

(2008) 12 AP CK 0045
In the Andhra Pradesh High Court
Case No : C.R.P. No. 5351 of 2007

Mir Shah Zahoor Trustee/Mutavalli

APPELLANT

Vs

Haji Shaik Madhar and Others

RESPONDENT

Date of Decision : 31-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, 11, 151, 29(2), 92
Waqf Act, 1954 — Section 15, 16, 43, 43A
Waqf Act, 1995 — Section 55, 57, 59, 69, 70

Citation : (2009) 2 ALD 557

Hon'ble Judges : G. Yethirajulu, J

Bench : Single Bench

Advocate : V.S.R. Anjaneyulu, for the Appellant; S.Srinivas Reddy and S. Subhani, for the Respondent

Final Decision : Dismissed

Judgement

G. Yethirajulu, J.—C.R.P. No. 5351 of 2007 has been filed by respondent No. 1 in I.A. No. 81 of 2005 in O.S. No. 113 of 1913 on the file of the Principal Senior Civil Judge, Vijayawada. C.R.P. No. 3797 of 2008 has been filed by respondent No. 1 in I.A. No. 968 of 2004 in O.S. No. 113 of 1913 on the file of the Principal Senior Civil Judge, Vijayawada. C.R.P. No. 3796 of 2008 has been filed by respondent No. 1 in I.A. No. 1543 of 2005 in I.A. No. 968 of 2004 in O.S. No. 113 of 1913 on the file of the Principal Senior Civil Judge, Vijayawada.

2. Since the issue and the parties in all the Revision Petitions are similar, they are clubbed and this common order is passed.

3. The respondents 1 to 5 herein filed I.A. No. 81 of 2005 u/s 151 of C.P.C. praying to appoint them as members of panchayat of the suit schedule mosque and its properties or in the alternative to appoint five persons as shown in the list who are also qualified to be appointed as members of panchayat of the suit mosque and its properties. The respondents herein are the third parties to the suit. They are the orthodox muslims and residents of Vijayawada City. They used

to offer namaaz as per the Islamic tenants. O.S. No. 113 of 1913 was filed by one Mohammed Abdul Hakim Saheb and Mohammed Abdul Sattar Baig, in which a scheme was framed by the Court on 30-09-1915 for the administration of the subject mosque and its properties. As per the scheme, a trustee shall have the power to appoint his successor and the succeeding trustees shall also have power to appoint their successors. Janaab Abdul Sattar, Janaab Mohammed Abdul Rahim Baig Sahib, Janaab Mohammed Saddit Ally Sahib, Janaab Sowdagar, Mohammed Azeem Sahib and Janab Mohammed Abdul Raheem Sahib were the members of the first panchayat. They hold the panchayat for their life and died in course of time. But, no other persons were appointed as members of panchayat as per the scheme decree framed by the Court. Since vacancies were caused on account of the death of the descendants of the founder trustee and also members of the panchayat, one Mirza Nizamuddin Baid and others filed I.A. No. 3517 of 1980 praying the Court for appointment of trustee and also for appointment of five panchayatdars as laid down in the scheme framed by the Court. In the said I.A., One Mir Shahzahoor filed I.A.Nos.4431 and 4432 of 1980 to implead him and for appointing him as Trustee or muthavallid of the suit Mosque. The lower Court passed an order on 09-01-1997 allowing the Applications. Against the said orders, the tenants in the suit mosque and others preferred Revision Petitions before this Court and this Court disposed of the same by confirming the orders of the lower Court. As per the orders of this Court in the said Revision Petitions, the petitioner in I.A. No. 4432 of 1980 was appointed as trustee of the said mosque. Though it was prayed for appointment of five members as panchayatdars, no persons have been appointed by filling up the vacancies of panchayatdars. The respondents did not choose to take steps for the appointment of panchayatdars as per the scheme decree. The petitioners are interested persons in the proper management of the properties of the suit mosque, therefore they offered themselves to be the panchayatdars, as they are qualified to be appointed as such.

