
(2013) 02 OHC CK 0014
In the Orissa High Court
Case No : Second Appeal No. 287 of 1986

Mian Sahataz Pir and Others

APPELLANT

Vs

Sk. Ahmed and Others

RESPONDENT

Date of Decision : 26-02-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 80
Waqf Act, 1995 — Section 25, 25(7), 25(8), 26, 4

Citation : AIR 2013 Ori 173 : (2013) 1 OLR 898

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Advocate : S.S. Basu, S.S. Rao, G.S. Das, G.P. Dutta and P.K. Khuntia, for the Appellant; Irshad, Miss. Mira Ghose and D.N. Subudhi, for the Respondent

Final Decision : Allowed

Judgement

M.M. Das, J.—Both the aforesaid second appeals arise out of the same judgment passed in Title Suit No. 161 of 1980 by the learned First Munsif, Cuttack on 30.8.1983. As two Title Appeals were filed against the said judgment passed in the suit, being Title Appeal Nos. 89 and 98 of 1983, by two of the defendants in the suit, the learned Second Addl. District Judge, Cuttack by his common judgment dated 4.8.1986 passed in both the appeals reversed the judgment and decree of the Trial Court. Hence, these second appeals. These second appeals were heard together and are being disposed of by this common judgment. In order to appreciate and answer the substantial questions of law on which the second appeals have been admitted, it would be necessary to narrate the facts in gist which gives rise to these second appeals, which are as follows:

2. T.S. No. 161 of 1980 was filed by the present appellants, who were plaintiffs and the legal heir of one of the plaintiffs who has expired in the meantime. In the said suit, a decree for declaration was sought for over "B" schedule property as a Private Wakf belonging to the family of the plaintiffs-marfatdars where the general public have no right including the defendants and to declare the order of

the defendant No. 1, i.e. Commissioner-cum-Secretary, Board of Wakf dated 6.11.1980 as illegal and invalid which does not create any right in favour of the Muslim public and to restrain the Muslim community in general not to come over the suit property and exercise any right of worships by offering Fatiah and Prayer to the Shrine of plaintiff No. 1.

3. The plaintiffs' case was that the plaintiff No. 1 -Mian Sahataz was the ancestor of Mir Ghashi and Chuni Bibi was the wife of Mian Sahataz. After their death, they were buried inside the family compound and whose Shrines were erected to commemorate their memory and in course of time, those Shrines were acclaimed as Pira for which incenses were offered daily and periodical Fatiah was also offered. Thereby the Pirsthan was recorded as Mian Sahataz Pir being represented by the family members of Mir Ghashi in the settlement papers. The said Pirsthan is situated over "B" Scheduled property of the plaintiff and the same is used as a grave yard of the family members of the said Mian Sahataz Pir and is not a Public Wakf. The defendant No. 2 with the help of certain Muslims of the locality and some outsiders forged the signatures of some of the Marfatdars of the said Private Wakf and filed an application before the defendant No. 1, i.e. the Commissioner of Wakf u/s 25 of the Wakf Act, 1954 (hereinafter referred to as "the Act") for registration of plaintiff No. 1 as a Public Wakf. The defendant No. 1 without any proper enquiry and without visiting the local spot as well as without calling for any objection from the recorded Marfatdars registered the said plaintiff No. 1 as a Public Wakf. When this fact came to the knowledge of the plaintiffs upon a certified copy of the register being maintained by the defendant No. 1 u/s 26 of the Act, the plaintiffs-marfatdars filed their objections against the said registration before the Commissioner-cum-Secretary, Orissa Board of Wakf for cancellation of the registration of Plaintiff No. 1 from the register. But the said defendant No. 1 -Commissioner-cum-Secretary in the said proceeding, which was numbered as Misc. Case No. 1 of 1979, passed an order on 6.11.1980 that the plaintiff No. 1 and its place of installation i.e. Schedule "B" property of the plaintiff, is a Public Wakf and the registration of the same is in accordance with the Wakf Act, 1954. The plaintiffs challenged the said order in the suit. alleging that the same is absolutely illegal as per the provisions of the Wakf Act, 1954 which has not been recorded as a Public Wakf and has not been notified in the Gazette as required under Sections 4 and 5 of the said Act. The defendant No. 2 filed an application forging the signatures of the Marfatdars and some others and no notice was given as envisaged u/s 25(7) of the Wakf Act nor the limitation as provided u/s 25(8) of the Act was taken into consideration. The defendant Nos. 3 and 4 were impleaded as representatives for themselves and for the large number of Muslim Public as per the leave granted under Order 1, Rule 8 C.P.C.

