

(1991) 08 KL CK 0005

In the High Court Of Kerala

Case No : S.A. No's. 760 and 761 of 1987, 186, 303, 315, 316 and 317 of 1989 and 388 of 1990

Kuniyil Lakshmanan

APPELLANT

Vs

A.P. Mohamood

RESPONDENT

Date of Decision : 14-08-1991

Acts Referred:

Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 25, 25(1)
Mussalman Wakf Validating Act, 1913 — Section 3
Trusts Act, 1882 — Section 1
Waqf Act, 1954 — Section 3(1)

Citation : (1991) 08 KL CK 0005

Hon'ble Judges : Radhakrishna Menon, J;K.A. Nayar, J;Balakrishnan, J

Bench : Full Bench

Advocate : T.R.G. Warriar, K. Lakshminarayanan and D. Anil Kumar, in S.A. No. 388/90 and N.N. Sugunapalan, T.N. Girija, K.P. Dandapani and Sumathy Dandapani, in S.A. Nos. 760 and 761 of 1987 and 186, 303, 315, 316 and 317 of 1989, for the Appellant; P.K. Balasubramanyan, K. Jayakumar, N.L. Krishna Moorthy, Mohan C. Menon, M.A. Manhu, S. Narayana Poti, C.E. Unnikrishnan and A.V.M. Salaludeen and P.K. Mohammed, for Kerala wakf Board, for the Respondent

Judgement

Radhakrishna Menon, J.—The question about the validity of the Notification, S.R.O. No. 47/82 u/s 25 of The Kerala Buildings (Lease and Rent Control) Act, 1965, for short The Rent Control Act, granting exemption in respect of buildings owned by wakfs registered under the Wakfs Act, 1954 with the Kerala Wakf Board from all the provisions of the said Act, among others, arises for consideration in these Second Appeals. The validity of the Notification was upheld by our brother K.S. Paripoornan, J. as is seen from the judgment in O.P. 4959/1984 and connected cases, relying on a decision of the Supreme court in S. Kandaswamy Chettiar Vs. State of Tamil Nadu and Another, .

2. A Division Bench of this Court doubted the correctness of the judgment in O.P. 4959/84 and consequently referred the issue for the consideration of a Full

Bench and that is how these second, appeals have come up before us. For easy reference we shall now reproduce relevant portions of the reference under:

3. The two enactments have differing provisions on this crucial question. The condition contained in Section 25 of the Kerala Act are more rigorous than those in the corresponding section of the Tamil Nadu enactment. Considerations of public interest or existence of other sufficient causes are indispensable requirements in the Kerala enactment. It was noticed that there were no such provisions in the corresponding Tamil Nadu Act.

4. It was, in the light of the above consideration, that this Court directed notice to the State Government and issued a direction to the Government Pleader to produce the relevant files leading to the decision for the notification.

5. We notice that there, are very many matters where in the identical question comes up for consideration. Having regard to the various aspects, we feel that an authoritative decision by a Pull Bench of this Court would be desirable and necessary in the circumstances....

3. In these Second Appeals, by leave of the court the Appellants who are the tenants of the buildings belonging to the wakfs registered with the Wakf Board, challenge the legality/validity of the Notification, giving total exemption to all buildings, owned by the wakfs from all the provisions of the Rent Control Act, issued in exercise of the powers conferred upon the Government u/s 25 thereof.

4. Section 25 reads:

25. Exemptions.--(1) Notwithstanding anything contained in this Act the Government may, in public interest or for any other sufficient cause, by notification in the Gazette, exempt any building or class of buildings from all or any of the provisions of this Act....

We shall at this stage itself reproduce the Notification also:

S.R.O. No. 47/82.--In exercise of the powers conferred by Sub-section (1) of Section 25 of the Kerala Buildings (Lease and Rent Control) Act, 1965 (2 of 1965), the Government of Kerala hereby exempt in public interest the buildings owned by the Wakfs registered under the Wakfs Act, 1954 (Central Act 29 of 1954) with the Kerala Wakf Board from all the provisions of the said Act.

