

(1972) 01 MAD CK 0021

In the Madras High Court

Case No : Second Appeal No's. 1432 of 1968 and 1604 of 1969

C.A. Khaja Mohidden Sahib and Others

APPELLANT

Vs

The Madras State Wakf Board and Others

RESPONDENT

Date of Decision : 21-01-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : AIR 1973 Mad 104

Hon'ble Judges : V. Ramaswami, J

Bench : Single Bench

Judgement

1. Second Appeal No. 1432 of 1968 has been filed against the judgment and decree in A. S. No. 292 of 1963 arising out of O. S. No. 2175 of

1959 and the plaintiffs are the appellants. S. A. No. 1604 of 1969 has been filed against the judgment and decree in A. S. No. 196 of 1967

arising out of O. S. 899 of 1960 and the second defendant is the appellant.

2. O. S. No. 2175 of 1959 is a suit for a declaration that the suit property measuring about 19 grounds and 321 sq. ft. described in the plaint

schedule is not a wakf property and the defendant in that suit is the Madras State Wakf Board. O. S. No. 899 of 1960 was filed by one Mir

Sardar Ali for a declaration that the property which was the subject-matter in O. S. 2175 of 1959 is a Shia Wakf and that he was the mutavalli of

the property and for an injunction restraining the defendants from interfering with his management of the property. The first defendant in this suit is

the Madras State Wakf Board and the second defendant is the first plaintiff in O. S. 2175 of 1959 and the third and fourth defendants claimed to

be lessees of the property under the second defendant. Since the subject-matter in both the suits was identical property and the question whether it

was wakf property or not was common, both the suits were tried together by consent of parties by the third Assistant Judges, City Civil Court, Madras.

3. Since the controversy in these second appeals relates to the question of statutory notice u/s 56 of the Muslims Wakfs Act, the facts in respect of

the same alone need be set out. In the plaint in O. S. 2175 of 1959 the plaintiff pleaded that he issued a notice as required u/s 56 of the said Act

and that had been served upon the Secretary of the Wakf Board. The Wakf Board did not traverse this allegation in the plaint in the written

statement filed by it. Number of issues were framed. but, there was no issue relating to want of notice u/s 56 or the sufficiency of the notice issued

by the first plaintiff. Both the suits were taken up for trial on 30-11-1962 as seen from the entries in the P Diary. P.W. 1 was examined on that

day. Exs. A-1 to A-10 and some of the defense documents were also marked. The trial was adjourned time and again and the evidence was

closed on 22-3-1963 and the case was posted for arguments. At that stage, it appears, at the request of the defendant State Wakf Board, the trial

Court framed an additional issue on 9-4-1963. It is as follows:

Is the suit bad for want of proper notice u/s 56 or has the defendant acquiesced in the validity or propriety of the notice?

The trial Court after hearing arguments on all the issues and after a consideration of the oral and documentary evidence, dismissed O. S. No. 2175

of 1959, holding that the suit property was a Wakf property and in O. S. 899 of 1960 it declared that it is a shia Wakf. On the finding that it is a

shia Wakf, O. S. 899 of 1960 was decreed. The learned Third Assistant Judge City Civil Court, also gave a finding on the additional issue that the

requirement of notice under Sec. 56 is a condition precedent for maintaining a suit against the Wakf Board and that the defendant could raise that

plea at any stage of the proceedings and in that view held that the suit was bad for want of notice u/s 56 of the Wakf Act.

4. The plaintiffs in O. S. 2175 of 1959 filed A. S. 292 of 1963 against the dismissal of the suit in O. S. 2175 of 1959. The second defendant in O.

S. 899 of 1960 who was the first plaintiff in O. S. 2175 of 1959 also filed A. S. 284 of 1963 against the decree and judgment in O. S. 899 of

1960 since that decree gave a declaration that the suit property is a Shia Wakf.