4. The defendant Nos. 1 and 5 objected to the allegations made in the plaintiff on similar grounds, that is, the suit property was not ancestral property of the plaintiffs-marfatdars but is a Wakf Property of the Shrine Mian Sahataz Pir. It was also denied that the said property was a family grave yard. It was further pleaded that in the Wakf Act, there is no provision with regard to Private Wakf

and the publication of Wakf u/s 5 of the said Act in the Gazette is under process. Hence, it was pleaded that the registration of the Wakf is in accordance with the provisions of the said Act, 1954. The defendant Nos. 3 and 4 in their written statements supported the case of the plaintiffs. The defendant No. 2 in his pleadings only stated that the claim of the plaintiffs that the Wakf is a private one, is not acceptable as under the Mohammedan Law and Wakf Act, there is no contemplation of any Wakf as "Private". It was further pleaded by them that the said Mian Sahataz Pir after attaining sainthood severed the relationship with the members of the family for which the word "ancestor" loses its sanctity. Hence, the plaintiffs, claim that Mian Sahataz was their common ancestor is not correct. It was also pleaded that the decisions of the defendant No. 1- Commissioner are correct and in accordance with law, which is final. The "B" Scheduled property was used as a Pirsthan by the Muslim Public of the town as well as the neighbouring villagers as a religious place, where they used to offer Fatiah, Incense, Shrini and perform prayer as well as annual Urs is observed at the shrine. Thus, according to them every Muslim has got right to visit this Shrine, offer Fatiah, prayer and perform annual Urs etc.

5. On the above pleadings, the Trial Court framed as many as eight issues.

With regard to Issue Nos. 1 and 8 i.e. maintainability of the suit and whether the suit is maintainable without service of notice u/s 56 of the Wakf Act and u/s 80 C.P.C. the Trial Court on analyzing the materials on record came to the conclusion that the suit is not maintainable against the defendant No. 5,-the Chairman, Orissa Board of Wakf. Issue Nos. 2, 3 and 7 read as follows:

(2) Is the property in Schedule "B" property is Wakf property and the public have right to worship the shrine?

(3) Is the Mohammedan Law recognizes any private Wakf?

(7) Are the Muslim Public entitled to visit the institution and to offer Fatiah and Prayer etc.?

The trial Court referring to various authorities and decisions as well as the evidence adduced came to the conclusion that the public have no right to worship the Shrine situated over "B" Schedule property, which is not a Public Wakf and accordingly, the Muslim public excepting the Marfatdars of the Pirsthan are not entitled to visit the institution to offer Fatiah or Prayer. Dealing with Issue No. 4, i.e. has the defendant No. 1 any authority to register the Schedule "B" property as Wakf Property as per the Act, the Trial Court on analyzing the respective cases concluded that the registration of the plaintiff No. 1 as per the provisions of Section 26 of the Act is illegal because the mandatory provisions of Section 25 of the said Act has not been complied with. The Trial Court also held that the application filed for registering the Wakf u/s 25 of the Act was a forged one as well as the said application was filed much after three months from the date of coming into force of the Act as prescribed in Section 25 of the Act. With regard to Issue No. 5 is the publication of the notice under Order 1 Rule 8 C.P.C.

