

(2011) 08 MAD CK 0529

In the Madras High Court

Case No : Writ Petition No. 30029 of 2010

M.S. Muhammad Yahya

APPELLANT

Vs

The Chairman Tamil Nadu Wakf Board and Others

RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226, 300A
Waqf Act, 1995 — Section 32, 51, 65(1), 83

Citation : (2011) 08 MAD CK 0529

Hon'ble Judges : D. Hariparanthaman, J

Bench : Single Bench

Advocate : O.R. Abul Kalam, in W.P. No. 30029 of 2010 and V. Manohar, in W.P. No. 15652 of 2011, for the Appellant; V. Lakshminarayanan, for Respondents 1 and 2 in W.P. No. 30029 of 2010 and 15652 of 2011 and A. Prabhakaran, for Respondents 4-7 in W.P. No. 30029 of 2010, for the Respondent

Final Decision : Dismissed

Judgement

D. Hariparanthaman, J.—One Thiru K.Magdoom Muhammad Marakayar S/o. Khader Sahib Marakayar executed a document during 1924, which was registered as document No. 2671/1924 relating to the properties at Mannadi Street, Thambu Chetty Street, Linghi Chetty Street, and Angappa Naicken Street, at Chennai.

2. According to the first Respondent Wakf Board, the document created a public Wakf and the properties could come under the control of the first Respondent Board. But according to the Petitioners, the aforesaid document does not create public Wakf and Thiru K.Magdoom Muhammad Marakayar gave away the properties to his legal representatives.

3. According to the Petitioner in both the writ petitions, the legal representatives of Thiru K.Magdoom Muhammad Marakayar took steps to probate the will dated 09.03.1935, 03.04.1939 and codicil dated 06.04.1943 before this Court by filing Original Petition in O.P. No. 106/1944 and this Court ultimately granted probate

on 27.04.1944 in favour of the legal representatives of Thiru K.Magdoom Muhammad Marakayar.

4. It is the further case of the Petitioners that there were disputes between the legal representatives of Thiru K.Magdoom Muhammad Marakayar and a compromise degree dated 02.03.2001 was passed in O.S. No. 8296/1988 by the learned v. Assistant Judge, City Civil Court O.S. No. 8296/1988, Chennai, appointing the Petitioner in W.P. No. 30029 of 2010 as the receiver in respect of the properties concerned in the matter.

5. There are 83 legal representatives to the aforesaid Thiru K.Magdoom Muhammad Marakayar and out of 83, 76 legal representatives executed the sale deed dated 05.02.2007 in respect of some of the properties in favour of the Petitioner in W.P. No. 15652 of 2011. Hence the Petitioner in W.P. No. 15652 of 2011 has interest in those properties.

6. While so, the Wakf Inspector, Chennai North, sent a notice dated 01.06.2007 to the Petitioner in W.P. No. 30029 of 2010 directing him to register the Wakf and its properties as mentioned in the said notice with the first Respondent Board. Along with the notice, he enclosed the registration form with a direction to fill the same and to send it back to the Board with a demand draft for Rs. 100/-drawn in favour of the Wakf Board.

7. The Wakf Inspector, Chennai North, also sent another notice dated 11.06.2007 to the Petitioner in W.P. No. 15652 of 2011 directing him to surrender the properties that were purchased by him in document No. 31/2007, which was registered at the office of the Sub-Registrar-I, Chennai North, since those properties are Wakf properties coming under the supervision and control of the first Respondent Board. It is stated therein that the purchase of the Wakf properties is illegal and without obtaining "No Objection Certificate" from the first Respondent Board, the Wakf properties could not be sold / purchased, as per Section 51 of the Wakf Act, 1995 (Act 43 of 1995).

8. The Petitioner in W.P. No. 15652 of 2011 sent a reply dated 23.06.2007 to the Wakf Inspector, Chennai North, stating that he was the bonafide purchaser for valuable consideration and therefore, the question of vacating or handing over possession would not arise.

9. The Petitioner in W.P. No. 30029 of 2010 also sent a reply dated 25.06.2007 to the Inspector of Wakf, Chennai North, stating that the properties registered in document No. 2671/1924 are not Wakf propertites and the first Respondent Board could not make a claim after 53 years i.e., after the enactment of the Wakf Act, 1954.

10. The Petitioner in W.P. No. 15652 of 2011 filed a petition in August 2009 u/s 32 of the Wakf Act before the first Respondent seeking to declare

(i) thatthe notice dated 11.06.2007 issued by the Inspector of Wakf Board, North Zone, Chennai as null and void;

(ii)that the properties purchased by them by way of a sale deed dated 05.02.2007 executed by 76 legal representatives of Thiru K.Magdoom Muhammad Marakayar for a valuable sale consideration and registered in document No. 31/2007 at Sub-Registrar Officer-I, Chennai North is valid under law and those properties could not be treated as a public Wakf; and

(iii)being the innocent and bonafide purchaser from the descendants of Thiru K.Magdoom Muhammad Marakayar, permission could be granted to them to sell the properties to anybody.