5. The tenants challenge the Notification on the ground that the Notification deprives them of equal protection of the beneficial provision of the Rent Control Act which is available to the tenants of other buildings and as such the same offends against equal protection Clause of Article 14. Dilating on this aspect Sri T.R. Govinda Warriar, Counsel for some of the Appellants, argues that the Notification cannot be said to serve any public purpose because the beneficiaries of this Notification are in no way different from the landlords left out of this Notification. May be that the Wakfs registered under the Wakfs Act constitute a distinct and different class; but it cannot be said that this classification is based

on an intelligible differentia. It is all the more so because, the classified group is inclusive of wakf-alal-awlad, which is only a family wakf, in no way different from a private landlord. Not only that, the classification has no nexus with the object for the accomplishment of which, the power to grant exemptions has been conferred upon the State Government. On the other hand the State Government and the Respondent landlords have refuted the above contentions. The learned Advocate-General Sri M.B. Kurup argues that the wakfs registered under the Wakfs Act fall into a distinct class different from the private landlords and as such the classification can be said to be based on an intelligible differentia. Not only that, it is further argued by the learned Advocate General, that the State Government after conducting an investigation into the matter was satisfied that the difficulties confronted with by the Wakfs in getting the market rent, without which it may not be possible for the wakfs to accomplish their objects, can be obviated, only by issuing the Notification. This notification would help the wakfs to evict the tenants who were not prepared to pay the wakfs the market rent. It is clear from the Notification that it was issued with the intention of helping the wakfs which suffer undue hardship and injustices from the uniform application of the beneficial provisions of the Act. The exemption granted therefore must be regarded as germane to the policy and purpose of the Act namely, to control rack renting and to prevent unreasonable eviction discernible from the preamble and the operative provisions of the Act. In other words, it is submitted, the classification made has a clear nexus with the object to accomplish which, the power to grant exemption has been conferred upon the State Government u/s 25 of the Act. The Counsel representing the landlords supported" the above argument of the learned Advocate General.

6. We have first to deal with the issue (arising from the above competing arguments) namely, whether the buildings owned by the wakfs registered with the Wakf Board in terms of The Wakf Act, 1954, fall into a distinct class different from the buildings owned by private, landlords. The answer to be in the affirmative, it should be established that the wakfs registered with the Wakf Board have the characteristics of public religious and/or charitable endowments. Without understanding the real nature of the word "wakf" it may be difficult, if not impossible, to find an answer to the question. A reference in this connection to the judgment of the judicial committee in *Vidyavaruthi v. Balusami Ayyar* (1921) 48 IA 302 at 312 is indispensable. The judicial committee has declared that the wakf owes its origin to a Rule laid down by the prophet of Islam, and means "the tying up of property in the ownership of God the Almighty". And therefore, when once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in the case of *Jewun Doss Sahoo v. Shah Kubeer-odd-din* (1840) 2 M.I.A. 390, that a dedication to pious or charitable purpose is meant, the right of the wakf is extinguished and the ownership is transferred to the Almighty. The beneficiaries of a valid wakf can be: (1) the affluent and indigent alike, (2) the affluent and thereafter the indigent or (3) the indigent alone. Mohammedan law does not

insist that the beneficiary under a wakf must necessarily be poor. Poverty is only one of the many qualities which are recognised as being capable of attracting the benefit of a wakf, but it by no means is the sine qua non. The manager of such a wakf is called a Mutawalli. In *Jewun Doss Sahu's* case (1840) 2 M.I.A. 390 the judicial committee called the Mutawalli a "Procurator". He has no rights in the property belonging to the wakf; the property is not vested in him and he is not a trustee as understood in English law. The ownership of the property is vested in God Almighty. Taking note of this fundamental difference between the judicial conceptions on which the English law relating to trusts is based and those which form the foundations of the Hindu and the Mohammedan systems, the Indian Legislature in enacting the Indian Trusts Act (II of 1882) deliberately exempted from its scope the rules of law applicable to wakf and Hindu religious endowments. Section 1 of that Act says that "but nothing herein contained affects the rules of Mohammedan law as to wakf, or the mutual relations of the members of an undivided family as determined by customary or personal law; of applies to public or private religious or charitable endowments...." The beneficiaries of these wakfs, it cannot be disputed, represent a considerable portion of the public answering a particular description. The wakfs therefore can be treated as public religious and charitable institutions. A reference in this connection to the following passage from *Lewin on Trusts*, Fifteenth Edition, pages 15-16 is profitable:

By public must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for charitable purposes, and indeed public trusts and charitable trusts may be considered in general as synonymous expressions. In private trusts the beneficial interest is vested absolutely in on or more individuals who are, or within a certain time may be, definitely ascertained....

vide the Supreme Court ruling in *Deoki Nandan Vs. Murlidhar*, . Applying this principle the Supreme Court has observed thus:

...a religious endowment must be held to be private or public, according as the beneficiaries thereunder are specific persons or the general public or Section thereof.