4. The first respondent filed a counter denying the allegations in the Application by contending that the petitioners cannot be appointed as panchayatdars, as they did not have requisite qualifications.

5. The second respondent filed counter by contending that the petitioners have no locus standi to file the present Application after the enactment of Wakf Act, 1995. The petitioners neither approached the Wakf Board nor sent any representation against the present Muthavalli u/s 69 of the Wakf Act. The Wakf Board has got a statutory right to change the scheme in respect of the wakf property and hence, the petitioners cannot seek any remedy in this petition. The A.P. State Wakf Board has got power of superintendence, management and control of all the wakf properties in the State u/s 70 of the Wakf Act, 1995. The question of appointment of panchayatdars as per the scheme was agitated in the earlier proceedings, but it was negatived. The present Wakf Act, 1995 has provided all the remedies against the erring mutawallis. They can initiate an enquiry against the mutawalli on the basis of the proof furnished before the A.P.

State Wakf Board and deal with the matter suitably. The A.P. State Wakf Board, being a statutory body, has to be allowed to use its discretion under the Act. The present petition is totally misconceived and there is neither prima facie case nor balance of convenience in favour of the petitioners. The petition is, therefore, liable to be dismissed.

6. The lower Court framed the following points for consideration:

1. Whether the Committee consisting of five panchayats has to be appointed in pursuance of the scheme decree in O.S. No. 113 of 1913?

2. Whether the petitioners can be appointed as panchayatdar of the Committee?

7. The lower Court, on verification of the record and after hearing both the counsel, held that the members of panchayatdaras or committee of the said mosque have to be appointed in pursuance of the scheme decree. The lower Court further observed that I.A. No. 3517 of 1980 was allowed appointing a trustee/mutawalli by name Hakim Abdul Saheb. But so far as the second relief of appointment of panchayatdars is concerned, no finding was given and the petition was dismissed in respect of that claim. The High Court did not mention that the panchayatdars cannot be appointed in pursuance of the scheme decree. The High Court upheld the scheme decree passed by this Court in O.S. No. 113 of 1913. The High Court of A.P. observed that even after passing of the Wakf Act in the year 1954-55, the scheme decree framed by the Court shall continue to be operative and the said scheme decree does not exhaust after commencement of Wakf Act, 1954 or 1955. As per Clause 5 of the scheme, the panchayatdars or committee consisting five respectable mohammeden residents of the Vijayawada City shall be constituted to supervise and control the management and administration of the trust by the Trustee. The lower Court, ultimately, allowed I.A. No. 81 of 2005 in part directing to issue a notification in a paper calling for the applications of the intending responsible mohammeden who are residents of Vijayawada City to act as members of the panchayat or committee of the mosque and its properties in pursuance of the scheme passed in O.S. No. 113 of 1913.

8. I.A. No. 968 of 2004 has been filed by the third parties u/s 151 of C.P.C. praying to appoint them as members of the panchayat or committee of the suit schedule mosque and its properties or in the alternative to appoint any five persons who are qualified to be appointed as panchayatdars. I.A. No. 1543 of 2006 was filed in I.A. No. 968 of 2004 under Order 14 Rule 2(ii) and Section 151 of C.P.C. praying to decide the point of res judicata and other infirmities whether the petition is maintainable or a suit is liable to be filed for removal etc.

9. Separate orders have been passed in all the petitions on the same day. I.A. No. 81 of 2005 was allowed in part. I.A. No. 968 of 2004 was allowed directing to issue notification in a newspaper calling for the applications of the intending responsible Mohammeden who is the resident of Vijayawada City to act as members of the Committee. I.A. No. 1543 of 2005 was dismissed in view of the order passed in I.A. No. 968 of 2004. Being aggrieved by the respective orders of

the lower Court, dated 06-11-2007, the present Revision petitions have been preferred by contending that since no order was passed regarding the appointment of the panchayatdars in the previous proceedings, which was confirmed by the High court, the respondents herein are not entailed to file another Application seeking appointment of panchayatdars, which is hit by res judicata. The orders passed by the lower Court are contrary to the letter and spirit of the wakf Act, therefore, they are liable to be set aside.

