

(1973) 08 KAR CK 0025

In the Karnataka High Court

Case No : First Appeal No's. 57 and 22 of 1969

Mysore State Board of Wakfs

APPELLANT

Vs

K.S. Lakshmaiah Setty

RESPONDENT

Date of Decision : 01-08-1973

Acts Referred:

Citation : AIR 1974 Kar 28

Hon'ble Judges : Venkataswami, J; Venkataramiah, J

Bench : Division Bench

Advocate : K.S. Savanur, for the Appellant; Y. Adinarayana Rao, for the Respondent

Judgement

Venkataramiah, J.—These two appeals are filed against the decree passed in O. S. No. 98 of 1966 on the file of the Civil Judge. Bangalore City. The plaintiff instituted the said suit for a declaration of his title to the property described in the schedule attached to the plaint and for a permanent injunction restraining the defendant, i.e., Mysore State Board of Wakfs from interfering with his possession. It was also prayed that an entry made in the Notification No. MBW-19(1)-64, dated 7-6-1965 issued by the defendant, should be suitably corrected excluding the plaint schedule property from the operation of the said Notification. The plaint schedule property is a piece of land situated in Old Taluk Cutcheri Road, Bangalore City, on which a building has been recently constructed. The case of the plaintiff is that he had purchased the land referred to above from its predecessors-in-interest under a registered sale deed dated 25-5-1958 and thereafter had constructed a building thereon at a cost of about Rs. fifty thousand. In the year 1965 the Mysore State Board of Wakfs (the defendant), published a notification u/s 5 of the Wakfs Act, 1954 (hereinafter referred to as the Act) mentioning at Si No, 143 thereof that the suit property was a Wakf property. As required by Section 6 (1) of the Act, the plaintiff filed the above suit for declaration of his title, permanent injunction and other reliefs. Before instituting the above suit, the plaintiff had issued a notice to the

defendant u/s 56 of the Act intimating the defendant that such a suit would be filed.

2. The defendant contested the suit On behalf of the defendant it was pleaded, that the suit property along with certain other properties lying adjacent to it had been dedicated as Wakf property, It was further pleaded that on the said Wakf property there were three graves of Muslim saints and an Ashurkhana. It was also alleged that at that place a "Urs" was going on from a long time in view of the foregoing, it was claimed by the defendant that the property in question was a Wakf.

3. The trial Court after overrating the contention of the defendant, made a decree in favour of the plaintiff. While doing so it fixed the Pleader's fee at Rs. 30 and omitted to give a direction with regard to the correction of the entry in the notification published under. Section 5 of the Act, as prayed for in the plaint

4. The defendant has filed R.P.A. No. 57 of 1969 questioning the decree in so far as it declared the title of the plaintiff and granted injunction against the defendant and the plaintiff has filed R. F. A. No. 22 of 1969 in so far as the Court below fixed the Pleader's fee at Rs. 30 and omitted to issue a direction for the correction of the notification, Hence these two appeals.

5. We shall first take up for consideration the appeal filed by the defendant The plaintiffs case is that he had purchased the suit property under a registered sale deed dated 25-5-1958 marked as Ext P-6 in the case executed by its previous owners Abdul Rahim Khan, Maim una Khatun Chandbi, Ameena Khatun and Saffia Khatun.

It is also seen that Municipal assessment was being collected in respect of the suit land. Ordinarily no municipal assessment would be collected in respect of a property which is endowed for religious or charitable purposes (vide Section 84 of the Mysore City Municipalities Act). We are not satisfied from the evidence on record that Abdul Rahim (P.W. 1) had ever functioned as a Muthavalli, or a Muzavar, or a Makandar, or a Manager of the Wakf property and, therefore, any alienation made by him cannot be considered as an alienation made by a Muthavalli of Wakf Property.

6. It is no doubt true that it is stated in Ext P-1 that there were three graves on the land dealt with therein and that there is also a reference to a Makan therein. It is, admitted on all hands that there are no graves on the suit land. There is also no satisfactory evidence to show that on the suit land, there ever existed an Ashoorkhana or a Makan. Graves are admittedly on a piece of land sold to one Anantharamalah which is adjoining the suit property. P.W. I Abdul Rahim has deposed, that the said graves were of his great-grandfather, his brother and his son. D.W. 3 has stated that the place where Panjas were being kept during Muharam was situated to the west of the graves and the place where the graves were situated and 10-15 feet open space all-round the grave had been sold in favour of Anantharamaiah. It is, therefore, clear that on the suit land, there was