The wakfs registered with the Wakf Board, therefore, must be held to have been constituted for the benefit of, in any event, some considerable portion of the public answering a particular description. It should in this connection be remembered that the legislature Which enacted the Indian Trusts Act has treated the wakf created under the Muslim law on a par with the Hindu religious and/or charitable trusts or public charitable trusts the beneficiaries of which, going by the decision of the Supreme Court in *S. Kandaswamy Chettiar Vs. State of Tamil Nadu* and *Another*, , are public at large or in any event representing a considerable portion of the public answering a particular description. The buildings owned by the wakfs therefore belong to a class distinct and different

from the buildings owned by private landlords.

7. Finding it difficult to grapple with this situation, Sri T.R. Govinda Warrier argued that the class of buildings coming under the Notification takes in its fold the buildings owned by the family wakfs namely wakf-alal-awlad, also. The family wakfs cannot be said to be wakfs created for public benefit and as such the buildings owned by such wakfs cannot be said to be different from the buildings owned by private landlords. On a reading of Section 25 it can be seen, the learned Counsel submits, that a Notification that sub-serves public interest alone can be issued. Buildings owned by family wakfs also are entitled to the benefit of the notification, the Counsel submits. The private right is interwoven with, the scheme of the notification and hence the same is not severable and therefore the Notification is liable to be declared as offending Article 14 is the further argument of the Counsel. To decide whether or not there is any substance in this argument, we may have to refer to the law relating to wakf-alal-aulad prior to the Wakfs Act, 1913 and the law after the said Act. Prior to 1913 the field was occupied by the Privy Council ruling in *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (1894) 22 I.A. 76. The law declared by the Privy Council in this regard is as stated below:

...Where the wakfs were founded for "the aggrandizement of a family", or where the gifts to charity were illusory or merely nominal, the wakfs were declared to be void.

This decision created a storm in the country. According to Muslim pandits this decision ran counter to the fundamental notions of Islamic law and therefore a number of Muslim divines headed by Ulama Shibli Numani, protested against it and wrote forceful pamphlets and finally the legislature stepped in by passing the Muslim Wakf Validating Act, 1913. The provisions of this enactment do reflect the principles of Muslim law governing the creation and administration of family wakf, as stated hereunder.

From the promulgation of Islam upto the present day there has been an absolute consensus of opinion regarding the validity of wakfs on one's children, kindred and neighbours.... A wakf is a permanent benefaction for the good of God's creatures; the wakf may bestow the usufruct, but not the property, upon whomsoever he chooses and in whatever manner he likes, only it must endure for ever. If he bestows the usufruct in the first instance upon those whose maintenance is obligatory on him, or if he gives it to his descendants so long as they exist to prevent their falling into indigence, it is a pious act,--more pious, according to the prophet, than giving to the general body of the poor. He laid down that one's family and descendants are fitting objects of charity, and that to bestow on them and to provide for their future subsistence is more pious and obtains greater "reward" than to bestow on the indigent stranger. And this is insisted upon so strongly that when a wakf is made the indigent or poor generally, the proceeds of the endowment is applied to relieve the wants of the endower's children and descendants and kindred in the first place (see Baillie's

Dig., 2nd ed. page 593). When a wakf is created constituting the family or descendants of the wakf (sic, for wakf), the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in not for the purpose of making the wakf charitable (for the support of the family and descendants is a part and parcel of the charitable purpose for which the dedication is made), but simply to impart permanency to the endowment. When the wakf's descendants fail, it must come to the poor. So it is an enduring benefaction--An act of "ibadat or worship, to use the language of the Jawahir-ul-Kalam"--An act by which kurbat or "nearness" is obtained to the Deity, according to the Bahr-ur-raik.