10. It is the contention of the respondents that Clause 5 of the scheme provides for appointment of five panchayatdars. When the I.A. No. 3517 of 1980 was filed for appointment of trustees and panchayatdars, the lower Court appointed only trustee, but remained silent regarding the appointment of the panchayatdars. The High Court also confirmed the said order without making any observation regarding the appointment of panchayatdars, therefore, the present Application has been filed for appointment of panchayatdars by way of appointing petitioners or some other eligible persons to supervise the affairs of the wakf and its properties.

11. The learned Counsel for the Revision Petitioner, Sri V.S.R. Anjaneyulu, submitted that it is an undisputed fact that the scheme has been framed by the Court in O.S. No. 113 of 1913 and it was in force and continued after the Wakf Act came into force. The scheme provides for appointment of trustee and panchayatdars. The trustee will manage the affairs of the mosque and its properties and the panchayatdars will have the supervisory powers against the functioning of the mutawalli. When the previous Applications were filed for appointment of trustees and panchayatdars, the trustee was appointed and the order was silent about the appointment of panchayatdars. When a request was made to the Court and when it was not considered by the lower Court without passing any orders on merits, even then the doctrine of res judicata will come into operation, therefore, the respondents/petitioners are precluded from filing the present Applications. He further submitted that though the Court appointed the trustee and panchayatdars immediately after framing of the scheme, after the demise of those panchayatdars nobody was appointed since several years, therefore, the question of appointing panchayatdars at this stage to supervise the management of the mosque and other properties relating to the mosque does not arise. He further submitted that since the legal position is very clear that the earlier order operates as res judicata, the present Applications must be dismissed as not maintainable by virtue of operation of the doctrine of res judicata.

12. On the other hand, the learned Counsel for respondents 1 to 5, Sri Srinivasa Reddy and the learned Standing Counsel for Wakf Board, Sri S.M. Subani, submitted that the scheme was framed in the year 1915 and it is in operation since then. It was also upheld by the High Court even after the Wakf Act came into force. Initially the trustee was appointed along with the panchayatdars for their life time. But the panchayatdars died in the natural course and

subsequently no panchayatdars were appointed for a very long time and when the Applications were made by third parties in the previous proceedings, the trustee was appointed, but no order has been passed by the Court by giving a specific finding whether the panchayatdars can be appointed or not. When there is no reference about the appointment of panchayatdars, the principle of res judicata is not applicable, therefore, there cannot be any objection for the orders passed by the lower Court, and the Revision Petitions are liable to be dismissed by confirming the orders passed by the lower Court.

13. Sri V.S.R. Anjaneyulu, the learned Counsel representing the Revision petitioners, relied on certain judgments in support of his contention that by virtue of operation of res judicata, the Applications are not maintainable.

In Pawan Kumar Gupta Vs. Rochiram Nagdeo, the Supreme Court considered the scope of Section 11 of C.P.C.

In the case covered by the above decision, the appellant, by claiming to be the transferee of the suit building under a sale deed, filed a suit for eviction of the respondent on the ground of arrears of rent. The respondent-defendant pleaded that the sale deed was binami transaction and the real owner of the building was not the defendant, but the defendant's father. The trial Court held that the appellant-plaintiff to be the real owner of the suit building and entitled to rent thereof. However, since the respondent had by then deposited the arrears of rent, the trial court permitting the appellant-plaintiff to withdraw the same, dismissed the suit. The Appellant filed another suit for eviction of the respondent on the ground of his bona fide need. The question arose is whether the plea of binami nature of the sale could be raised by the respondent-defendant in the subsequent suit.

