
(1973) 09 DEL CK 0006

In the Delhi High Court

Case No : Regular Second Appeal No. 127 of 1973

Moinudin

APPELLANT

Vs

Syed Mohd. Hassan

RESPONDENT

Date of Decision : 10-09-1973

Acts Referred:

Citation : (1974) 44 CompCas 530 : (1974) RLR 70

Hon'ble Judges : H.L. Anand, J

Bench : Single Bench

Advocate : Chand Bihari Lal and Amrit Lal Patency, for the Appellant;

Judgement

H.L. Anand, J.

(1) This second appeal by the Mutawalli of a Wakf who was an unsuccessful defendant in the proceedings arising out of the suit filed by the first respondent raises two questions namely, (a) whether the suit of the first respondent for a declaration that the first respondent was a co-mutawalli in respect of wakf in question and entitled to share the offering and income thereof was liable to be rejected on the ground that the plaint did not disclose any cause of action; (2) whether the suit was impliedly barred by the provisions of Section 6 of the Wakf Act, 1954, hereinafter called the "Act".

(2) On these questions, which were raised by way of preliminary objections, the Trial Court returned the finding that (a) the plaint did not disclose as to how and why the notification which was challenged by the plaintiff was "wrong, unjust and illegal" and that (b) the suit was impliedly barred by the provisions of Section 6 of the Act and as a result, the suit of the plaintiff was dismissed.

(3) In appeal, the First Appellate Court reversed the judgment and decree of the Trial Court on a finding that the plaint disclosed a cause of action for the suit which was not barred by the provisions of Section 6 of the Act.

(4) Learned counsel for the appellant did not press the first question but

confined the attack on the validity of the judgment and decree of the First Appellate Court to the second question, namely, as to the maintainability of the suit by virtue of the implied bar said to have been created by Section 6 of the Act and correct interpretation of the provisions of .Section 4, 5, and 6 of the Act as indeed the Scheme of the said statute it must be held that the, suit was impliedly barred and that the questions raised in the suit could only be raised before the authorities constituted under the Act whose decision in relation to that has been made final and beyond the scope of judicial, scrutiny.

(5) Learned, counsel for the first respondent however, sought to justify the judgment of the First Appellate Court on the ground that no express or implied bar could be read in the provisions of Section 6 of the Act to such a suit nor was there any provision in the Act which may justify such a conclusion and particularly placed reliance on the provisions of Section 57(1) of the Act which clearly envisaged that one of the suits which could be filed in an ordinary civil Court may relate to "the right of a mutawalli" and sought reinforcement for his contention with reference to the principle that the exclusion of jurisdiction of a civil Court should not be readily inferred and any provision which seeks to exclude the ordinary jurisdiction of a Court must, Therefore, be strictly construed. It appears to me that the contention of the appellant must succeed.

(6) It is well settled that the exclusion of jurisdiction of an ordinary civil Court would not be readily inferred, and any provision of law which purports to incorporate such an ouster must be .strictly construed and unless it appears to the Court that the jurisdiction of the civil Court was either expressly or impliedly barred by any statute a party who brings a civil suit to the Court of law, should not be non-suited. It is, Therefore, necessary to determine with reference to the various provisions of the Act as indeed the overall Scheme of it whether the suit of the plaintiff is expressly or impliedly barred.

(7) The Wakf Act, 1954, according to its preamble, is an Act which provides for "the better administration and supervision of wakfs." Section 3 of the Act is a defining section and clause (f) thereof, defines the term "mutawalli".

(8) Chapter II of the Act deals with survey of Wakfs and Section 4 in this chapter deals with the preliminary survey of wakf with a view to make a survey of wakf properties existing in the State concerned on the date of commencement of the Act. Sub-section (3) of this Section provides that after making the necessary inquiry the Commissioner of wakfs, appointed under the Act. may submit his report in respect of the wakfs existing at the date of the commencement of the Act to the State Government which would contain various particulars .Certain particulars are then set out in clauses (a) to (c) of the Section but we are not concerned with these particulars Clause (f) of the sub-section, however visualises that certain other particulars relating to wakfs may also be set out in the report as may be prescribed. By Rule 3 of the Delhi Wakf Rules, 1963, which were framed u/s 67 of the Act, it is provided that one of the particulars which should form subject matter of the report is the name of the mutawalli, Section 5

provides that on receipt of the report of the Commissioner, the Board constituted under the Act shall examine it and publish in the Official Gazette a list of wakfs "containing such particulars as may be prescribed" and this would obviously contain the particulars with regard to the person who is mutawalli of the wakf in view of the requirement of Rule 3 of the Rules.

(9) Section 6 of the Act which falls for consideration for the present purpose provides that certain disputes may be taken to a civil Court and sub-section (4) of it makes the list of wakfs published under sub-section (2) of Section 5 final and Conclusive except, to the extent modified pursuant to the decision of a civil Court. The Section is in the following terms :-(After reproducing judgment proceeds).