(see page 303--Fyzee's outlines of Muhamadan Law, IV edition). The decisions of the Supreme Court in Bibi Saddiqa Fatima Vs. Saiyed Mohammad Mahmood Hasan, , supports the above view. This is what the Supreme Court has stated: After the Validating Act of 1913, on the basis of the law as it prevailed even before creation of wakf for the purpose of maintenance of the members of the wakfs family and their descendants is also a charitable purpose. The above argument of the learned Counsel therefore cannot be taken cognisance of. The same therefore is rejected.

8. Sri T.R.G. Warriar then argued that in any event the buildings owned by a wakf, created for the benefit of the wakf and the members of his family is invalid, as creation of such a wakf is not permissible under the Shiah or Shafi law. This argument also cannot be taken cognisance of in view of the provisions contained in the Validating Act of 1913. Section 3(a) and (b) are relevant here:

3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

provided....

The preamble of the Act makes it very clear that the Muslims have the right to make settlements of property by way of wakf in favour of their families, children and descendants. According to Hanafi doctrine, the wakf has the right to reserve the entire produce of the wakf property for his benefit during his lifetime. Prior to the Validating Act, this was not possible in view of the decision of the Privy Council in Abul Fata Mahommed (1894) 22 IA 76. It is in this background the meaning of the word "family" employed in Clause (a) of Section 3 requires to be construed. This word, in the context in which it is used, must be construed in a wide sense. The object to accomplish which, namely, to get over the problems created by the Privy Council ruling and thereby restore the muslim law governing

muslim wakfs, the Validating Act was passed, does not permit a construction other than the one suggested above. That, Clauses (a) and (b) reflect those principles of muslim law, is beyond challenge. It therefore follows that it always has been lawful for wakf to create a wakf in favour of his family, children, descendants, etc. Under the circumstances the word family shall be held to take in its fold a house-hold consisting of parents, children and even servants. To put it differently the policy of the Validating Act is to validate the creation of a wakf in perpetuity in favour of persons who are members of a family according to the proper acceptance of that term. A similar view is expressed by a division bench of the madras high court See *Asha Bibi and Others Vs. Nabissa Sahib and Others*, . It can, however be seen that under the Validating Act, 1913 only those wakfs, which satisfy the requirements prescribed by it, which requirements are nothing but the requirements prescribed by Muslim personal law, alone can get registered with the wakf board. It is relevant in this context to note the following aspects: A wakf-alal-aulad may be a wakf under the general law and also under Mussalman Wakf Validation Act, 1913 which came into force with effect from 7th March 1913. Retrospective effect is given to the Validation Act of 1913 by the Validation Act of 1930. But the Notification S.R.O. No. 47/82 exempts only building owned by wakf registered under Wakf Act, 1954 (Central Act 29/54) with the Kerala Wakf Board. For this purpose wakf as defined in the Wakf Act which is a uniform consolidated legislation passed by the Centre alone is taken into account. We shall now see the definition. Section 3(1) of the original Act defines wakf to mean permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious and charitable and to include, among others, a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable. Thus, Wakf Act, 1954 recognised Wakf-alal-aulad as a wakf registrable only to the extent it relates to properties dedicated for purposes recognised by Muslim Law as pious, religious or charitable. In other words, a wakf-alal-aulad simpliciter is outside the scope of the Act as it originally stood. But, by the amending Act 69/84 attempt has been made to bring wakf-alal-aulad within the purview of the Act and the definition of wakf in Section 3(1) has been amended to include "a wakf-alal-aulad". But, this amended provision, we are told, has not been brought into force. Thus wakf-alal-aulad, though in general Muslim law can be a valid Wakf, for the purpose of the Wakf Act it will be a wakf only to the extent, the property is dedicated to any purpose recognised by the Muslim law as pious, religious or charitable. That being the position it will be too much for anyone to contend for the position that the buildings belonging to such wakfs do not fall into a class different from the buildings belonging to the private landlords.