The Supreme Court held that:

Since the earlier suit was dismissed merely on account of depositing of the rent by the respondent-defendant during the pendency of the suit and not on account of non-maintainability of the suit, the finding recorded therein that the appellant was the real owner of the building as per the sale deed concerned, became final. Such a suit even though termed as dismissed, was really successful and the respondent-defendant, if he disputed that finding, should have challenged the same by filing an Appeal. Therefore, reagitating of the issue of appellant's title to the building in question in the subsequent suit barred by res judicata.

The Supreme Court further observed that:

The rule of res judicata incorporated in Section 11 of the CPC (CPC) prohibits the Court from trying an issue which "has been directly and substantially in issue in a former suit between the same parties," and has been heard and finally decided by that Court. It is the decision on an issue, and not a mere finding on any incidental question to reach such decision, which operates as res judicata. It is not correct to say that the party has no right of appeal against such a decision on

an issue though the suit was ultimately recorded as dismissed. The decree was not in fact against the plaintiff in that first suit, but was in his favour as shown above.

The Supreme Court further observed that:

If dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as *res judicata* in a subsequent suit. But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as *res judicata* in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal he cannot thereby avert the bar of *res judicata* in the subsequent suit.

In *Pandurang Ramchandra Mandlik (Since Deceased) by his Lrs. and Another Vs. Shantibai Ramchandra Ghatge and Others*, , the Supreme Court considered Section 11 of C.P.C.

In the case covered by the above decision, an Application u/s 29(2) C.P.C. read with Section 25(2) of Bombay Tenancy and Agricultural Lands Act, 1948 was filed for possession of land and it was dismissed by holding that the Act did not apply to the land in question. The Court held that since the Application was decided *ex parte*, the order would not operate as *res judicata* in the subsequent suit for possession.

In *Vithal Yeshwant Jathar Vs. Shikandarkhan Makhtumkhan Sardesai*, , the Supreme Court, while considering the scope of Section 11 C.P.C., held that when a final decision was rendered by the Court at more than one issue, the decision on each issue operates as *res judicata*.

In *State of West Bengal Vs. Hemant Kumar Bhattacharjee and Others*, , the Supreme Court, while considering the scope of Section 11 of C.P.C., held that:

A wrong decision by a Court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides.

In *Aanaimuthu Thevar (Dead) by Lrs. v. Alagammal* 2005 (5) SCJ 222, the Supreme Court considered Section 11 of C.P.C.

In the case covered by the above decision, a suit for permanent injunction was filed jointly by the mortgager and mortgagee restraining the respondent from interfering with their possession of suit house. The respondent resisted the suit on the ground that when the disputes arose in the family, her husband had relinquished his ownership of the suit house in her favour in the village panchayat. The trial Court dismissed the suit on the ground of nonjoinder of children as necessary parties to the suit. Dismissal of the suit was not appealed

against and it had attained finality. The husband of respondent sold the suit house by registered sale deed in favour of the appellant. The Appellant filed a suit for declaration of his title and possession from the respondent and her children. The trial Court and Appellate Court rejected the plea of res judicata raised by the respondent and her children on the ground that in the former suit, the question of title was neither directly nor substantially involved or decided.

The Supreme Court held that the Appellant was litigating under the same title, which the husband of the respondent had in the suit house. The issue of title or ownership of suit house was directly or substantially involved in the former suit. Hence, the main part of the suit is hit by Section 11 of C.P.C.

The Supreme Court, while considering Section 11, Explanation IV, held that in the former suit filed by the husband of the respondent as owner and mortgagor with the mortgagee, the plea of ownership to the suit house was substantially involved for seeking relief of permanent injunction. Such plea of ownership could and ought to have been raised in the former suit. The subsequent suit filed by the Appellant as purchaser from husband of respondent was barred by constructive res judicata.

14. From the above decisions, it is clear that when an issue is finally decided between the same parties, the subsequent suit on the same issue will operate as res judicata. It is pertinent to examine whether the principle of res judicata is applicable to the present case.