neither a grave nor a Makan or an Ashoorkhana. The question for consideration is whether on the evidence that is available in the case it is permissible for the court to presume relying upon the principle of lost grant, on which reliance was placed by Shri Savanur, learned counsel for the defendant that the property in question was a Wakf by user. As already mentioned by us there is no satisfactory evidence to show that any "Urs or Sandal" was being carried on on the suit property. No member of the Jamait who actually participated in such "Sandal or Urs" has been examined as a witness in this case. The Manager or a person who was supervising the "Sandal or Urs" has not been examined by the defendant, although it is stated by D.W. 1 that they were available. In order to hold that the property had become Wakf by user by applying the principle of lost grant, there must be satisfactory evidence to show that the grant itself was lost in antiquity and the evidence about it was not available and further that the property was being used as Wakf property for a long time without interference. Admittedly from 1958, after the plaintiff purchased the property, no "Urs or Sandal" took place there and the evidence regarding the celebration of "Urs" prior to that is hopelessly discrepant and unreliable. In this state of affairs, it is very difficult to hold that the defendant had established that the property was Wakf by user by applying the principle of lost grant. Mere presence of 2 or 3 graves on a piece of land is not sufficient to hold that the property on which the graves are situated had been dedicated as Wakf property. In AIR 1924 58 (Lahore) Shadi Lal, C. J., has observed as follows :

Mr. Tek Chand for the appellant is unable to cite any authority to support the contention that the mere burial of a saintly person in a plot of land has the effect of converting that land into trust property, and we do not think that the circumstance/that Urs was held for a few years without any demur by the defendants materially advances the case for the plaintiff..... BO that as it may the onus was clearly upon, the plaintiff to establish a "dedication", express or implied, to public religious uses, and we consider that he has failed to discharge that onus.

It is, therefore, clear that the mere existence of two or three graves on or near the suit land or the circumstance that Urs was being carried on there for some time, even if true, is not sufficient to hold that it is wakf property without proof of dedication of the same for religious purpose. To the same effect is the opinion of the High Court of Allahabad in AIR 1934 263 (Oudh) wherein it was held that the existence of some kachha graves of the members of the defendant's family on a land, was not by itself sufficient to presume that the land was wakf property. Reliance was however placed by Sri Savanur on a decision of the Privy Council in Court of Wards v. Ilahi Baksh, ILR (1913) Cal 297 (PC) in support of his contention that a grave-yard must be considered as Wakf property. The facts of that case are clearly distinguishable from the facts of the present case. The subject-matter of the above decision was a grave-yard on which there were a large number of graves and in the Record of Rights maintained by the Government it had been mentioned that the said graveyard was in the-

possession or Mohammedans of the locality. The Privy Council relying upon the entries made in the Registers maintained under the Punjab Land Revenue Act was of the opinion that the land in question was a Wakf by user in the absence of any reliable evidence to rebut the presumption arising under the said Act Hence the said decision is of no avail to the defendant.

7. The plaintiff has been admittedly in possession of the property and he is entitled to maintain his possession against the whole world except the true owner. The defendant has failed to show that it was Wakf property and it is entitled to administer the same. The plaintiff is, therefore, entitled to the relief of injunction prayed for by him. The evidence adduced by the plaintiff in the case shows that he and his predecessors-in-interest have been in possession of the same for more than 30 years prior to the date of suit In the circumstances, we are of opinion that the Court below was right in declaring that the plaintiff was the owner of the suit property and that the defendant had failed to establish its case. We, therefore, find no substance in the appeal-R.F.A. 57/1969-filed by the defendant.

8. In R. F. A. 22/1969 filed by the plaintiff, there are two prayers: (1) that the Court below was wrong in not issuing direction to the defendant to rectify the Notification issued by it by deleting the suit property from the list of Wakf properties and (2) the Court below was wrong In fixing the Pleader's fee at Rs. 30 for the purpose of taxation -of costs. When the Court below came to the conclusion that the suit property belonged to the plaintiff and that it was not Wakf property, it should have issued a direction to the defendant to delete the suit properly from the list of Wakf properties and publish if necessary, a Corrigendum in Mysore Gazette to that effect As the continuance of an entry in respect of the suit property in the Notification issued u/s 5 of the Act is likely to create a cloud on the title to the property, we accept the submission made by the plaintiff in that behalf and direct the defendant to delete the entry in respect of the suit property in the Notification issued u/s 5 of the Act and to publish a Corrigendum in Mysore Gazette to the above effect.

9. In so far as Pleader's fee is concerned, the Court below has not given any reason for fixing it at Rs. 30. The suit was one for declaration of title and injunction. Having regard to the complex questions involved In the case and the nature of the suit, the Court below was wrong in fixing the Pleader's fee at Rs. 30. We direct that the Pleader's fee should be fixed ad valorem on the basis of the value of the suit In accordance with the rules governing the said question. The decree passed by the Court below is modified by (1) directing the defendant to delete the entry in respect of the suit property from the Notification issued u/s 5 of the Act and to publish a Corrigendum to that effect in Mysore Gazette within a period of 4 months from today: and (ii) directing the Pleader's fee to be fixed in accordance With the rules according to the value of the suit as directed above. R.F.A. 22 of 1969 is allowed accordingly.

10. In the result, R.F.A. 57 of 1969 is dismissed with costs and R.F.A. 22 of 1969

is allowed, but with no order as to costs.