9. Now we have to see whether the classification has any nexus with the object, to accomplish which, the power to grant exemptions has been conferred upon the State Government u/s 25 of the Act. This aspect, the Government shall establish by production of materials. The files of the State Government, made

available for scrutiny, would reveal that the State was of the view that in the absence of total exemptions of the buildings from the Act, augmenting the income of wakf would be extremely difficult, because these buildings continue to be rented out "on very meagre and inadequate rents". Taking note of these aspects the States of Andhra Pradesh, Tamil Nadu, Karnataka, Rajasthan etc. have already exempted all types of wakf buildings from the purview of their respective rent control legislations, the Government submit. A reference in this connection to the letter of the Central Government to the State Government, dated 27th February 1980 the letter, dated 21st April 1980, the Secretary, Board of Revenue addressed to The Special Secretary to State Government, Public Works and. Electricity (H) Department and the explanatory note appended is relevant. This explanatory note reads:

The Kerala Wakf Board stands notified as a public authority for the purpose of the Kerala Buildings (Lease and Rent Control) Act, 1965 vide Notification No. 54792/B2/65/PW, dated 1st January 1966. By virtue of this notification, the Wakf Board can evict its tenants from the buildings owned by it without applying the provisions of the Rent Control Act. But this procedure applies only to the buildings of which the Wakf Board is the landlord. The buildings owned by the various wakfs registered with the Wakf Board are not covered by the above Notification. The Secretary, Kerala Wakf Board has therefore requested to exempt all the buildings owned by the registered wakf from the provisions of the Act. Government of India also have requested to exempt all types of wakf properties from. the application of the Rent Control Act "since Wakf properties are for charitable purpose". Government have accepted the request. The notification is intended to achieve the above object.

In the same strain is the recitals contained in the letters mentioned above. These materials and the recitals contained in the statements filed on behalf of the State Government (no counter statement contending that the materials provided by the documents and the statements do not help one to infer that the buildings fell into a class) clearly show that the buildings belonging to the wakfs fall into a class where undue hardship and injustice resulting to them from the uniform application of the beneficial provisions of The Rent Control Act required to be relieved. The exemption granted therefore could be regarded as being germane to the policy and purpose of the Act. In other words the classification has a clear nexus with the object to accomplish which the power to grant exemption has been conferred upon the State Government u/s 25. Under the circumstances we are constrained to reject the argument of the Counsel for the tenants that the State Government did not apply its mind which it was required to do before it issued the Notification.

10. The above aspect can be viewed from another angle. In this connection we have to find an answer to the question why Section 25 was enacted at all. A reference in this context to the objects/purposes sought to be achieved by the enactment is relevant. It cannot be disputed that the two objectives of the

enactment are to control rack renting and to prevent unreasonable eviction. They are interrelated and the provisions which subserve these objectives supplement each other. To put it differently the purpose of the enactment indisputably is to prevent unreasonable eviction and also to control rack renting, as observed by the Supreme Court in *P.J. Irani Vs. The State of Madras*, . At the same time the Act contains provisions indicating that there are areas where the uniform application of the Act is likely to result in unnecessary or undue hardship to the landlords who, on account of their unique position in the society, will not go in for rack renting or unreasonable eviction. Wakfs, we have already found, do occupy such a position. The wakfs therefore must be given the freedom to charge the normal market rent and to make that freedom effective, in our view, it is necessary to arm the wakfs with the right to evict the tenants for non-payment of such market rent. The wakfs can accomplish this object only if they are permitted to recover from the tenants reasonable market rent and if that be so impossibility to evict them when reasonable market rent is not paid would be unreasonable. It should in this connection be remembered that if the market rent is paid by the tenants no wakf would evict them. Not only that the wakf may desire eviction of the tenants for the purpose of carrying out major or substantial repairs and for the purpose of demolition and reconstruction and this can be had only if the Wakfs are able to effect eviction without being required to fulfil the onerous conditions prescribed by the various provisions of the Act and required to be complied with by the landlord when they seek eviction for such purposes. So in our view the total exemption granted to such buildings by the impugned Notification is perfectly justified.

11. The learned Counsel Sri P.K. Balasubramanyan representing some of the landlords argued that the tenants who had challenged the validity of the Notification by filing Original Petitions under Article 226 without success are disentitled to take up the issue again as the said plea is hit by the doctrine of *res judicata*. On going through the judgments in these writ petitions we are of the view that the learned Counsel is well founded in this submission. A reference in this connection to the following decisions is profitable:

Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, .

Whatever that be, in the light of the opinion expressed by us on the main issue, it is unnecessary to go into the further details of this issue.

12. On the merits: There is little scope to interfere with the findings as they are based on materials.

The Second Appeals therefore fail. Accordingly they are dismissed.