15. The scheme was framed by the Court in the decree, dated 30-09-1915 in O.S. No. 113 of 1993. The relevant terms of the scheme are as follows:

(5) That a Panchayat or Committee consisting of five respectable Mohammedan residents of Bezawada shall be constructed to superintendent and control the management and administration of the trust by the trustee.

(6) That the 2nd plaintiff (1) Abdul Sattar (2) Mahammed Badul Rahim Baig Sahib (3) Mahammed Saddit Ally Sahib (4) Sowdar Maamed Azeem Sahib (5) Mahmed Abdul Rahim Sahib shall be the members of the 1st Panchayat:

(7) That the members of the Panchayat like the trustee hold office for life, any vacancy caused among the members of the Panchayat other than the member who is the descendant of the founder, by death, resignation, removal, suspension or other cause shall be filled up by the majority of the trustee and the surviving members of the Panchayat. If within two months after the occurring of a vacancy it is not so filled up or when they are equally divided, the Court may on the application or not less than two worshippers resident in Bezawada shall fill up the vacancy. If the vacancy of a descendant member occurs by such cause the vacancy may be filled up by the trustee and the surviving members by selection from the descendants or by the Court on their application. All acts done in the interval between the occurrence of the vacancy and or filing it up shall be as valid as if they were done by all the Panchayatdars.

(8) That the Panchayatdars may transact business either by meeting together or by the circulation of the papers and no resolution of the Panchayatdars unless it is in writing and signed by a majority of the members for the time being shall be valid. It will be competent for three members to convene a meeting though the trustee has no voice in the business transacted by the Panchayat, all resolutions about and affecting the trust property or which relate to the introduction or proposal to introduce changes in the execution of the trust should be communicated to the trustee in writing and his signature of such communication has been made, must be obtained from him if he is a descendant or the founder as he is more directly interested in the trust than the members of the Panchayat who are not the descendants.

(9) That the Panchayatdars shall have power to superintend and control the management and administration of the trust. They shall annually take stock of the property of the trust, audit the accounts of the income and the expenditure of the Endowment, sanction necessary expenditure by the trustee and allot from the trust funds such sums of money as may in their opinion be necessary to carry on the management of the trust charities, ceremonies and other acts connected with the fulfillment and the execution of the Wakf.

16. The scheme was framed before the Wakf Act came into force. Section 15 of the Wakf Act, 1954, deals with the functions of the Board constituted under the Act, which reads as follows:

15. Functions of the Board.- (1) Subject to any rules that may be made under this Act, the general superintendence of all wakfs in a State in relation to all matters, except those which are expressly required by this Act to be dealt with by the Wakf Commissioner, shall vest in the Board established for the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended:

Provided that in exercising its powers under this Act in respect of any wakf, the Board shall act in conformity with the directions of the wakif, the purposes of the wakf and any usage or custom of the wakf sanctioned by the Muslim law.

Explanation.- For the removal of doubts it is hereby declared that in this Sub-section, "wakf" includes a wakf in relation to which any scheme has been made by any Court of law, whether before or after the commencement of the Wakf (Amendment) Act, 1984.

The explanation to Section 15 clearly indicates that the wakf includes the wakf in relation to which any scheme has been made by any Court of Law, whether before or after the commencement of the Wakf Act, 1984.

17. A Division bench of this Court, while disposing of A.S. No. 480 of 1976 and batch, held that since the wakf did not provide for any mode of administration or

appointment of trustees, the devotees approached the Court and got a scheme framed. There is nothing in that Section which excluded the Application of the scheme. Further, the scheme, which was framed in the year 1915 and was strictly followed by the devotees can be said to have given rise to usage and established the custom. When a method is prescribed under a scheme, the same can be equated to the terms of a deed. At any rate, as long as it is in operation, and proceedings are initiated thereunder, the right of any one to act as Mutawalli, till appointed by the Court, has to be treated as disputed. A seal of approval is accorded to the Scheme framed by a Court of Law in relation to wakfs whether before or after the commencement of the 1995 Act. Though separate machinery is provided for adjudication of disputes, Sections 92 and 93 of C.P.C., for the repeal of which an abortive attempt was made in 1954 Act, are not repealed under this Act, therefore, the scheme framed in O.S. No. 113 of 1913 shall continue to be operative in respect of the mosque.

