necessary correction in the settlement records. After an elaborate enquiry, the Settlement Officer has allowed the petition filed by the petitioner holding that Late Kassim Sahib was only a Manager and not the owner of the property in question and that is why in matric copy the term "Thaikkal" is found and late Kassim Sahib was mentioned as manager of Thaikkal and ordered to make necessary correction in the settlement records in favour of the Muthavali M.Nathar Sahib. The said order of the Settlement Officer under Ex.B.6 was, admittedly, not challenged by the mother of the plaintiff Tmt.Sabura Beevi till her death. Under such circumstance,

the claim of the plaintiff that as a heir to his mother, he was maintaining the plaint schedule Thaikkal holds no water. I am of the considered view that without challenging Ex.B.8 it cannot be said that the suit is not barred by limitation. Hence, I hold on the point No.1 that the suit is barred by limitation.

7. Point No.2 : In view of my discussion and findings in the earlier paragraphs under Point No.1, I hold on Point No.2 that the decree and judgment in O.S. No. 25 of 1997 on the file of the Court of Additional District Judge, Pondicherry at Karaikall, need not be set aside for the reasons stated in the memorandum of appeal.

8. In fine, the appeal is dismissed and the decree and judgment in O.S. No. 25 of 1997 on the file of the Court of Additional District Judge, Pondicherry at Karaikall, is confirmed. The plaintiff/appellant is at liberty to challenge Ex.B.8 if he is so advised, before the appropriate forum. For the purpose of limitation, the time will run from today. No costs.