(10) Chapter III of the Act deals with the establishment and functions of Boards which may be constituted for the administration of the wakf property under the Act and Section 15 provides that subject to any Rules that may be made under the Act, the general superintendence of all wakfs shall vest in the Board and it shall be the duty of the Board so to exercise its powers under the Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended. Sub-section (2) of this Section lists some of the specific functions. and clause (g) of this sub-section deals with the functions or power to appoint and remove a mutawalli in accordance with the provisions of the Act while clause (o) of this sub-section is in the nature of residuary provision which empowers the Board to "generally do all such acts as may be necessary for the due control, maintenance and administration of wakfs." The various functions of the Board include the settlement of Schemes for the management "for a wakf" and directions regarding the utilization of the income of a wakf. Sub-section (3) of this Section deals with the jurisdiction of a civil Court and is in the following terms: "(3) Where the Board has settled any scheme of management under clause (d) of sub-section (2) or given any direction under clause (e) of sub-section (2), any person interested in the wakf or affected by such settlement or direction may institute a suit in a civil court of competent jurisdiction for setting aside such settlement or directions and the decision of the civil court thereon shall be final."

(11) Chapter V deals with Mutawallis and Wakf Accounts. Section 36 lays down the duties of a mutawalli and Section 41 provides for penalties for default on the part of a mutawalli in carrying out the duties cast on him by the Act, Sections 42 and 43 deal with the power of the Board to appoint a mutawalli and for his removal. Section 42 empowers the Board to appoint any person to act as a mutawalli if there is a vacancy or the right of a person to act as mutawalli is disputed. Section 43 empowers the Board to remove a mutawalli on any of the grounds set out in clauses (a) to (e) of sub-section (1) of this Section and sub-section (4-A.) of this Section provides that any mutawalli who is aggrieved by an order made under any of the clauses (c) to (e) of sub-section (1) or sub-section

(2) of this Section may within a certain period file an appeal against the order to the State Government and provides that the decision of the State Government on such appeal "shall be final and shall not be questioned in any Court of law." Clauses (c) to (e) of sub-section (1) deal with the charges of misappropriation, unsoundness of mind or failure to pay contribution payable by any mutawalli. Sub-section (2) of this Section deals with the default on the part of a Committee appointed by the Board as a mutawalli. Sections 44 and 45 provide for enquiry by the Board relating to the administration of a wakf and confers power of a civil Court on the Board in respect of enforcing attendance of witnesses and production of documents.

(12) Chapter Vii deals with judicial proceedings Section 55 provides for institution of suits u/s 91 of the CPC by the Board or any other person with the consent in writing of the Board without obtaining the consent referred to in that Section. Section 56 provides for notice of suits by parties against the Board. Section 57 of the Act, on which reliance was particularly placed on behalf of the first respondent provides for certain requirements in relation to proceedings in a Court of law. Section 57 is in the following terms : " (1) In every suit or proceeding relating to a title to wakf property or the right of a mutawalli, the court shall issue notice to the Board at the cost of the party instituting such suit or proceeding, (2)..... (3) In the absence of a notice under sub- section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board", within one month of its coming to know of such suitor proceeding, applies to the court in this behalf. Section 59 enables the Board to appear and plead as a party to any suit or proceeding in respect of a wakf property Section 60 provides for a bar to compromise of suits by or against a mutawalli without the sanction of the Board.

(13) Chapter Viii deals with miscellaneous matters and the only Section in that chapter which need be referred is Section 65 which is in the following terms : "No suit or other legal proceeding shall lie against the Board or the Commissioner or any other person duly appointed under this Act in respect of anything which is in good faith done or intended to be done under this Act."

(14) It is well known that whenever a statute constitutes or authorises the constitution of a Tribunal or other judicial or quasi- judicial or administrative authority or body and confers or authorises conferment on that of any power or authority over any subject matter or empowers such authority to deal with and decide matters arising under the statute, the legislature always concerns itself with the question whether or not, the decision, order or any act of such a Tribunal, authority or body should be made final and conclusive and beyond judicial review and the legislative will in relation to it is invariably incorporated in the statute itself A review of various statutes incorporating provisions regarding bar of the jurisdiction of the civil Court shows that such provisions do not conform to any particular pattern and may vary. While some statutes incorporate the rule of absolute bar to the jurisdiction of the civil Court in express terms, the

bar of judicial review in certain others may be implied and be even partial, so that the decision in respect of some matters is made final while in respect of the others is made subject to judicial scrutiny.