11. Apart from the Petitioner in W.P. No. 15652 of 2011, another person by name one Thiru D.Sambandam, who has been arrayed as third Respondent in W.P. No. 30029 of 2010, gave a complaint against the Petitioner in W.P. No. 30029 of 2010 to the first Respondent Wakf Board that the Petitioner is illegally taking steps to sell away the properties of the Wakf Board and also made other allegations.

12. The Wakf Board enquired into the complaint given by the Petitioner in W.P. No. 15652 of 2011 and also the complaint given by Thiru D.Sambandam. All the parties were heard and ultimately, the first Respondent Board passed the impugned order on 15.10.2010 holding that the concerned properties namely house and shops at No. 93, Mannady Street, Madras - 600 001, Nos. 100 and 101, Thambu Chetty Street, Madras - 600 001, No. 43, Linghi Chetty Street, Madras - 600 001, No. 6, Vadamarakayar Street, No. 1/148A, Angappa Naicken Street, Madras - 600 001 are public Wakf properties and the purchase of the Wakf properties by the Petitioner in W.P. No. 15652 of 2011, without the permission of the first Respondent Wakf Board, is illegal. It is also held that the Wakf are brought under its administration as per Section 65(1) of the Wakf Act, 1995. The administration of the Wakf under the control of the first Respondent Board would be for one year from the date of publication of the notification in the Tamil Nadu Gazette.

13. In the meantime, the Wakf Superintendent at Poonamallee was appointed as Administrative Officer, by an order dated 22.11.2010 of the first Respondent Board, to retrieve the Wakf properties and to take over the administration from the Petitioner in W.P. No. 30029 of 2010. The said orders are put to challenge in W.P. No. 30029 of 2010.

14. While the Petitioner in the receiver appointed by the v. Assistant Judge W.P. No. 30029 of 2010, City Civil Court, Chennai in the compromise decree dated 02.03.2001 in O.S. No. 8296/1988, the Petitioner in W.P. No. 15652 of 2011 is the purchaser of the properties from the Petitioner in W.P. No. 30029 of 2010.

15. Heard the submissions made on either side.

16. The issue that arises for consideration is as to whether the writ petitions are maintainable against the impugned order, when there is appeal remedy provided under the Wakf Act, 1995.

17. The learned Counsel for the Petitioner in W.P. No. 15652 of 2011 submitted that the Petitioner is willing to approach the Wakf Tribunal by filing appeal against the impugned order and the Tribunal may be directed to entertain the appeal, without reference to delay, as the Petitioner has diligently prosecuted the case before this Court.

18. The learned Counsel for the Petitioner in W.P. No. 30029 of 2010 submitted that the writ petition is maintainable and this Court could entertain the writ petition, despite the existence of alternative remedy. In this regard, the learned Counsel relied on the judgment of the Honourable Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, .

19. It is submitted by the learned Counsel for the Petitioner in W.P. No. 30029 of 2010 that in the following three circumstances namely,

(1) when the writ petition seeks enforcement of any of the fundamental rights

(2) when there is any violation of principles of natural justice; or

(3) when the impugned order is wholly without jurisdiction or the vires of the Act is challenged, this Court could entertain the writ petition, as per the decision of the Honourable Supreme Court referred to above. The learned Counsel further submitted that the Petitioners' fundamental right to property guaranteed under Article 300-A of the Constitution of India is involved and therefore, the writ petition is maintainable. Secondly it is submitted that the first Respondent Wakf Board exceeded its power and jurisdiction, since they assumed the family properties as public Wakf properties. It is submitted that only in admitted public Wakf, the first Respondent Board has jurisdiction under Sections 32 and 69 of the Wakf Act, to pass orders and issue directions and not in respect of other private properties.

