

(1990) 11 KAR CK 0009

In the Karnataka High Court

Case No : Regular First Appeal No. 860 of 1980

Sayyed Murtujahaseni @ Murshad Peer

APPELLANT

Vs

Karnataka State Board of Wakfs

RESPONDENT

Date of Decision : 13-11-1990

Acts Referred:

Waqf Act, 1954 — Section 56

Citation : (1991) ILR (Kar) 1572 : (1990) 3 KarLJ 592

Hon'ble Judges : K.A. Swami, J

Bench : Single Bench

Advocate : K.S. Savanur, for the Appellant; D.L.N. Rao, for R-1 and K.B. Adhyapak, for R-2, 3(a) and (b) and R-4 to R-7, for the Respondent

Final Decision : Allowed

Judgement

K.A. Swami, J.—This second Appeal is preferred against the Judgment and decree dated 4-9-1980 passed in Regular Appeal No. 108 of 1979 by the Principal Civil Judge, Bijapur, affirming the Judgment and decree dated 24-8-1979 passed in Original Suit No. 149 of 1975 by the Additional Munsiff, Bijapur.

2. Appellant is the plaintiff. He filed the aforesaid suit for a declaration that the order passed by the first defendant (first respondent) in No. LCC 16/41/69 dated 29th August 1972 is null and void and for a permanent injunction restraining the defendants from interfering with the working of the plaintiff as Managing Mutwalli of the suit Darga.

3. The first defendant (first respondent) did not file a written statement. Other defendants contested the suit. Issues 6 and 7 were tried by the trial Court as preliminary issues. Those issues are as follows:

"Issue No. 6: Whether this Court has jurisdiction to try the suit?

Issue No. 7: Whether the suit is bad for want of notice u/s 56 of the Wakf Act?"

4. When the suit was taken up for hearing, defendants gave up their objection as to the jurisdiction of the Court to try and decide the suit. Therefore, the trial Court answered Issue No. 6 in favour of the plaintiff and against the defendants. However, Issue No. 7 was answered against the plaintiff. Consequently the suit was dismissed. The lower appellate Court also confirmed the finding of the trial Court on Issue No. 7. Hence this Second Appeal.

5. In the light of the contentions urged, the following points arise for consideration:

1. Whether in view of the fact that the first defendant has not controverted the averments made in para-7 of the plaint, the plaintiff can be held to have proved the fact that he has issued notice as required by Section 56 of the Wakf Act?

2. Whether the notice issued u/s 56 of the Act before filing O.S.No. 1 of 1973 enured to the benefit of the plaintiff?

6. Point No. 1 : It is contended on behalf of the plaintiff that in para-7 of the plaint he has specifically averred that he has given a notice to the first defendant as required by Section 56 of the Wakf Act, 1954 (hereinafter referred to as the Act'), and the first defendant has not replied to it nor it has controverted the same because no written statement is filed by the first defendant. Therefore, it is contended that the first defendant must be deemed to have admitted the fact of issue of a notice by the plaintiff to it u/s 56 of the Act. On the contrary, it is contended on behalf of the respondents that whether the first defendant denies the plaint averments or not, it is a statutory requirement, therefore, it must be proved by adducing proper evidence.

6.1. Section 56 of the Act specifically directs that no suit shall be instituted against the Board in respect of any act purporting to be done by it in pursuance of the Act or of any Rules made thereunder, until the 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. Thus, issuing of notice as per Section 56 of the Act by the plaintiff to the Wakf Board is a condition precedent for instituting the suit which attracts Section 56 of the Act. It has to be proved by the plaintiff that he has complied with Section 56 of the Act. Therefore, whether or not the Wakf Board appears and denies the averment in the plaint that the notice as required by Section 56 of the Act has been issued, it is for the plaintiff to prove by producing necessary evidence that he has issued notice as required by Section 56 of the Act. He cannot simply depend upon his plea in the plaint that he has issued notice by not producing necessary evidence to prove that he has actually issued notice. Accordingly, Point No. 1 is answered in the negative.

7. Point No. 2: In para-12 of the plaint, the plaintiff has stated thus:

"The plaintiff had filed a suit in the Court of the District Judge, Bijapur seeking similar reliefs under a misconception of law that the said Court had jurisdiction to grant the same. The suit was O.S.No. 1/1973 and it was ultimately withdrawn and now this suit has been filed in this Court. If any of the defendants take up a contention regarding limitation, it is submitted that this suit is in time, as the plaintiff is entitled to the exclusion of the time taken up by the District Court in the disposal of O.S.No. 1/1973."

