

(2002) 10 MAD CK 0043
In the Madras High Court
Case No : C.R.P. No. 1997 of 2001

M.S. Abdul Hameed

APPELLANT

Vs

S.M. Sheik Mohammed, H. Ahmed Thambi, M.G.M. Abdul
Rahaman, J.M. Sultan and S. Mohamed Basheer

RESPONDENT

Date of Decision : 08-10-2002

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : AIR 2003 Mad 179 : (2003) 3 LW 184 : (2003) 1 MLJ 216

Hon'ble Judges : V. Kanagaraj, J

Bench : Single Bench

Advocate : R. Srinivasan, for the Appellant; T.R. Rajaraman, for the Respondent

Final Decision : Dismissed

Judgement

V. Kanagaraj, J.—This revision petition filed by the petitioner in Wakf O.P. No. 22/2000 as against the fair and decretal order dated

26.4.2001 made in I.A. No. 186/2000 in the said Wakf O.P. by the Court of the Principal Subordinate Judge, Nagapattinam, on certain grounds

as broughtforth in the grounds of revision petition.

2. The application in I.A. No. 186/2000 had been filed in Wakf O.P. No. 22/2000 by the defendants 1 to 5 u/s 83(5) of the Wakf Act 1995 read

with Order 7 Rule 11 C.P.C. for want of statutory notice u/s 89 of the Wakf Act thereby praying to reject the Wakf O.P. No. 22/2000.

3. The Court below i.e., the Court of Principal Subordinate Judge, Nagapattinam, in its order dated 26.4.2001 would not only trace the facts and

circumstances of the case to the effect that on the part of the petitioners they would come forward to file this application on the grounds that the

respondents have filed the main Wakf O.P. No. 22/2000 seeking to cancel the

nomination of the petitioners therein as co-trustees of the trust, the subject matter therein is that proper notice u/s 89 of the Tamil Nadu Wakf Act is mandatory without which there is no cause of action for such a petition to be filed and therefore seeking to reject the petition in Wakf O.P. No. 22/2000 have filed I.A. No. 186/2000.

4. On the part of the respondent in Interlocutory Application, who are the petitioner in the main Wakf O.P., he would come forward to allege that these petitioners/defendants have no locus-standi to challenge the validity of such non-compliance of the provision of law u/s 89 of The Tamil Nadu Wakf Act 1995. It is up to the Wakf Board to require such a notice and the petitioners have no locus-standi to raise such questions and moreover Section 89 is applicable only to the suits filed before the Civil Court and since the Tribunal is not a civil Court, the compliance of Section 89 is not warranted; that such notice is required only for the claim of title and hence would ultimately pray to dismiss the Interlocutory Application filed by the respondents herein.

5. The Lower Court having traced the facts and circumstances and the position of law as pleaded by the parties and framing necessary point for consideration viz. "whether the Interlocutory Application filed by the defendants in the main Wakf O.P. was to be allowed?" and having regard to the materials placed on record and discussing the facts and law would ultimately allow the Interlocutory Application but without costs thereby rejecting Wakf O.P.22/2000. Testifying the validity of the same, the sole petitioner/plaintiff in Wakf O.P.22/2000 has come forward to file the above civil revision petition seeking to set aside the order dated 26.4.2001 passed by the Court of Principal Subordinate Judge, Nagapattinam, in the said matter and to restore the Wakf O.P. No. 22/2000 to file.

6. During arguments, the learned counsel appearing on behalf of the petitioner cited Sections 63 and 64 of the Wakf act which are respectively concerned with "the power of the Board to appoint mutawallis in certain cases in case of vacancy in the office of the Wakf" and "removal of the Mutawalli by the Board from its office for reasons specified in Sub Sections (a) to (k) of Section 64(1)" and would further cite Section 64(4) wherein it is laid that "in case a Mutawalli is aggrieved by order passed under any of the clauses (c) to (j) of Section 64(1) he may within one

month from the date of receipt of the same, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final."