Both the appeals were heard together by the Principal City Civil Judge, Madras. When the appeals were heard, it appears that both the parties agreed that for a better and proper disposal of the case, some more evidence is necessary and on that ground he set aside the judgment and decree in O. S. 2175 of 1959 and 899 of 1960. While so setting aside and remanding the matter for a fresh trial, the learned Principal City Civil Judge also directed that the trial Judge shall consider the question whether the objection taken on behalf of the State Wakf Board on the question of notice u/s 56 of the Act ""at a very late stage in the trial of the case could be deemed to have been waived by the Wakf Board as contended for on behalf of the appellants"".

5. The State Wakf Board filed C. M. A. No. 299 of 1964, (State Wakf Board, Madras v. C. A. Khaja Ibrahim Saheb) against A. S. No. 292 of 1963, which arose out of the judgment and decree in O. S. 2175 of 1959, in which it was contended that since the question of notice u/s 56 goes to the root of the jurisdiction of the Court, the learned Principal City Civil Judge ought to have considered and given a finding before he remanded the suit for fresh trial on the merits. This Court accepted the contention of the State Wakf Board, allowed the C. M. A. No. 299 of 1964 by an order dated 8-3-1966 and directed to take A. S. 292 of 1963 on the file and dispose of the same after giving a clear finding on the question of notice or waiver of notice u/s 56 of the Act. After this order of remand in C. M. A. 299 of 1964, the Principal City Civil Judge again took A. S. 292 of 1963 on file and by his order dated 2-8-1966 held that the suit was bad for want of notice u/s 56 and that the State Wakf Board had not waived the notice under the Act. S. A. 1432 of 1968 was filed on 30-11-1968 against this order, dated 2-8-1956 in A. S. 292 of 1963.

6. In the meanwhile, O. S. 899 of 1969, which was remanded in pursuance of the order dated 10-7-1964 in A. S. 284 of 1963 was taken on file and after hearing the arguments, the suit was dismissed on 25-3-1967, holding that the suit property did not constitute a Wakf at all and that therefore, the question whether it was Shia Wakf or not did not arise. Aggrieved by this order the State Wakf Board, which was the first defendant in this suit filed A. S. 196 of 1967 on 19-7-1967. This appeal was allowed on 16-4-1968 on the ground that the finding of the trial Court in O. S.

2175 of 1959 that the suit property was Wakf property is res judicata. He also held on merits that the suit, property is Wakf property, apart from

the finding that the suit is barred by res judicata on the question whether the property is Wakf or not. Though by the time when this appeal was

disposed of the second appeal A. S. 1432 of 1968 was filed and pending in this Court it did not appear that this fact was brought to the notice of

the lower appellate Court.

7. The second defendant in the suit has filed S. A. 1604 of 1969 against the judgment and decree in A. S. 196 of 1967. The learned counsel for

the appellants in these appeals raised four main contentions. Firstly, the submitted that the notice required u/s 56 of the Act was not mandatory.

Secondly, in fact, the plaintiff have issued a valid notice and the notice was not defective in any way. thirdly that the appellants filed an application

for dealing plaintiffs 2 to 6 from the array of parties in order to make the suit competent, but that was wrongly rejected by the lower appellate

Court. And lastly, the State Wakf Board having not raised the plea of notice in the written statement shall be deemed to have waived the notice

under the Act.

8. Though the learned counsel seriously contended that the notice u/s 56 of the Act was not mandatory. I do not think it requires any serious,

consideration, Section 56, which is analogous to Section 80. Civil P. C. came up for consideration in this Court in the decision reported in Madras

State Wakf Board Vs. B.A. Jamal Muhammed and Others, , wherein it was held that the notice u/s 56 is mandatory. This is a decision by a

Division Bench of this Court and therefore, the point does not call for any further consideration.