(15) On a reference to the various provisions of the Act, it appears that the bar of judicial review provided under the Act is not only implied but is partial so that the Act envisages that while certain matters relating to wakfs or wakf property as also others which the authority under the Act is empowered to deal with and decide may form subject matter of civil litigation, there are other matters in which the decision of the authorities under the Act is made final and these decisions are placed beyond the ambit of judicial review. For example sub-section (4) of Section 6 of the Act makes the list of wakfs published under sub-section (2) of Section 5, except to the extent it is modified in pursuance of a decision of a civil Court under sub-section (1) of Section 6, final and conclusive and since a suit under sub-section (1) of section 6 could be filed only in regard to the question whether a particular property specified is wakf property in the list of wakf properties or not and whether it is a Shia or Sunni wakf, the particulars in the list of wakfs in respect of other matters would be beyond judicial review. The position u/s 15 of the Act is, however, slightly different because while Section 15 empowers as well as enjoins the Board to consider and decide various matters referred to in sub-section (2) of that Section, besides those that are within the ambit of the general powers conferred under sub-section (1) of that Section, the only matters which may be raised in a civil suit are those set out in sub-section (3) of that Section which are confined to the settlement by the Board or any scheme of management under clause (d) of sub-section (2) or any direction given in clause (e) of sub-section (2) and it is only the decision of the civil Court on these questions which is made final. There is, however, no provision in Section 15 which may make the decision of the Board in matters other than those mentioned in sub-section (3) as being final and conclusive or being subject to judicial review, with the result that there would be no bar to any of the matters decided by the Board u/s 15 being taken to a civil Court because there is no provision in Section 15 which may correspond to the provisions of sub-section (4) of Section 6, and sub-section (3) of Section 15 is confined only to certain acts. Section 42 which empowers the Board to appoint a mutawalli in certain circumstances does not attach any finality to any order made under this Section nor is the jurisdiction of the civil Court barred to examine matters which could be decided u/s 42. The position with regard to the removal of a mutawalli which is provided for by Section 43 is, however slightly different because while a mutawalli may be removed for any of the grounds set out in clauses (a) to (e) of sub-section (1) of that section, an appeal against the order of the Board is provided by sub-section (4A) of this Section only in cases where the order is passed under clauses (c) to (e) of sub-section (1) or sub-section (2) of that Section and the decision in appeal is then made final and beyond the ambit of judicial review. Here again, no finality attaches to the orders for the removal of a mutawalli made on account of the grounds set out in clauses (a) and (b) of the

sub-section (1) of Section 43 and such a decision is neither appealable under sub-section (4A) nor would there be any bar to such an order being challenged in a civil Court. Section 55 provides the institution of suit u/s 92 in certain circumstances while Section 56 also contemplates that certain suits may be instituted against the Board. Sub-section (1) of Section 57 also envisages certain types of suits being filed and same is the effect of Sections 59 and 60. Section 65, however, incorporates a bar to suits or other legal proceedings against the Board or the Commissioner or any other person duly appointed under the Act in respect of anything done or entitled to be done under the Act and from the marginal note to the Section and the tenor of its language would appear to confine to suits of which the subject matter is not an action of the Board or Commissioner but the consequences of it such as an action for damages,

(16) On an examination of the Scheme and the provisions of Sections 4, 5 and 6 of the Act, it is evident that the survey is made of the wakfs by the Commissioner u/s 4 of the Act which deals with various matters relating to the wakfs and the report that may be submitted must deal, amongst others, with the question as to the person who is mutawalli of the wakf and on the submission of this report, the Board on an examination of it has to publish a list of wakfs which list contains all particulars as may be prescribed and these particulars would obviously relate to the particulars which are prescribed in terms of clause (f) of sub-section (3) of Section 4, and that being so, the list would also contain the names of person or persons who may be mutawalli or mutawallis in respect of a wakf. Section 6 of the Act makes it possible for certain matters being raised in a suit in a civil Court because it specifically provides that if any question arises whether a particular property specified in the list was wakf property or not or whether the wakf was a Shia Or Sunni wakf, the matters may be raised in civil Court and sub-section (4) of that section clearly lays down that list published under sub-section (2) of Section 5, shall be final and conclusive except to the extent modified pursuant to the decision of a civil Court.

(17) It is obvious, Therefore, that where various matters form part of the survey report and various particulars in relation to the wakf must be set out in the list to be published, the restricted right given by Section 6 sub section (1) of the Act to certain classes of persons to raise certain specified matters in a civil Court would mean that the other matters referred to either in the report or in the list must be left for decision of the authorities constituted under the Act which would have regard to the provisions of sub-section (4) of Section 6 become final and beyond the purview of judicial review.

(18) It is, however, not possible to infer any express or implied bar to such a suit on account of the provisions of Sections 42 and 43 of the Act, on which reliance was placed on behalf of the Wakf Board, because while Section 42 merely confers power to appoint a mutawalli, if there is a vacancy. Section 43 deals with the removal of a mutawalli and is not relevant for the determination in the list under Sections 4 and 5 of the Act as to the person who may be mutawalli of a wakf.