7. Citing the above provisions of law and the contents of the same, the learned counsel would point out that it is a statutory appeal that is provided

u/s 64(4) by the enactments, the Wakf Act 1995, which is in pari-materia of Section 86 of the old Act and would cite a Judgement delivered in

N.M. Palanimuthu Vs. The Commissioner HR & CE (Admn.) Dept. & others reported in 1999 T.N.L.J. 110 wherein in para No. 3, the learned

Single Judge of this Court while dealing with the point ""whether the compliance of Section 80 of the C.P.C. is essential requirement"" and citing an

earlier judgment of the Division Bench of this Court delivered in Tholappa Iyengar etc. Vs. Executive Officer Sri Kallingar Devasthanam reported

in 1993 (2) L.W. P.537 would ultimately hold that "a notice u/s 80 of C.P.C, is not an essential requirement before filing the suit u/s 70 of the

Endowment Act for modifying or cancelling the order of the Commissioner."

8. The second Judgment cited on the part of the petitioner is one delivered in The District Board, Banaras Vs. Churhu Rai and Another, wherein it

has been held:

It is open to a defendant for whose benefit a notice is prescribed by law to waive it. Thus where the plea of defect in or want of notice was not

pressed in trial Court, nor was it raised in the memorandum of first appeal and of second appeal, the High Court, in the circumstances of the case

held that the right based on the ground of notice was waived.

9. The third Judgment cited on the part of the petitioner is one delivered in Vellayan Chettiar Vs. The Province of Madras reported in 1947 (2)

M.L.J. 208 wherein it has been held ""Section 80 of the CPC according to its plain meaning requires that there should be "identity of the person

who issues the notice with the person who brings the suit." Hence, where a notice as required by the section is given on behalf of only one person,

a suit cannot be instituted by that person and another on the strength of such notice. To hold otherwise would be to admit an implication or

exception for which there is no justification"".

10. The last judgment cited by the learned counsel for the petitioner is one delivered in The Coimbatore District Central Co-operative Supply and

Marketing Society Ltd. Vs. The Union of India (UOI) and Another, wherein it has

been held by a learned Single Judge of this Court:" It is true that the terms of section 80, Civil Procedure Code, should be strictly construed. But the terms of the notice should not be scrutinised in a pedanti manner or in a manner completely divorced from common sense. Where in the written statement filed by the defendant no objection was taken with regard to the validity of the notice, there is justification for the inference that the defendant had waived the objection, even if there was any defect in the notice".

11. The learned counsel for the petitioner, citing the above judgments would submit that where the Wakf board and others are the defendants, notice u/s 89 is necessary but not where individuals are parties such as the respondents herein. On such arguments, the learned counsel would seek to allow the above C.R.P setting aside the fair and decretal order of the lower Court dated 26.4.2001.

12. In reply, the learned counsel appearing on behalf of the respondents would submit that Section 89 notice is mandatory; that the plea of the petitioner that the notice u/s 80 C.P.C. and u/s 89 of the Wakf Act 1995 are in pari-materia is not correct since Section 80 C.P.C. is very much diluted and that the decision cited are not applicable to the facts and situation of the case which have been applied by those courts for different facts and circumstances. The learned counsel would also cite two judgments, the first one delivered in Madras State Wakf Board Vs. B.A. Jamal Muhammed and Others, and the second one Rahmath Bi V. State Wakf Board 1982 Madras P-202.

13. So far as the first judgment cited above is concerned, it has been delivered by Division Bench of this Court early in 1965 (20.12.1965) in a case between Madras State Wakf Board represented by its Secretary Vs. B.A. Jammal Mohammed and others that "After the amendment of the Wakf Act of 1954 by Section 66-C of the amended Act of 1964, the scope of the definition of "Wakf" u/s 3 of the Act has become considerably enlarged. Even properties donated by the person not professing Islam would be part of Wakf property if they are given for the support of a Wakf in the nature of a mosque, grave-yard, choultry, etc".

14. In the second judgment cited above, which is by a Single Judge of this Court, it has been held that "The court cannot make exceptions or

qualifications to the explicit terms of S. 56 on account of consideration of hardship and absence of prejudice or detriment. A defect as in the present case, cannot be equated to a formal defect contemplated by O.23, R.1 (3) Civil P.C. It is a radical defect going to the root of the claim of the plaintiff (petitioner). S. 56 is express, explicit, mandatory and admits of no exceptions. Therefore, the issue of a notice under S. 56 is a condition precedent to the institution of the suit itself. Cases where suits have been instituted without the issue of a notice in accordance with S. 56 as in the instant case, are cases which clearly fall under O.7 R.11 (d) C.P.C." On such arguments, the learned counsel for the respondents would pray to dismiss the above Civil Revision Petition.