20. On the other hand, the learned Counsel for the first Respondent Wakf Board submitted that the very dispute as to whether there has been a public Wakf created by Thiru K.Magdoom Muhammad Marakayar lies within the jurisdiction of the first Respondent, when the same is disputed by somebody else. It is stated that as early as on 15.07.1959, the concerned Wakf was registered with registration No. 115. Without properly verifying the same, the Wakf Inspector, Chennai North, sent the letter dated 01.06.2007 to the Petitioner in W.P. No. 30029 of 2010 directing him to register the Wakf. According to learned Counsel, under the Wakf Act, 1995, the word "Mutawalli" is widely defined. The Petitioner in W.P. No. 30029 of 2010 acted illegally and sold away the properties of public Wakf, without permission from the first Respondent Wakf Board and thereby caused loss to the Wakf Board. Whether the document executed in 1924 by Thiru K.Magdoom Muhammad Marakayar created public Wakf or it was a deed purporting to be a family's private properties, has to be decided by the Wakf Tribunal, when once the first Respondent Board rejected the contention of the Petitioner that the document registered in 1924 is only a deed giving away the properties to the descendants of the family members of Thiru K.Magdoom

Muhammad Marakayar after his demise. When the appeal remedy is available before the Tribunal, wherein parties are free to let in evidences and to mark documents, this Court could not normally interfere in the extraordinary jurisdiction under Article 226 of the Constitution of India. According to him, there is No. substance in the submissions made by the learned Counsel for the Petitioner that the fundamental rights of the Petitioners have been violated, as there is No. fundamental right involved in this case.

21. As far as the submissions relating to jurisdiction, the learned Counsel for the first Respondent submitted that the first Respondent Wakf Board has been granted wide powers to determine various issues that arise as to public Wakf and the properties belonging to public Wakf. It is also submitted that the Petitioner in W.P. No. 15652 of 2011 himself filed an application before the first Respondent Board seeking to declare that the properties were private properties belonging to the family members of Thiru K.Magdum Muhammad Marakayar. In these circumstances, the submissions made by the learned Counsel for the Petitioner in W.P. No. 30029 of 2010 has No. substance in saying that the first Respondent has No. jurisdiction. It is submitted that the Petitioners could avail the appeal remedy available under the Wakf Act.

22. I have considered the submissions made on either side and perused the materials available on record.

23. The learned Counsel for the Petitioner in W.P. No. 15652 of 2011 submitted that the Petitioner is willing to approach the Wakf Tribunal u/s 83 of the Wakf Act, 1995 questioning the impugned order and he seeks only limited relief that the appeal could be entertained without reference to delay, as he prosecuted the matter diligently before this Court.

24. On the other hand, the learned Counsel for the Petitioner in W.P. No. 30029 of 2010 heavily relied on the judgment of the Honourable Supreme Court in Whirlpool Corporation's case (cited supra) and sought to sustain the maintainability of the writ petition. He relied on para 15 of the said judgment, which reads as follows:

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold

the field.

25. The learned Counsel for the Petitioner has sought to maintain the writ petition alleging that the Petitioner's constitutional right guaranteed under Article 300-A of the Constitution of India is violated and therefore, the writ petition is maintainable. But the Honourable Supreme Court, in the aforesaid judgment has held that only in the case of enforcement of fundamental rights, the writ petition could be maintained. Admittedly, Article 300-A of the Constitution of India does not recognize the right to property as a fundamental right. In fact, Article 19(1)(f) of the Constitution of India declaring right to property as fundamental right was deleted from the Constitution by way of the 44th Amendment. Hence, the submission that the fundamental rights of the Petitioner is violated and therefore, the writ petition is maintainable, has No. substance and the same is rejected.

26. The next contention is that the first Respondent Board acted without jurisdiction. According to the Petitioners, only in admitted public Wakfs, the first Respondent has jurisdiction under Sections 32 and 69 of the Wakf Act, 1995 to pass orders and to give directions. Suppose, if a person disputes a Wakf as public Wakf, could it take away the power and jurisdiction of the first Respondent Board to decide as to whether a public Wakf was created by the concerned deed. In my view, the first Respondent Board has been vested with enormous power u/s 32 of the Wakf Act, 1995 to determine various issues/questions concerning public Wakfs and its properties. Hence, I have No. hesitation to reject the contentions of the Petitioners.

27. As rightly contended by the learned Counsel for the first Respondent Board, appeal remedy is provided u/s 83 of the Wakf Act, 1995, before the Tribunal, and both parties could let in evidences and also produce documents and may cross examine the witnesses. An effective alternative remedy is thus provided to the parties u/s 83 of the Wakf Act, 1995. Hence, I have No. hesitation to come to the conclusion that the submissions of the learned Counsel for the Petitioner in W.P. No. 30029 of 2010 have No. merit and the same is liable to be rejected.

28. In these circumstances, both the writ petitions are dismissed and the Petitioners are given liberty to approach the Tribunal questioning the impugned order, within a period of two weeks from the date of receipt of a copy of this order. In such an event, the Tribunal is directed to entertain the same, without reference to delay, as the Petitioners have diligently prosecuted before this Court. No. costs. Consequently, connected miscellaneous petitions are closed.

29. The Registry is directed to return the original impugned orders after substituting the same by Photostat copies.