18. So, one of the terms of the scheme is for appointment of panchayatdars. The earlier order passed by the lower court in I.A. No. 3517 of 1980 and batch does not disclose whether the Application for appointment of panchayatdars was rejected or allowed. There is no whisper about the term of the scheme relating to panchayatdars. If the Court accepts or rejects a particular plea, the same point cannot be agitated in a subsequent suit. But, in the said Applications, there is no such mention of dismissal or allowing the applications regarding the appointment of panchayatdars, therefore, it can be safely concluded that the Court forgot to take up the point of panchayatdars. Hence, there is no mention about the said aspect in the order. As per Section 11 of C.P.C., if any substantial issue is decided finally between the same parties, it will operate as res judicata. In the present case, there is no finding touching upon the aspect of panchayatdars, therefore, in my humble view, the principle of res judicata will not operate in the present case and the suit is maintainable.

19. So far as the validity of the scheme is concerned, the learned counsel for the Revision petitioners relied on the following Judgments:

In Mohammad Ghouse Sahib and Others Vs. Muhammad Kuthubudin Sahib and Others, , the Supreme Court, while considering the scope of Section 92 of C.P.C. and Sections 55, 57 and 59 of the Wakf Act, held that the suit filed prior to enforcement of Wakf Act for framing of the scheme will not abate on coming into force of Wakf Act. The Court passing decree framing scheme for wakf after enforcement of the Wakf Act is not void and unenforceable.

In Andhra Pradesh Wakf Board Vs. Mohd. Hidyathulla, , this Court, while considering Sections 43, 43A and 16 of the Wakf Act, 1954, held as follows:

When a mutawalli recognized by the Wakf Board is effectively working, the Board has no power to appoint a committee for the Management of Wakf, and if there is such a committee it cannot order it to continue thereafter. So long as the mutawalli is effectively working and there are no proceedings pending against

him the Board has no power to direct him to hand over the record to the committee without removing him. The fact that a supervisory committee can be appointed u/s 16 it does not mean that the Board can direct the mutawalli to hand over the entire property to the committee without having recourse to Section 43 or 43-A.

In *Md. Saleem UR Rahman v. A.P. State Wakf Board*, Hyd 2007 (4) ALD 527, this Court, while considering the administration of a wakf, held as follows:

The administration of a Wakf predominantly vests with the Muthwalli, appointed through succession or otherwise. The appointment of a Committee arises only when the Wakf does not have a Muthawalli. Conversely, no Committee can be appointed as long as the Muthawalli functions for a wakf.

In the case covered by the above decision, when the mutawalli as well as the Board were appointed to manage the affairs of the committee, the Court held as above. Whereas in the present case, the panchayatdars are to supervise the management of the mutawalli and they are managing the affairs of the wakf. When the scheme provides for appointment of panchayatdars, the panchayatdars can be appointed at any time so long as the scheme is in force and mere non-appointment of panchayatdars for a particular period is not a bar to appoint a fresh team of panchayatdars to supervise the management in respect of the mosque and its properties. If the petitioners manage the mosque and its properties effectively, there cannot be any objection for appointment of panchayatdars as provided under the scheme.

20. In the light of the foregoing discussion, the lower Court was right in passing the orders for appointment of panchayatdars and I do not find any grounds to set aside the orders passed by the lower Court, therefore, they are liable to be confirmed.

21. In the result, the Civil Revision Petitions are dismissed by confirming the orders passed by the lower Court. No order as to costs.