15. In clarification, the learned counsel for the petitioner would submit that the petitioner was the mutawalli and he was removed and someone-else got appointed which could be challenged u/s 64(4) of the Wakf Act before the Tribunal within 30 days and Section 89 is not a bar nor is it necessary and that it is only a continuation of proceedings on such grounds.

16. In consideration of the facts pleaded, having regard to the materials placed on record, keeping in tune with the legality of the subject and upon hearing the learned counsel for both, it comes to be known that the petitioner herein has filed the main Wakf O.P. in the Tribunal praying (i) for declaration that the order passed by the Tamil Nadu Wakf Board, the 7th defendant therein dated 26.9.2000 is null and void if not legally bad and in law and in operative (ii) grant a consequential order of injunction restraining the defendants 1 to 6 from disturbing his right of trusteeship in any manner and for costs.

17. No doubt the main proceedings in Wakf O.P. No. 22/2000 is not only against the respondents herein but also against two others among whom the 7th defendant/respondent is the Tamil Nadu Wakf Board.

18. It is the firm case of the respondents herein that for filing the O.P. of this sort the petitioner has filed in Wakf O.P. No. 22/2000 a notice u/s 89 of the Wakf Act 1995 is mandatory re-requisite and inevitable and the proceeding in Wakf O.P. No. 22/2000 is not maintainable since it suffers for want of mandatory compliance of Section 89 of the Wakf Act and therefore they would testify the maintainability of the said Wakf O.P. in the

I.A. No. 186/2000 and the Tribunal agreeing with the contentions of the

respondents had not only allowed the interlocutory application of the respondent but also rejected the suit filed in Wakf O.P. No. 22/2000 before the Tribunal as per its order dated 26.4.2001 made in I.A. No.

186/2000. It is only challenging the said order, the respondent in I.A. No. 186/2000 has come forward to file the above C.R.P.

19. No doubt, Section 89 is mandatory and in the negative form as it comes to be revealed from the language of Section which reads: ""No suit

shall be instituted against the board in respect of any Act purporting to be done by it in pursuance of this Act or any rules made thereunder, until

their expiration of two months next after notice in writing has been delivered to, or left at, the office of the Board, stating the cause of action, the

name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has

been so delivered or left"". The tenor and temper of the language employed in the Section leaves no room for any mis-interpretation to the effect of

dispensing with the notice u/s 89 and therefore so far as the warranting Section 89 is concerned, the only conclusion that the Court could arrive at

is that no suit shall lie without compliance of Section 89 and in fact such a suit, as it has been instituted in the form of Wakf O.P., should not have

been entertained and taken on file by the Tribunal.

20. It cannot also be argued that Section 89 applies not to the Tribunal but only to the Civil Court wherein suits are instituted since Section 83

which deals with Constitution of Tribunals etc. is specific. In Sub-Section 5 of Section 83 it is laid down: "" The Tribunal shall be deemed to be a

civil court and shall have the same powers as may be exercised by a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a

suit, or executing a decree or order"". The language of the above section is plain and simple and it does not need any explanation at all so as to

arrive at a different conclusion from what is meant by the language of the section and therefore there is no room to arrive at the conclusion that the

mandatory provision of law u/s 89 of the Wakf Act would apply only to Civil Courts and not to the Tribunals.

21. In the light of the above legal position clarified, no judgment rendered in the past much-less those which are cited on the part of the learned

counsel for the petitioner equating Section 89 of the Wakf Act with that of

Section 80 of the C.P.C. under pretext that Section 89 of the Wakf Act is in pari-materia with Section 80 of the C.P.C cannot come to the rescue of the petitioner herein. On the contrary the one Judgment cited on the part of the respondents reported in Rahmath Bi and Another Vs. State Wakf Board, is pointed to the facts and circumstances of the case in hand and telling to the effect that cases where suits have been instituted without the issue of the notice in accordance with Section 56 as in the instant case are not maintainable.

22. This Judgment aptly applies to the facts and circumstances of the case in hand in all fours and has to be relied on, in which event the only conclusion that could be arrived at by this Court, so far as the whole of the above Civil Revision Petition is concerned, is to dismiss the same as devoid of merit.

In result,

i) the above Civil Revision Petition is devoid of merit and the same is dismissed as such.

ii) The fair and decretal order dated 26.4.2001 made in I.A. No. 186/2000 in Wakf O.P. No. 22/2001 by the Court of the Principal Subordinate Judge, Nagapattinam, is hereby confirmed.

iii) However, there shall be no order as to costs.