Moreover, sub-section (4A) of Section 43 deals with only such orders as are passed under clauses (c) to (e) of sub-section (1) or sub-section (2) of Section 43 which do not relate to the question as to the claim of the person to be appointed mutawalli or co-mutawalli. Even otherwise no finality attaches to the orders that may be made u/s 42 and 43 except in relation to matters dealt with by sub-section (3) of Section 43 of the Act which alone are made final, Subject to the right of appeal to the State Government.

(19) The contention urged on behalf of the first respondent that the ouster of jurisdiction u/s 6 of the Act could not be said to be express or implied is not sustainable because u/s 6 as indeed under sub-Section (3) of Section 15, sub-Section (3) of Section 43, the legislature was considering the question whether an order in any of that matters which may be decided under Sections 4 and 5 of the Act or under the other Sections referred to above should be left to be determined by the authorities constituted under the Act or should be made subject to judicial scrutiny and the legislature decided that decisions in some of these matters be made final and beyond judicial scrutiny while there should be no finality and bar to jurisdiction in respect of others. If the intention of the legislature was to exempt all matters from the operation of the bar and of the finality provided under sub-Section (4) of Section 6, there was nothing to prevent the legislature from providing clearly that all matters that may be referred to, in the survey report and the list may be raised in any civil suit. The phraseology of the Section, however, appears to indicate that it is only some of the fundamental matters such as the very nature of the property or whether the property belonged to one section or other of the Muslim community, that it was made justifiable to the exclusion of all others and in such a situation, it would be reasonable to infer that all other matters were excluded from the purview of judicial scrutiny and the decision of the authorities in relation to these has been made final

(20) Learned counsel for the first respondent particularly relied on the phraseology of sub Section (1) of Section 57 of the Act in support of his contention that the suit filed by the first respondent would be maintainable. This contention appears to be based on a misconstruction and misreading of the said sub-section.

(21) SUB-SECTION (1) of Section 57 of the Act provides that in any civil suit or proceeding relating to the title of a wakf property or Right of a mutawalli" the Court would issue notice to the Board at the cost of the party instituting such suit or proceeding and it is clear on a plain reading of the sub-Section that the suits that are envisaged by sub- Section are those that relate "to to the title of wakf property" and "the right of a mutawalli". The right of mutawalli is distinguishable from the right of a person to be a mutawalli of a property. It is difficult to accept the position that term "right of a mutawalli" would be wide enough to include the claim: of a stringer that he is entitled to be recognised as a mutawalli or co-mutawalli. This contention of the first respondent must, Therefore, fail

(22) It may, however, be mentioned that the power of this Court under Article 226 of the Constitution as indeed the jurisdiction of a Civil Court to examine any act, order or decision of the authorities under the Act to satisfy itself if the order, decision or act are ultra virus or otherwise void having been made otherwise than in accordance with the Act is unfettered notwithstanding any of the provisions of the Act which may purport to bar the jurisdiction of the Courts or may attach finality to them. The plaintiff has, however, not invoked .the jurisdiction of the Civil Court on the aforesaid allegation and this principle is, Therefore, not attracted in the present ease.

(23) Learned counsel for the first respondent sought to rely on some decisions to the effect that the claim of a person to be a mutawalli of a wakf property would amount in terms of the provisions of the Specific Relief Act to be a claim to a legal character and contended that such a suit would, Therefore, be competent. This contention of the learned counsel, however, overlooks the provisions of Section 9 of the CPC which provides that a suit could be filed in a Civil Court if its institution is neither expressly nor impliedly barred. There is no doubt that the claim of a person to be a mutawalli or co-mutawalli of a property is a claim to a legal character but before such a claim could legitimately form subject matter of civil suit, the plaintiff must also satisfy the Court that the suit is otherwise not barred, expressly or implied, and if the suit is so barred, then the suit would not be maintainable notwithstanding the nature of the right that is claimed by the plaintiff.

(24) Learned counsel lastly sought support from an unreported decision of this Court in suit No. 386/66, Hakeem Abdul Farrab Vs. The Delhi Wakf Board, decided on November 30, 1971 by B.C. Misra J. but this decision is of no assistance to the first respondent because the question whether or not the suit before his Lordship was maintainable in law, was neither raised nor decided audit is well settled that a decision can be an authority only on questions that are raised and decided or are expressly or impliedly decided even though not raised but if the question is neither raised nor decided, it would only bind the parties to the suit in subsequent proceedings in respect of questions that ought to have been raised in view of the Explanation 4 to Section 11 of the CPC or the provisions of Order 2 Rule 2 of the Code of Civil Procedure. With great respect to the learned Judge, this decision would not be of any assistance to me in determining the matter in controversy in the present Appeal.