sufficient in the suit, the Trial Court held that the publication is sufficient for filing of the suit. In respect of Issue No. 6, i.e. are the plaintiffs entitled to file the suit and entitled to the relief claimed?, it was the finding of the Trial Court that in view of the discussion made in the judgment, the plaintiffs are entitled to get their relief by filing the present suit. Accordingly, the Trial Court decreed the suit on contest against the defendant Nos. 1 to 4 with costs and dismissed the suit on contest against the defendant No. 5 but without cost. A declaration was made that the Schedule "B" property is declared as a Private Wakf and the Muslim Public including the defendants have no right whatsoever in respect thereof. The Trial Court also decreed the suit with regard to the prayer for injunction by restraining the defendant No. 2 and the Muslim Community in general to go over the suit property to exercise any right of worship by offering Fatiah and Prayer to the Shrine, Plaintiff No. 1. The order passed by the defendant No. 1 on 6.11.1980 was declared as illegal and invalid which does not create any right in favour of the Muslim Public. Being aggrieved by the said judgment, the defendant No. 2- Sk. Ahmed filed T.A. No. 89 of 1983 and the defendant No. 1- Commissioner-cum-Secretary, Board of Wakf filed T.A. No. 98 of 1983. Both the appeals were heard together by the learned Second Addl. District Judge, Cuttack and disposed of by the common judgment dated 4.8.1986 reversing the judgment and decree passed by the Trial Court. Hence, these second appeals have been filed by the plaintiffs in the suit. The second appeals have been admitted on the following substantial questions of law:

Whether the decision of the lower appellate Court that the Muslim Law does not contemplate any Private Wakf is contrary to law and is liable to be set aside?

Whether the lower appellate Court has erred in law in holding that all Wakfs are public Wakfs and thereby holding that the appellant No. 1 is a public Wakf since there cannot be any private Wakf in Muslim Law?

6. With regard to the above two substantial questions of law, the Trial Court on analyzing the facts and referring to various case laws while giving its finding on Issue Nos. 2, 3 and 7 found that Mohammedan Law recognizes a private Wakf and the suit "Wakf is a Private Wakf to which the public are not entitled to visit and offer Fatiah or Prayer as the Wakf is not a Public Wakf. The lower appellate Court, on the other hand, coming to a contrary finding that the order passed by the Wakf Commissioner for registration of the disputed Wakf u/s 25 of the Wakf Act on 6.11.1980 is legal and valid, set aside the impugned order of the Trial Court. The lower appellate Court further found that the suit "Wakf including Pirsthan being thus declared by the appropriate authority under the Act as Public Wakf by order dated 6.11.1980 and also included in the register of the Wakfs maintained by the defendant No. 1, the dispute cannot be held to be one u/s 6 of the Act. According to the lower appellate Court, the Act does not contemplate of anything like a private Wakf much less the distinction between the private Wakf and the Public Wakf.

7. It may be mentioned here that the plaintiffs in the plaint specifically claimed

that Pirsthan situated over "B" Schedule property belongs to them and was used as a grave yard of the family members of the said Mian Sahataz and was not a Public Wakf. It was further pleaded, as already stated, that some outsiders forging the signatures of some of the marfatdars of the private Wakf filed an application before the defendant No. 1 u/s 25 of the Act for registration of the plaintiff No. 1 as a Public Wakf. No enquiry was conducted by the defendant No. 1, before he registered the same as a Public Wakf and entered it in the register being maintained u/s 26 of the Act. On the objection filed by the plaintiffs, the defendant No. 1 disposed of the said objections by holding that the Wakf is a public one and the registration is in accordance with the Wakf Act, 1954. This Court finds that the lower appellate Court fell into an error in holding that there is no concept of private Wakf under the Act. In M. Hidayatullah Mohammedan Law (18th Edition) at page-213, the authority with regard to the public and private Wakfs has stated as follows:

It was considered at one time that "to constitute a valid Wakf there must be a dedication of property solely to the worship of God or to religious or to charitable purposes (h), in other words, that a private Wakf was in no case valid. But this extreme view is no longer tenable (i), and a private Wakf may now be made subject to certain limitations. These limitations were very strict under the law as it stood before the Wakf Act, 1913. They have been considerably relaxed by the Wakf Act. Wakfs are divided into private and public.