9. There could also be no dispute that the notice which has been marked as Ex. A-49 in this case is defective and not a valid notice that was

contemplated u/s 56. In this notice, while calling for the return of certain documents filed by the first plaintiff with the Commissioner for Wakf, at

the time of the survey held by him, stated that he is finally issuing that notice informing the Secretary Wakf Board that he intended to file a suit in the

Civil Court u/s 6 of the Wakf Act for final decision on the question whether the property is Wakf or not. The notice neither set out the cause of

action nor the relief which he proposed to claim in the suit, nor does it clearly

state that it is a suit notice. It only informs that he intends to file a suit and it is not a suit notice itself. Further, the notice was given by only the first plaintiff and not a notice issued by all the plaintiffs. There are six plaintiffs in this suit. It is well settled that if a notice is issued by only one of the plaintiff and the suit is filed by the person who gave the notice along with others, such a notice is defective and could not be said to comply with the requirements of Section 56. Vide the decision referred u/s 80 Civil P. C. in AL. AR. Vellayan Chettiar (decd) v. Govt. of Madras, 74 Ind App 223 AIR 1947 PC 197 and the decision of this Court itself in this proceeding in A. A. O. 299 of 1964. But, what the learned counsel for the appellant would contend is that the first and second plaintiffs are the sons, plaintiffs 3 to 5 are the daughters and the sixth plaintiff is the widow of one Abdul Azeez to whom the plaintiffs are the legal representatives and it is not a Wakf property. Since according to him, there is a unity of title, it would be enough if one of the plaintiffs issued a notice contemplated u/s 56 of the Act. In my view this contention is not well founded. It is only in cases where the unity of the cause of action or the right is vested in a group of persons, that they are entitled to file one suit as a group. If the cause of action for each of them were different that suit will become bad for multifariousness and it will be open for attack on other grounds as well. In the decision reported in 74 Ind App 223 AIR 1947 PC 197 the Privy Council clearly held that if a suit is filed by the person who issued the notice and another, that notice is invalid. In the circumstances. I have no doubt that the notice issued under Ex. A-9 was defective and did not comply with the requirements of Section 56 of the Act. the third contention of the learned counsel is not borne out by any record or facts. He would only rely on a ground raised by him in the second appeal in 1432 of 1968. He has not produced any application or order thereon made by the lower appellate Court rejecting his plea to permit the withdrawal of the suit in so far as plaintiffs 2 to 6 are concerned.

10. But the learned counsel is well founded in his contention that in the facts and circumstances of this case the State Wakf Board shall be deemed to have waived the notice required under S. 56. In this connection, it is necessary to note a few more facts. The publication u/s 5 of the Act notifying the suit property as Wakf property was made on 20-5-1959. The period

prescribed for filing a suit to set aside or modify this order u/s 6

of the Act was one year from the date of publication. The suit was actually filed on 5-8-1959 within a period of three months. The written

statement itself was filed in the suit on 24-12-1959. It is rightly contended by the learned counsel for the appellant that if the plea had been raised

by the State Wakf Board in the written statement filed on 24-12-1959, the plaintiff could have withdrawn the suit and issued a notice and then filed

a fresh suit within the period prescribed u/s 6. Further on the pleading no issue arises as to the question whether there was a valid notice or waiver

of that notice. Before the defendant asked for framing of the additional issues he had not filed any application for amendment of the written

statement raising the additional plea. In the absence of amendment to the written statement, no plea could arise in this matter. It therefore, follows

that the additional issue framed by the trial Court was not called for.

11. In the foregoing circumstances, the judgment and decree in A. S. 292 of 1963 is set aside and second appeal No. 1432 of 1968 is allowed

with costs and the matter is remanded to the lower appellate Court for a fresh disposal on merits.

12. It is not disputed that if the additional issue does not arise and also on the fact that second appeal No. 1432 of 1968 was pending at the time

A. S. 196 of 1967 was disposed of by the lower appellate Court, the order of the lower appellate Court holding that the suit is barred by res

judicata is unsustainable. Of course the learned counsel for the respondent would point out that the lower appellate Court also gave a finding on the

merits. but, in view of the order in S. A. 1432 of 1968, a fresh disposal of the entire matter by the lower appellate Court becomes necessary. S.

A. 1604 of 1969 is accordingly allowed. The judgment and decree in A. S. 196 of 1967 is set aside and the appeal before the lower appellate

Court is restored to file. The appeal A. S. 196 of 1967 and 292 of 1963 will be disposed of afresh by the lower appellate Court; court-fee paid

on the memorandum of second appeals be refunded to the respective appellants. There will be no order as to costs in S. A. 1604 of 1969. No

leave.

13. Appeal allowed.