The trial Court has not considered this aspect of the matter. However, the lower appellate Court has referred to the contention of the plaintiff in this regard thus:

"It is contended by the learned Counsel for the appellant-plaintiff that the suit O.S. No. 1/73 was filed in the Court of the District Judge and it was dismissed as the suit was not pressed by the plaintiff on 14-3-1975 and therefore, the notice which was issued before the filing of the suit O.S.No. 1/73 enures for his benefit in this suit also. But it is contended by the learned Counsel for the respondents that the notice which was issued in O.S.No. 1/73 exhausts itself and this notice cannot be relied on by the appellant for the purpose of this suit.....It is contended by the learned Counsel for the respondent that the notice terminates as soon as the suit is disposed of and it cannot be the basis of another suit and in this connection, it was pointed out by the learned Counsel for the respondent that the notice which was issued in O.S.No. 1/73 cannot be construed as a valid notice for the purpose of the suit....."

I am of the opinion that this contention urged on behalf of the defendant has to be accepted and that the fact that the provisions of Section 56 are mandatory and there is no scope for any departure from the provisions of Section 56 of the Wakf Act."

Thus, it is also clear that the learned appellate Judge also has not given any reason for negating the contention of the plaintiff that the notice issued by him before filing Original Suit No. 1 of 1973, would enure to his benefit it for complying with the requirement of Section 56 of the Act. Courts below have failed to see that the earlier suit O.S.1/1973 was filed for the very same relief for which the present suit is filed and that suit was got dismissed as not pressed because the Court in which it was filed was not competent to entertain it. In such a case, the notice issued as required by Section 56 of the Act would remain unaffected and could be taken advantage of by the plaintiff for filing the suit in a competent Court for the same relief.

7.1. The averments made in para-7 and para-12 of the plaint can very well lead to an inference that the averments made in para-7 of the plaint are with reference to the notice issued by the plaintiff u/s 56 of the Act before filing Original Suit No. 1 of 1973. In addition to this, whenever the plaintiff is required to issue a statutory notice for the purpose of filing a suit and he issues such notice but files the suit in a wrong Court which does not have jurisdiction to entertain such a suit and therefore such a suit is got dismissed either as

withdrawn or as not pressed on the ground that the Court had no jurisdiction to entertain the suit, and thereafter he files the suit in a competent Court for the very same reliefs, the notice issued before the filing of the suit in a Court which had no jurisdiction to entertain, would enure to the benefit of the plaintiff. The notice is required to be issued only once before the suit is filed. The notice does not get exhausted nor it comes to an end as long as the claim made in the notice is not either settled by the defendant or considered and decided by a competent Court. Normally the law provides for issuing of notice to Statutory Institutions and Public Authorities and Public Officers so that they can settle the claim before the plaintiff institutes the suit if the claim made in the notice is tenable or justified. In the instant case the claim made by the plaintiff in the notice issued by him to the defendant before he filed the suit O.S.No. 1/1973 in a Court which had no jurisdiction to entertain it and it was got dismissed on the ground that that Court had no jurisdiction to entertain it, was not settled by the defendant or decided by a competent Court, therefore, it did not come to an end nor it was exhausted. Therefore, the Courts below are not justified in holding that the notice issued by the plaintiff u/s 56 of the Act before filing O.S.No. 1/1973 did not enure to the benefit of the plaintiff. In the facts and circumstances of the case, the Courts below ought to have raised a specific issue regarding this aspect of the matter and permitted the plaintiff to produce the notice issued by him before filing O.S.No. 1/1973 and if necessary, ought to have permitted the plaintiff to file necessary application to call for the records of O.S.No. 1/1973. The trial Court has not considered this aspect of the matter and the lower appellate Court has proceeded on the basis that the notice issued prior to filing of O.S.No. 1/1973 did not enure to the benefit of the plaintiff. Accordingly point No. 2 is answered in the affirmative.

8. For the reasons stated above, the appeal is allowed; the finding recorded by the Courts below on issue No. 7 is set aside and the finding recorded on issue No. 6 is confirmed. Consequently, the Judgments and decrees of the Courts below are set aside. The case is remanded to the trial Court with a direction to frame an additional issue:

"Whether the plaintiff proves that he had issued a notice u/s 56 of the Act before filing O.S.No. 1/1973 in the District Court, Bijapur."

and try the aforesaid additional issue along with other issues involved in the suit. The parties are directed to appear before the trial Court on 17-12-1990. The trial Court is directed to decide the suit within six months from 17-12-1990. No order as to costs.