8. It is a settled position of law with regard to the Wakfs that the Wakfs may be divided into two classes, i.e. (1) public and (2) private. A public Wakf is one for a public religious or charitable object. A private Wakf is one for the benefit of the settlor's family and his descendants, and its called Wakf-alal-aulad. At one time, it was considered that there must be a dedication of the property to constitute a valid Wakf solely to the worship of God almighty him or for religious or charitable purposes. (See Mahomed Hamidulla Khan Vs. Lotful Huq and Others, . The extreme view that private Wakf no more exists was held to be tenable and it was permitted under law to have a private Wakf subject to certain limitations. These limitations were very strict under the law as it stood before the Wakf Act, 1913 and there has been considerably relaxation by the Wakf Act. The decision in the case of Abdul Fata Mahomed v. Russomoy (1894) 22 Cal. 619, the Privi Council held that the Wakf both for the benefit of the Settlor's family, children and descendants, and for charity was valid, if there was a substantial dedication of the property to charitable uses at some period of time or other. But if the primary object of the Wakf was the aggrandizement of the family, and the gift to charity was illusory whether for its small amount or from its uncertainty and remoteness, the Wakf for the benefit of the family was invalid and no effect could be given to it. The decision of the Privi Council in Abdul Fata Mahomed's case caused dissatisfaction in the Mahomedan community in India. A representation was thereafter made to the Government of India, with the result, an Act was passed in 1913, called the Mussalman Wakf Validating Act, the object being to remove the disability created by the said decision. However, the said Act was not

given retrospective i.e. it did not apply to Wakfs created before the Act came into force. This led to the enactment of another Act in 1930 by which a retrospective effect was given to the Wakf Act, 1913. In the result, therefore, the provisions of the Wakf Act, 1913 now applies to it created before that Act.

9. In view of such position and in view of the provisions of Section 3 of the Mussalman Wakf Validating Act, it is 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 purpose of maintenance and support wholly or partially of his family, children or descendants and where the person creating a Wakf is a Hanifi Mussalman also for its own maintenance and support during his life time or for payment of his debts out of the rents and profits of the property dedicated, provided that the ultimate benefit in such cases expressly or impliedly is reserved for the poor or for any other purpose recognized by the Mussalman Law as religious, pious or charitable purpose of a permanent character. No such Wakf shall be deemed to be invalid merely because the ultimate benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the Wakf.

10. Keeping the above position of law in view, it would be clear that the lower appellate Court has acted contrary to law in holding that there is no concept of private Wakf under the Mahomedan Law. Further, there being enough material on record on which the Trial Court arrived at a finding of fact that the property in "B" schedule has been dedicated by the founder, the said Wakf created is a private Wakf and the defendant No. 1 could not have registered the same as a public Wakf and could not have rejected the representation made by the plaintiffs objecting such action as well as the registration of the Wakf was not in accordance with Section 25 of the Act, the lower appellate Court has come to a contrary finding without referring to the materials which were brought on record during trial of the suit.

11 It is by now well settled in law that jurisdiction of the civil Court cannot be presumed to have been taken away if the ultimate order passed by a statutory authority exercising quashi judicial power is challenged on the ground that the procedure contemplated under the said statute has been violated while passing the said impugned order. In the instant case, the plaintiffs alleged that the procedure prescribed u/s 25 of the Act was not duly followed over and above the fact that signatures of some of the marfatdars were forged in the application for registering the Wakf u/s 25 of the Act. The Trial Court also found that, as a matter of fact, the enquiry contemplated under the Act has not been done and the objections filed have not been taken into consideration. The lower appellate Court, therefore, was not right in holding that the said order passed by the defendant No. 1 cannot be challenged before the Civil Court. In the result, therefore, the said findings of the lower appellate Court cannot be sustained.

12. Finding thus, this Court has no hesitation to set aside the judgment and

decree passed by the lower appellate Court and restore the judgment and decree passed by the Trial Court in T.S. No. 161 of 1980. Accordingly, the judgment and decree passed by the lower appellate Court in Title Appeal Nos. 89 and 98 of 1983 is set aside and the judgment and decree passed by the Trial Court in T.S. No. 161 of 1980 is restored. These second appeals are, therefore, allowed but in the circumstances, without cost.